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HINDU LAW

PRINCIPLES & PRECEDENTS

HINDU LAW

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BY

N. R. RAGHAVACHARIAR,
Advocate,
Associate Editor, the Law Weekly, Madras.

WITH A FOREWORD BY

The Hon'ble Mr. Justice
K. S. KRISHNASWAMI IYENGAR,
Judge of the High Court of Judicature at Madras

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FOREWORD

It is now more than four years since the first edition of this valuable book was published. The legal world has had ample time to appraise its worth, and if it has earned their approval, it was due purely to its intrinsic merit as an outstanding contribution to a somewhat difficult, and to a non-Hindu an abstruse, subject. The book has been well received, and has given general satisfaction. The method of treatment pursued by the learned author has contributed not a little to its usefulness—by the illuminating yet brief discussion of principle, accompanied by a wealth of case-law utilised with discriminating judgment. Simple and clear, the statements of law have been set forth with precision and are easily followed and understood. The form of exposition adopted by the author strikes a golden mean between elaborateness of discussion and brevity of enunciation. Yet one finds in the book a sufficient discussion of principle and precedent, leading to a full understanding of the basic grounds on which the propositions of law rest. In fact the book is a work of outstanding merit and has rightly secured a place in the front rank among the extant treatises on Hindu Law.

The present edition has not by any means come too soon, and there can be no doubt that it is bound to meet with an even greater measure of welcome than its predecessor. A good deal of new matter in the shape of additional information has been introduced into the present edition, and this is an improvement which greatly enhances its value and utility not only to the student but to the lawyer and the judge. Several portions have been re-written in order to incorporate the effect of the case-law since the last edition. The treatment of the doctrine of devesting as a consequence of and as a limitation on adoption, is refreshingly suggestive and stimulating. The author has dealt more fully than any other text-book writer with several questions of prime importance such as those relating to the quantum of widow's maintenance, pre-partition debts, successive partitions, presumptions in joint families, liability of the manager to account, effect of reversioner's consent to widow's alienation, etc. He has not hesitated to express what in his view is the correct rule of law in spite of contrary interpretations accepted by even Full Bench decisions: *vide* for example pages 153 and 162 where will be found informative and instructive criticisms on the adopted son's right of succession *ex parte materna* and on the

restrictions imposed on the exercise of the power of adoption by a widow. A separate Chapter on the Hindu Women's Rights to Property Act, 1937, has been added at the end of the book and deals with many questions of interest relevant to the topic.

The book does not perhaps contribute much to purely academic thought, but that however is not apparently the object of the author which is something different, namely, to produce a work of essential value to such as are interested in the realities of modern Hindu Law as a living system. Coherent and well-written, with references adequate and full, compact yet clear in exposition and definite in statement, this edition is sure to recommend itself in a perhaps larger measure to the practising lawyer and the judge than did its predecessor. Scholarly analysis, and lucid discussion are its distinguishing features. I wish all success to this handy useful book which is, I think, an example of skill and labour bestowed with knowledge and insight on a realm of law whose importance cannot be over-estimated.

The printing and get up have left nothing to be desired and show the care and attention with which the publishers have done their part of the work.

12th July, 1939. K. S. K.

PREFACE

While writing this preface, it is my pleasant duty at the outset to acknowledge with gratitude the uniformly warm and welcome reception that was accorded by the legal public to the first edition, and the kindness and consideration with which it was received by learned judges and editors of legal journals. After all, the chief justification for ushering in a new book on a subject already traversed by well-known treatises lies in the approbation of those for whom it is intended; and judged by this test, this book stands amply justified. I venture to think that the words of praise it has elicited from both the Bench and the Bar cannot be fortuitous, but must have emanated from genuine appreciation. But this is not all. In these days of decreasing incomes, the legal profession needs a good book, which is at once cheap and comprehensive offering at the same time all the advantages of costlier publications, and this book has been designed to supply that want. How far I have succeeded I must necessarily leave for others to judge.

As in the First Edition, so in this, I have adopted the golden mean between what may appropriately be called the discussive method of Mayne and the digestive method of Mulla. I have not spared discussion and even elaboration on matters of doubt or difficulty, and, in their elucidation, I have freely drawn on all available materials including those gatherable from ancient sources. But a vast subject like Hindu Law cannot be covered within the compass of a handy volume except by rigorously avoiding fruitless and barren controversies of but little practical value. Hence on points well-settled by modern judicial pronouncements, I have refrained from delving into the obscurities of ancient texts, which would only tend to cloud the discussion and might even confuse the issue. Still, I could not help adding about 250 pages in this edition. Some of the sections have been reconsidered, some others re-written, several amplified and the whole book has been given a thorough and careful revision. Important and numerous citations have been added in the foot-notes with parallel references to all the official and non-official legal journals and that it is hoped will considerably enhance the utility of the book. For instance, in referring to a Privy Council case, not only have the volume and page of the Indian Appeals and the Indian Law Reports been mentioned, but also the corresponding references in more than half a dozen important non-official reports, All-India and provincial.

Considerable additions have been made in some of the Chapters, especially on Adoption, Inheritance and Women's Estate, and two fresh chapters, one on the Law of the Jains and the other on the Hindu Women's Rights to Property Act have been added. What was the Introduction in the First Edition has now been transposed to the end of the book under the captain of 'Epitome'. Otherwise both the method and arrangement pursued in the First Edition have been retained. It is confidently hoped that this edition will be found to be considerably more useful than the former edition and will amply satisfy the needs of the legal profession and the students of Law.

I take this opportunity of expressing my grateful thanks to the Hon'ble Mr. Justice K. S. Krishnaswami Aiyangar for having given his benediction to the book by his Foreword and to Mr. V. V. Srinivasa Aiyangar for the kind and continuous interest which he has been taking in this publication by ungrudgingly sparing his busy and valuable hours for discussion with me on several of the difficult points with which I was confronted, especially in the Chapter on the Hindu Women's Rights to Property Act. I also wish to express here my thanks to the several members of the Madras Advocates' Association who had helped me with their valuable suggestions in the course of this publication.

Lastly, my heartfelt thanks go to the rising and enterprising firm of Law Book publishers, the Indian Law House, and to Mr. G. Srinivasachariar of the G. S. Press for the excellent printing and elegant get up of this edition.

12th July, 1939. N. R. R.

EXTRACTS FROM THE FOREWORD TO THE FIRST EDITION

The subject of Hindu Law is a vast one and to write a book thereon requires considerable patience, learning, industry and research. Mr. Raghavachariar has got the advantage of being the Assistant Editor of one of the foremost legal journals, 'The Law Weekly,' and as such, has had the opportunity of carefully reading most of the leading decisions on the subject. He has, I find, adopted the very words of the decisions themselves in enunciating the principles.

A novel feature of this book is the fact that the author has given extracts from important and useful judgments at the end of the paragraphs enunciating the principles. This should surely prove very useful not only to the busy lawyer and the judge but to the student who would thus acquire a familiarity with the decisions themselves.

The case-law on every branch of the subject has been brought up-to-date and the conflicting views of various High Courts clearly analysed. The author has also given his own views on those topics.

The introduction in the beginning of the book giving a bird's eye-view of the subject should be specially useful to the student preparing for the examination.

I feel confident that the book would be found useful by judges, lawyers and students and would form a valuable adjunct to any law library. The author has brought to bear on the subject considerable learning and research and I congratulate him on his success in having brought out at such cheap cost a treatise which combines clearness of expression in the enunciation of principles with thoughtful discussions on case-law.

(Sd.) V. RAMESAM.

EXTRACTS FROM THE PREFACE TO THE FIRST EDITION

This book has been designed to serve three purposes: (i) to enunciate the legal principles; (ii) to indicate their *sastraic* background; and (iii) to illustrate them from the decided cases. Hence is the book entitled "Hindu Law, Principles and Precedents." The last purpose is sought to be served not only by referring to the cases where a given proposition is accepted or laid down expressly or by necessary implication, but also by extracting, wherever expedient or necessary, in whole or in part, the important judgments in which it is discussed. This method of giving lengthy extracts from the relevant decisions, though a departure from the conventional method of treatment, will, it is hoped, be a welcome feature, inasmuch as it gives the reader a choice collection of the leading cases or passages therefrom, thus helping

(i) *the student* by training him in the language of the law as a result of his being brought into touch with the very phraseology of eminent judges;

(ii) *the lawyer* by facilitating ready reference to the exposition of the controversial points in the most useful judicial pronouncements;

and (iii) *the judge* by furnishing him with the lead and the authority of those who, before him, had to face the same or similar questions.

I may assure the readers that no pains have been spared to meet the needs of the legal public and to make this book as complete and useful as possible. Most of the relevant books, whether reports, translations, treatises or digests, have been carefully consulted. All the Hindu Law subjects have been, consistent with space, exhaustively and analytically dealt with. The case-law has been brought up to the end of 1934. The *ipsissima verba* of the judicial pronouncements have been, as far as possible, adhered to. Conflicts in judicial pronouncements have been indicated and my own views thereon submitted. Exploded theories and unprofitable and antiquated rulings have either been omitted or, when referred to, have not been allowed to cloud the discussion or introduce confusion. All the connected statutes with full case-law have been given in finer types under the relevant headings. In short, an honest attempt has been made to cover the whole field of Hindu Law by a clear, comprehensive and critical examination of all the relevant material, *sastras*, cases and statutes, without at the same time making the book unduly bulky or diffuse. The Introduction, giving as it does a bird's eye-view of the whole ground covered by the body of the book, will, it is hoped, be specially useful to the beginners and examinees in Hindu Law.

N. R. R.

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HINDU LAW

(PRINCIPLES AND PRECEDENTS.)

CHAPTER I.

NATURE AND SOURCES OF HINDU LAW.

1. Nature of Hindu Law.—What is ordinarily understood as Hindu Law is not like the customary law of the country like the Common Law of England. Neither is it a statute law in the sense that some King or Legislature framed the law and enforced its acceptance by the people. Hindu Law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing the Hindus.[a] Mr. J. H. Nelson, in his "A view of the Hindu Law as administered by the High Court of Judicature at Madras," is disposed to characterise Hindu Law as "a mere phantom of the brain imagined by Sanskritists without law, and lawyers without Sanskrit." The latter portion of the observation is to some extent justified in view of several changes effected in the ancient law by English judges having no knowledge of Sanskrit, but the former portion of it is either due to ignorance or a partial or a perverted view of the real nature of the law that has been governing the Hindus for centuries and that has been handed down to us from the Rishis of old, almost unimpaired by the vandalism of ages. The fact that Mr. Nelson wrote at a time when the domain of Hindu Law was not as clear to a foreign eye as it is to-day might have lent some excuse for this surprising sally of his imagination if really there was a genuine attempt on his part to study and appreciate, before he launched on a criticism of, the Hindus and their laws, but unfortunately a reading of the above book and another treatise of his, published by him four years later in 1881, entitled "The Scientific Study of the Hindu Law", roots in us the impression that he, like some others of his kin, loved to live more on the wings of abstract and imaginary criticism than on the *terra firma* of concrete understanding. As Dr. Julius Jolly observes at the very commencement of his Tagore Law Lectures, "The Indian soil has not only been productive in deep thinkers, eminent

(a) *Vannia Kone* v. *Vannichi*, 51 M. 1=27 L.W. 611=1928 M. 299=54 M.L.J 174 (F.B.)

founders of world religions and gifted poets, but it has brought forth a system of law which, after having spread the whole vast continent of India, has penetrated at an early period into Burma and Siam, and has become the foundation of the written law in these two countries". If it is a mere truism to say that nothing is better capable of illustrating the degree and kind of culture attained by a nation than its laws and usages, the cultured civilisation of ancient India at a period far in the remote past when the other nations of the world were merged in abysmal ignorance and rank barbarism, is indeed marvellous. The aim of law must be to make men virtuous, and as Jenks observes in his work 'The New Jurisprudence', "Law may be defined provisionally as the force which makes for righteousness". The province of law, according to Mr. Priyanath Sen, is "the establishment of rules for the regulation of human conduct amidst the diversity of inclinations and desires so as to reconcile and harmonise the wishes of the individual with the interest of the community in which ultimately the interest of the individual is also concerned." Law is also defined as a body of principles recognised and applied by the State in the administration of justice. Hindu Law as understood by the term *Dharma* very nearly fits in with these definitions, and elaborate rules of procedural and substantive laws have been laid down in the ancient Sanskrit texts with a method and a system which may evoke the envy and the admiration of the modern law-givers. These rules have been bowed to through and through the centuries by the Courts and Kings who administered justice to the subjects, and to characterise that law in the terms of Mr. J. H. Nelson's remark is, to say the least, to betray a profound ignorance of such great master-minds as Manu and Yagnyavalkya whose legal works command the highest respect and utmost submission from the Cape Comorin to the Himalayas.

No doubt Hindu Law cannot strictly be said to have been promulgated by any Sovereign within the meaning of the Austinian definition. But inasmuch as Hindu Law is a body of principles or rules recognised and allowed by the Sovereign to govern the subjects and inasmuch as what a Sovereign can alter but does not alter can be taken to have been impliedly commanded by him, even Hindu Law can be said, no doubt in a qualified sense, to have been promulgated by the Sovereign within the definition by James Austin.

Hindu Law, though believed to be of divine origin, is based essentially on immemorial custom, and many of the acts of the people which were purely of a secular nature were reduced to a system and given a religious turn by the Brahmin writers, who, as

days went on, were, by their intellectual superiority and religious influence, able to mould and modify the customs of the people so as to further the special objects of religion or policy favoured by them. But their law books mingle religious and moral considerations, not being positive laws, with rules intended for positive laws,[b] and owing to this admixture of religion, morality and law in such books, great caution is necessary in interpreting them, lest we should too hastily take for strict law, precepts which are meant to appeal only to the moral sense.[c]

2. Sources of Hindu Law.—*Yagnyavalkya, i. 7.* "The Sruti, the Smriti, the approved usage, what is agreeable to one's good conscience and desire sprung from due deliberation, are ordained the foundation of Dharma (Law)"—*Also Manu ii. 12.*

The Hindu Law as understood by us and as to-day administered by the British Indian Courts is the result of many ingredients and is to be found in (1) the Sruti, (2) the Smritics, (3) the Commentaries and Digests, (4) Judicial decisions, (5) Legislative enactments and (6) Custom.[d]

3. Sruti.—The Sruti derived from the root "Sru", meaning "to hear", and believed to contain the very words of the Deity, means what was *heard* by the sages in a Revelation by God. This is of supreme authority being given a divine source, but is practically of no legal value inasmuch as it does not contain any statement of law as such. The Sruti consists of the four Vedas and the Upanishads dealing chiefly with religious rites and the means of attaining true knowledge and Moksha.

Each of these four Vedas consists of two parts known as *Samhita* and *Brahmana*, the *Samhita* being a collection of *Mantras* or hymns in praise of the Almighty, and the *Brahmana* being the theological expositions of the *Mantras*. Both the *Samhita* and the *Brahmana* are supposed to have emanated from the Divine will and are together known as *Sruti* or Revelation. The labyrinthian intricacy and the baffling complexity of the *Brahmanas* soon necessitated their condensation and arrangement and the *Sutras* came into existence by which the Vedic lore was analysed and digested under proper headings in the form of aphoristic rules known as *Smrities*. These *Sutras* fall into three classes known as *Srauta Sutras* or those dealing with the ritual, *Grihya Sutras* or those

(b) *Balwant* v. *Rani Kishore*, 25 I.A. 54=20 A. 267=2 C.W.N. 273 (P.C.).

(c) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113=22 M. 398=21 A. 460=9 M.L.J. 67=1 Bom L.R. 226—3 C.W.N. 427 (P.C.)

(d) *Pudmaca* v *Pavanesa*. 45 M. 949 -43 M.L.J. 596 -1923 M. 215 -16 L.W. 563—1922 M.W.N. 693. (F.B.)

dealing with the domestic ceremonies, and *Dharma Sutras* or those dealing with law. Of these the *Dharma Sutras* alone are to be considered under the next source of Hindu Law, namely, the *Smrities*.

4. Smrities.—Unlike the Sruti, the Smriti, which means "what was remembered", is of human origin and is believed to be the recollections of Rishis handed down to us, constituting the principal source of Hindu Law. Even these are held by orthodox Hindus to have emanated from the Deity and to have been recorded, not like the Sruti in the very words uttered by that Being, but still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has to be determined by the ordinary process of reason.[e] The Smrities are divided into Primary Smrities and Secondary Smrities, the latter being later in date; the primary Smrities are again classified into Sutras and Dharmasastras. Gautama, Baudayana, Apastamba, Vasishta and Vishnu are the chief Sutra writers, and Manu, Yagnyavalkya and Narada are the most noteworthy of the writers of the Dharmasastras. Of these, Manu is of paramount authority on secular law and flourished according to Max Muller about 200 B.C. The celebrated commentary, the Mitakshara, was based upon Yagnyavalkya, who comes next in point of time and authority, and Narada is the last of the more important of the Smriti writers.

5. Commentaries.—(1) *The Mitakshara*, which is the most important commentary on Yagnyavalkya and which is held in considerable respect throughout India, owes its authorship to Vignaneswara, a mendicant scholar who lived at Kalyanapura during the reign of Vikramarka, a Chalukya ruler in the 11th century. He was a great legist whose logical acumen, judging from the merit of his work, seems to have been remarkable.[f]

The Mitakshara is the prevailing authority in Southern India, the Mahratta Country, Berar,[g] Sind,[h] Northern Canara and Ratnagiri and is of equal authority with Mayukha in the other parts of Western India except the Island of Bombay, Northern Konkan and Guzerat where the Mayukha reigns supreme.[i]

(e) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113=22 M. 398=21 A. 460=9 M.L.J. 67=1 Bom. L.R. 226=3 C.W.N. 427 (P.C.)

(f) *Buddha Singh* v. *Lallu Singh*, 37 A. 604=42 I.A. 208=20 C.W.N. 1=17 Bom. L.R. 1022=29 M.L.J. 434=13 A.L.J. 1097 =1915 M.W.N. 772=2 L.W. 897=1915 P.C. 70 (P.C.)

(g) *Ganaputi* v. *Salu*, 1926 N. 15; *Harigiri* v. *Bharathi*, 1925 P.C. 127=22 L.W 355=1925 M.W.N. 414.

(h) *Bodomal* v. *Mt. Kishnibai*, 1926 S. 231.

(i) *Narhar* v. *Bhau*, 40 B. 621=18 Bom. L.R. 744=36 I.C. 539; *Jiwan* v. *Mt. Indra*, 1934 P. 260.

(2) *The Mayukha.*—The Mayukha (or Vyavahara Mayukha) was the work of Nilakanta and its authority in Western India is superior to that of Viramitrodaya written by Mitra Misra.

(3) *The Dayabhaga.*—The chief commentary in Bengal is the Dayabhaga written by Jimuta Vahana.(j)

(4) *Other Commentaries.*—The Mitakshara is accepted as a high authority by all the Schools, even by that of Bengal when it is not controlled by the Dayabhaga and other treatises peculiar to that school. But the other four schools (Mithila, Madras, Bombay and Benares), like that of Bengal, though in a less marked degree, have their particular treatises and commentaries which control passages of the Mitakshara and give rise to differences between those schools. Thus whilst the Mithila School follows implicitly the Vivada Chintamani and the Ratnakara, the South India, the Smriti Chandrika and the Madhavya, and the Presidency of Bombay, the Vyavahara Mayukha, these works are by no means held in equal estimation at Benares.(k) The following table gives in order of importance the names of treatises held authoritative in the various parts of India with the names of their authors. This does not mean that on points on which the authorities of a particular school are silent, the authorities accepted by other schools may not be referred to.(l)

PARTS OF INDIA

South India	Mitakshara	Vignaneswara
"	Smriti Chandrika	Devananda Bhatta
"	Dayavibhaga	Madhavya
"	Saraswati Vilasa	Prataparudra
"	Viramitrodaya	Mitra Misra
"	Vyavahara Nirnaya	Varadaraja
Mahratta Country	Mitakshara	Vignaneswara
"	Vyavahara Mayukha	Nilakanta
"	Nirnaya Sindhu	Kamalakara
"	Viramitrodaya	Mitra Misra
Guzerat, Northern Konkan and the Island of Bombay	Vyavahara Mayukha	Nilakanta
	The Mitakshara	Vignaneswara
"	Nirnaya Sindhu	Kamalakara
Benares	Mitakshara	Vignaneswara
"	Viramitrodaya	Mitra Mistra(l)
"	Madana Parijatha	Viseweswara Bhatta
"	Nirnaya Sindhu	Kamalakara

(j) *Maniram* v. *Kerry*, 7. I.A. 115 - M I.A. 487.
5 C. 776 (P.C.)
(k) *Bhugwandeen* v. *Myna Baee*, 11 (l) *Bindra* v. *Mathura*, 6 Luck, 456 =1931 O. 17 (F.B.)

PARTS OF INDIA.	AUTHORITIES.	AUTHORS.
Mithila	Mitakshara	Vignaneswara[m]
,,	Vivada Chintamani	Vachaspati Misra
,,	Vivada Ratnakara	Chandeswara Thakura
Bengal	Dayabhaga	Jimutavahana
,,	Daya Tattwa	Raghunandana
,,	Dayakrama Sangraha	Shri Krishna Tarkalankara
,,	Mitakshara	Vignaneswara
,,	Viramitrodaya	Mitra Misra
The Punjab	Mitakshara	Vignaneswara
,,	Viramitrodaya	Mitra Misra
,,	The Punjab customs	

It must always be remembered that the commentaries are only commentaries and that they do not enact. They only explain and are the evidence of the congeries of customs which form the law.[n]

(5) *Treatises on Adoption.* In addition to the above treatises, Dattaka Chandrika reputed to have been written by Kubera, and Dattaka Mimamsa written by Nanda Pandita, which had been translated into English at an early period of British rule, are two chief authorities on the law of adoption which command respect throughout India,[o] except that, wherever they differ, the former is preferred in South India and Bengal and the latter in Benares[p] and Mithila. Both works have had a high place in the estimation of Hindu lawyers in all parts of India, and, having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their authority is not open to examination, explanation, criticism, adoption or rejection like any other scientific treatise on European customs, though caution is required in accepting their glosses where they deviate from or add to the Smrities. Dattaka Chandrika is supposed in the Bengal school to be a literary forgery of Raghumani Vidyabushana and there is indeed a good deal of difficulty and doubt in the determination of its authorship. It is this doubt that makes it impossible to fix with any certainty the date when it was written, but it is believed to be an earlier work than the Dattaka Mimamsa, which was written

(m) *Sourendra* v. *Hari*, 5 P. 135—52 I.A 418. 1925 P.C. 280—50 M.L.J. 1=24 A.L.J 33 - 1926 M.W.N. 49=28 Bom. L.R. 1126-30 C.W.N 482.

(n) *Balwant Rao* v *Baji Rao*. 48 C. 30—12 L.W. 679=1921 P.C. 59—47 I.A. 213 =25 C.W.N. 243—22 Bom. L.R. 1070—1920 M.W.N. 483—39 M.L.J. 166. (P.C.)

(o) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113—22 M. 398—21 A. 460—9 M.L.J. 67—1 Bom. L.R. 226-3 C.W.N. 427 (P.C.)

(p) *Gopi Nath* v. *Mt. Kishni*, 25 A L.J. 1009 1927 A. 634.

by Nanda Pandita, who is known to have lived about 300 years ago.[q]

6. Schools of Law.—It is usual to talk of the existence of several schools of Hindu Law, but strictly speaking there are only two schools, the Dayabhaga and the Mitakshara, the others like the Dravida, the Mithila, the Benares and the Maharashtra schools, being really the sub-schools of the Mitakshara differing from one another only in minor matters. On points on which the authority adopted by a particular school is silent, authorities adopted by other schools can be usefully referred to.

7. Difference between the Mitakshara and the Dayabhaga Schools.—The difference in the basic principles of the Dayabhaga and the Mitakshara is striking and fundamental as can be seen from the following table.

THE MITAKSHARA SCHOOL.	THE DAYABHAGA SCHOOL.
1. The son gets a right by birth in the joint family property and can insist on a partition even during the father's life-time.	1. There is no right by birth accorded to a son and he cannot demand partition so long as the father is alive.
2. The son by virtue of his right by birth can restrain unauthorised alienations of ancestral property by the father.	2. The father is the absolute owner of the properties and can deal with the property in any way he likes
3. There is no absolute right in a collateral member of the joint family like a brother to alienate his share in the joint family property and on his death without male issue his interest survives to his brother.	3. Owing to the existence of the theory of quasi-severalty each brother can alienate his interest and on his death without male issue his interest descends to his widow.
4. The widow of a deceased co-parcener cannot enforce partition of her husband's share against his brothers.	4. The widow becomes a co-parcener with her husband's brothers and can insist on a partition of his share.
5. Rule of propinquity is the dominating rule of preference in succession.	5. Test of religious efficacy is the prevailing rule.

(q) *Perrazu* v. *Subbarayudu*, 48 I A. 280=44 M. 656=26 C.W.N. 1=23 Bom. L R. 920=41 M.L J. 33=19 A.L.J. 621 =14 L W. 270=1921 M.W.N. 540=1922 P C. 71.

8. Origin of the Schools.—Though theoretically speaking, the ultimate sources of Hindu Law are the Sruti and the Smriti, they have in practice been replaced in different provinces by the commentaries or Nibandhas regarded as authoritative expositions of those sources by the different schools prevailing in those provinces and undertaken for purposes of resolving the conflict in the shastras. There is nothing more certain than that in dealing with the same ancient texts, the commentators who are the originators or the adherents of the various schools have often drawn opposite conclusions.[r] But the remoter sources of the Hindu Law are common to all the different schools. The process by which these schools have been developed seems to have been of this kind: Works universally or very generally received became the subject of subsequent commentaries: the commentator puts his own gloss on the ancient texts; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus both the Mitakshara and the Dayabhaga, between which there are principal divergences, equally admit and rely on the authority of Yagnyavalkya. In like manner there are glosses and commentaries on the Mitakshara, which are received by some of the schools that acknowledge the supreme authority of that treatise, but not by all.[s] The existence of so many schools shows the flexibility of the shastras to suit the changed conditions of society and that they do not stand in the way of social evolution and progress.

9. The Digests.—In addition to the commentaries referred to already, two digests prepared during the administration of India by the British deserve consideration and these are the Vivadarnava Setu commonly known as Halhed's Code compiled at the request of Warren Hastings, and Vivada Bangarnava compiled by Jagannadha Tarkapanchanana at the instance of Sir William Jones. The former was translated by Mr. Halhed and is practically worthless as a book of legal reference. But the latter book translated by Mr. Colebrooke, both a great Sanskrit Scholar and Sanskrit lawyer, is, with the exception of the Dayabhaga, the Dayatattwa and the Dayakrama Sangraha, of a higher authority in Bengal than that of any other writer on Hindu Law.[t] Its chief value consists in the fact that it contains ancient texts many of which are not accessible to the English readers elsewhere.

10. Interpretation of texts.—As was already observed, great caution is necessary in the interpretation of ancient books which

(r) *Moniram Kolita* v *Kerry Kolitani*, 5 C. 776=7 I.A. 115. *Ramalinga*, 12 M.I.A. 397.

(s) *Collector of Madura* v *Mootoo* (t) *Keri Kolitany* v. *Moneeram*, 13 Beng. L.R. 50.

mingle religious and moral considerations with rules intended for positive laws. The distinction between *vinculum juris* and *vinculum pudoris* is not always discernible.(u) But the Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognised expounders.(v) No doubt in the absence of clear rules of Hindu Law in the texts, a court can decide a point of law by applying the principles of justice, equity and good conscience,(w) though when there are such rules, it would be a serious inroad into the rights of the Hindus if those rules were to be construed in the light of legal conceptions borrowed from abroad.(x) There is a good deal of conflict and inconsistency in the Srutis and Smrities and between one Sruti or Smriti and another. Yagnyavalkya resolves this conflict by attributing to the Sruti an authority superior to the Smriti and by assuming different cases or customs for the application of the conflicting precepts. The duty of a judge in administering Hindu Law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law clear proof of usage will outweigh the written text of the law.(s) Indeed, the Mitakshara subordinates in more than one place the language of texts to custom and usage.(y) The commentators, while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people in the locality in which they flourished. As it is the opinion of the commentators which prevails in the provinces where their authority is recognised, in the event of a conflict between the ancient texts and the commentators, the latter's opinion must be given the preference.(z) But passages from the Smritics reasona-

(u) *Sri Balusu* v. *Sri Balusu*, 26 I.A 113 :22 M. 398 :21 A. 460—9 M.L.J. 67—1 Bom L.R. 226—3 C.W.N. 427 (P.C.) *Balwant Singh* v. *Rani Kishori*, 25 I.A. 54 20 A. 267—2 C.W.N. 273.

(v) *Ramchandra* v. *Vinayak*, 41 I.A. 290—42 C. 384—1 L.W. 831—1914 P.C. 1.: 18 C.W.N. 1154 :27 M.L.J. 333=1914 M.W.N. 835 12 A.L.J. 1281—16 Bom. L.R —883 (P.C.) : *Bhyah Ram* v. *Bhyah Ugur*, 13 M I.A. 373.

(w) *Jagernath* v. *Sher Bahadur*, 57 A. 85 :1935 A.L.J. 150=1935 A. 329 : *Vithal* v *Balu*, 60 B. 671—1936 B. 283=38 Bom. L.R 590 ; *Meenakshi* v. *Rama Aiyar*, 37 M 396 24 M.L.J. 106—18 I.C. 31 1913 M.W.N. 40

(x) *Vidyavaruthi* v. *Baluswami*, 44 M 831 18 I.A. 302 :20 A.L.J 497 :24 Bom L.R. 629 26 C.W.N. 537—41 M.L.J. 348 —15 L.W. 78 :1921 M W N. 449—1922 P C 123

(s) See p. 8, foot note (s).

(y) *Bhyah Ram* v. *Bhyah Ugur*, 13 M I A. 373.

(z) *Atmaram* v. *Rajirao*—62 I.A. 139 1935 P.C. 57=68 M.L.J. 673—37 Bom. L R. 553 :39 C.W N. 646—41 L.W. 613= 1935 M W N. 484 :1935 A.L J. 816.

bly traceable to selfishness or covetousness of priests can be treated as spurious.

11. Mimamsa of Jaimini.—In view of the contradictions apparent or real, in the various ancient texts and the difficulty in separating the legal from the religious or moral precepts, some rules of guidance and interpretation in respect of them became necessary. Chief among those who supplied this want was one Jaimini who flourished in the 6th to 7th Century A.D. The Mimamsa of Jaimini embodies some of these valuable rules of interpretation in regard to the ritual portion of the Veda and is resorted to even for deciding ambiguous or doubtful rules of law. One such rule of Jaimini which was alleged to have the effect that a text supported by the assigning of a reason is to be deemed not as mandatory but only as recommendatory came up for consideration before the Judicial Committee in a case where their Lordships had to interpret the text of Vasishta "Let no man give or receive an only son, since he must remain to raise up a progeny for the obsequies of ancestors".(a) Their Lordships characterised the rule as startling and observed that a very intimate acquaintance with the Smrities would be needed before admitting its truth. But there is no such rule in the Mimamsa and it is really the result of a misinterpretation on the part of Mr. Mandlik of a Mimamsa text. Even otherwise the rule is absurd on the face of it, since mandatory texts, of which there are many in the ancient books, would cease to be mandatory under this rule simply because a cogent or convincing reason is appended to them. No doubt, it is not strictly necessary for one who can command to give reasons for his orders. But he may append a reason to carry conviction to the doer and not to make him do it blindly or unwillingly. Why should it be said in such cases that the command was not intended to be a command and that the man addressed is at liberty to obey or not to obey it? Besides, in the case of texts which are held to be inspired, both the rule and the reason have equal authority, and it is impossible to imagine how an imperative order becomes merely a persuasive advice simply because the order has been given appended with a reason.

12. Factum Valet.—No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct, or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural

(a) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113=22 M 398=21 A 460=9 M.L.J. 67=1 Bom L.R 226=3 C.W.N. 427 (P.C.).

claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affection for him ruined them, and yet he may be within his legal rights. The Hindu sages doubtless saw this distinction and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it, the law must be so declared. But the mere fact that a transaction is condemned in books like the Smrities does not necessarily prove it to be void. It raises the question what kind of condemnation is meant by the precept, whether it is a moral condemnation or a legal one.[b] The doctrine of *Quod Fieri Non Debuit Factum Valet*, which means that a thing when done is valid though it ought not to have been done, has been applied in the administration of Hindu Law by the British Indian Courts on grounds of justice, equity and good conscience. Some scholars speak of this doctrine as peculiar to the Bengal School and as having been first known to and applied by Jimutavahana when he laid down that the power of the father to alienate the family property was absolute even in the presence of the sons. But this is a mistake due to an incorrect translation by Colebrooke of a Dayabhaga text. What Jimutavahana said was, when a person did an act which in law he had a right to do, that act could not be set aside on the ground that there were a hundred texts prohibiting it. His argument was that the ownership having been conferred upon the father by the texts, he had the right to alienate the property in spite of the text prohibiting alienation and that the latter text should be understood only as showing the undesirability on the part of the father of alienating the property to the prejudice of the sons. It will thus be seen that he started on the assumption that the father had the right to alienate, and it cannot be said from this that Jimutavahana was the first or the only author who applied the principle of *factum valet* and that the same was not known to the other Schools.

13. Applicability of the Doctrine.—Many things which ought not to be done in point of morals or religion are valid in point of law and the applicability of this doctrine is confined only to those instances where a legal precept has been reduced by an independent reasoning to a moral precept. This doctrine can never be availed of to violate a mandatory text of the Hindu Law,[c] but applies only to those cases where something is done which the doer

(b) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113=22 M. 398=21 A. 460=9 M.L.J. 67=1 Bom. L.R. 226=3 C.W.N. 427 (P.C.)

(c) *Ishwari* v. *Rai Hari*, 6 P. 506=1927 P. 145; *Mareyya* v. *Ramalakshmi*, 44 M. 260=1921 M. 331 :39 M.L.J. 495=12 L.W. 613=1920 M. W. N. 708.

is strictly entitled to do, though in exercising the right he violates a moral obligation.[d]

Instances of its application.—This principle has been applied to validate a marriage of a girl who was given away in marriage by her mother in violation of the text of Yagnyavalkya which gives preferential right of giving away to the father,[e] the ground of the decision being that the text laid down only a moral precept. But the doctrine is unavailable to validate a marriage where a Hindu woman having a Hindu husband, after becoming a convert to Muhammadanism, married a Muhammadan without getting the first marriage dissolved.[f] So also in matters of adoption, the adoption of an only son is valid since the rule of Vasishta to the contrary is not mandatory.[b] But an adoption of an orphan cannot become valid under this principle since the rule that a boy can be given in adoption only by his parents is a mandatory one.[g]

14. Legislation.—A portion of the law which is now administered to the Hindus is to be found in the modern Statutes which have altered, added to or nullified the effect of the original Sanskrit precepts. The following table gives the gist of the important changes effected by legislation.

No. of Act.	Name of the Act.	Change Effected.
XXI of 1850	Caste Disabilities Removal Act.	Forfeiture of rights enjoined by Hindu Law on the apostacy or exclusion of a Hindu from religion is done away with.[h]
XV of 1856	Hindu Widows' Remarriage Act.	The Act legalises the remarriage of Hindu widows about the legality of which there was previously some doubt.
XXI of 1866.	Native Converts' Marriage Dissolution Act.	The Act enables a Hindu convert to Christianity to get his Hindu marriage dissolved.

(d) *Lakshmappa* v. *Ramava*, 12 Bom. H.C.R. 361; *Ganya* v. *Lekhraj*=9 All. 253

(e) *Venkatachariyulu* v. *Rangachariyulu*, 14 M. 316=1 M.L.J. 85; *Bai Divali* v. *Moti*, 22 B 509; *Brindabun Chandra* v *Chandra Kurmokar*, 12 C. 140; *Rampiyar* v *Deva*, 1 R. 129—1923 R. 202; *Ram Harakh* v. *Jagar Nath*, 53 A. 815—1931 A.L.J. 816—1932 A. 5.

(f) *Badamea* v. *Fatima Bai*, 26 M.L.J. 260—22 I.C. 697=1914 M.W.N. 278.

(b) See p. 11, foot note (b).

(g) *Mareyya* v. *Ramalakshmi*, 44 M. 260—39 M.L.J. 495—1920 M.W.N. 708—12 L.W. 613—1921 M. 331; *Ram Kishore* v. *Jai Narain*, 49 C. 120=15 L.W. 144=1922 P.C. 2 42 M.L.J. 80—26 C.W.N. 881=20 A.L.J 857—1922 M.W.N. 125—48 I.A. 405 (P C)

(h) *Khunni Lal* v. *Gobind*, 33 A. 356—10 I.C. 477—38 I.A. 87=8 A.L.J. 552=13 Bom. L.R. 427=15 C.W.N. 545=21 M.L.J. 645=(1911) 1. M.W.N. 432.

No. of Act.	Name of the Act.	Change Effected.
IX of 1872.	Indian Contract Act.	This Act has superseded the Hindu Law of Contracts.
IX of 1875.	Majority Act.	Age of majority is fixed as 18 years except as to matters of marriage and adoption.
IV of 1882.	Transfer of Property Act.	The Hindu Law of Transfer has been with few exceptions superseded.
XV of 1916.	Hindu Disposition of Property Act.	Bequests in favour of unborn persons validated.
XII of 1928.	Hindu Inheritance (Removal of Disabilities) Act.	By this Act no affliction, physical or mental barring congenital lunacy or idiocy, operates as a bar to a claim to inherit or partition.
II of 1929.	Hindu Law of Inheritance (Amendment) Act.	The Act places the son's daughter, daughter's daughter, sister and sister's son after the paternal grandfather and before the paternal uncle in the Mitakshara line of Succession.
XIX of 1929.	Child Marriage Restraint Act.	The Act penalises marriages of girls below 14 and boys below 18 years of age.
XXX of 1930.	Hindu Gains of Learning Act.	Earnings by special education imparted at the expense of the family are deemed to be the separate property of the acquirer.
XVIII of 1937.	Hindu Women's Rights to Property Act.	This Act confers fresh rights to property on Hindu Widows.

In addition to the above, there are other Statutes effecting changes in the Hindu Law, such as the Religious Endowments Act, the Evidence Act, the Indian Succession Act, the Guardian and Wards Act and the Indian Penal Code.

15. Judicial Decisions.—It cannot be gainsaid that the early English Judges who administered the law to the Hindus with the help of the Pandits had brought to bear their own notions and influence in the development of the Hindu Law. Their ignorance of Sanskrit might, in some instances, have had the effect of imparting a rigidity to what has always been a very pliable legal institution, but in many other cases, for the sake of justice, logic or harmony, the effect of the original texts had been either altered or

added to by them in their judicial pronouncements, and naturally the later case-law came to be considerably influenced by the earlier precedents accounting thereby for much of the divergence that is now found between the original texts and the law as administered to-day. It is here and to this extent that Mr. J. H. Nelson's observation that Hindu Law is an imagination of lawyers without Sanskrit stands justified. The decisions of the Judicial Committee and of the High Courts in India have practically superseded or thrown into shade the Nibandhas or Commentaries and are now invariably resorted to as precedents when the principles propounded therein are applicable in subsequent cases. The large body of law relating to adoption, the limiting of the pious duty of the son to pay the father's debts to the actual ancestral assets in his hands, the extension of that duty even during the father's lifetime, the recognition in some of the provinces of a power in a coparcener to alienate his share in the joint family property prior to partition, the absolute powers of the father and brother under the Dayabhaga in respect of ancestral property and the restricted definition of Shridhanam and the curtailment of women's rights, are some of the numerous instances where the Judges in administering the Hindu Law either modified, altered or added to it either due to ignorance of Sanskrit or by the application of the principles of analogy and logic and the rules of equity and good conscience.

16. Custom.—Custom is the parent of personal law in each country, and even in India, which is a land of diverse customs of families, castes and territories, custom is the most important source of Hindu Law under whose system clear proof of usage will outweigh the ancient text.(i) Vignaneswara declares "Practice not that which is legal, but is abhorred by the world, for it secures not spiritual bliss." Custom is believed to be based on unrecorded Revelation and its observance is insisted on by the ancient writers. Custom in its legal sense means a rule exceptional to the general law,(j) a rule which in a particular family, class or District has from long usage obtained the force of law. It must be ancient,(k) certain, reasonable and continuous and, being in derogation of the general rules of law, must be strictly construed.(l) But a custom

(i) *Collector of Madura* v. *Moottoo Ramalinga*, 12 M.I.A. 397 ; *Palaniappa* v. *Alagiya Chetti* 44 M. 740—15 L.W. 521 —1921 M.W.N. 687. 1922 P.C. 228=48 I.A. 539 26 C.W.N 417.

(j) *Sri Broja Kishore* v. *Kundana Devi*, 26 I.A. 66—22 M. 431=3 C.W.N. 378—1 Bom. L.R. 287=9 M.L.J. 157. (P.C.)

(k) *Azimullah* v. *Phool Kunwari*, 1934 A 361 ; *Sundrabai* v *Hanmant*, 56 B. 298..31 Bom. L.R. 802 -1932 B. 398.

(l) *Ramalakshmi* v. *Sivananda*, 14 M.I.A. 570 ; *Sundrabai* v. *Hanmant*, 56 B. 298=1932 B. 398=34 Bom . L.R. 802 ; *Dwarka* v. *Raghubansa*, 8 Luck. 354= 1933 O 182.

which is either immoral or opposed to public policy or forbidden by Statute cannot be recognised to be valid.[m] It is of the essence of usages modifying the ordinary law that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their title to recognition depends.[n]

17. Proof of Custom.—As regards the nature and quantum of proof of custom, the following propositions enunciated by the Madras High Court in *Gopalayyan* v. *Raghupatiayyan*[o] are very valuable :—

"I. The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law and this conviction must be inferred from the evidence.

II. Evidence of the acts of the kind, acquiescence in those acts; decisions of Courts, or even of Panchayats, upholding such acts; statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible; but it is obvious that although admissible, evidence of this latter kind will be of little weight, if unsupported by actual examples of the usage asserted."

No hard and fast rules can be laid down as to how many instances are sufficient to make out a valid custom and many exceptions to the custom set up would make the Court hold that the custom pleaded is not obligatory or invariable.[p] In order that the general law may be overriden by proof of custom, the evidence must satisfy the court that the majority at least of the given class of persons look upon the customary rule put forward as binding. That must be established by a series of well known concordant and on the whole continuous instances, so that the common consent of the class in question is clearly demonstrated by the number of the instances proved. The mere filing in of affidavits from a number of leading members of the community from the point of view of opulence or influence, emphasising the desirability

(m) *Vannia Kone* v. *Vannichi*, 51 M. 1 =27 L.W. 611=1928 M. 299=54 M.L.J. 174 (F.B.)

(n) *Abdul Husein* v. *Bibi Sona*, 45 I.A. 10=45 C 450=16 A.L.J. 17=20 Bom. L.R. 528=22 C.W.N. 353=34 M.L.J. 48=1917 P.C. 181; *Mohammad Ebrahim* v. *Shaik*, 45 M. 308=15 L.W. 354=1922 P.C. 59=43 M.L.J. 69=1922 M.W.N. 470=24 Bom L.R. 944 28 C.W.N. 793=49 I.A. 119, *Sundrabai* v. *Hanmant*, 56 B. 298=34 Bom L.R 802. 1932 B. 398.

(o) *Gopalayyan* v *Raghupatiayyan*, 7 M H C R 250

(p) *Vannia Kone* v. *Vannichi*, 51 M. 1 27 L.W. 611=1928 M. 299=54 M.L.J. 174.

of a particular course of conduct, does not and cannot amount to a proof of custom in accordance with the desired course of conduct.[q] It is easier to hold established a custom which only proves a well recognised adjunct to the ordinary law, than it is when the law is said to be actually altered as in the case of a change of the rule of succession.[r] When the existence of a custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence and such evidence is therefore allowable as an exception to the general rule.[s] But a custom cannot be enlarged by a parity of reasoning. Customs may be similar or contradictory, probable or improbable, and the existence of one custom is no evidence of the existence of another. The only proof of a particular custom is the evidence of that custom and no other—evidence that given certain data, certain results follow with the force of law. For, custom cannot be said to be founded on reason and no reason would make a custom or law.[t]

Proof of Cessation of Custom.—Orientals are commonly tenacious of their usages and customs, more especially of their family and religious observances. Hence on the ordinary principles of viewing evidence, a continuance of the same state of things is presumable and the onus is on the party alleging an interruption or cessation of it to prove the allegation.[u]

18. Kinds of Custom.—Three kinds of custom are recognised by the Courts and they are: (*i*) Local custom, (*ii*) Class custom and (*iii*) Family custom. A local custom is one binding on all persons in the local area within which it prevails, and differs from a family custom binding only on members of the family as to rules of descent and so forth. It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence of the prevalence of the custom in that area. Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant.[v] Continuity is essential for a valid custom[w] and a custom cannot be created by an agreement of parties so as to be binding upon others.[x] A custom which is

(*q*) *Akbarally* v. *Mahomedally*, 57 B. 551 31 Bom L.R. 665=1932 B 356.

(*r*) *Sheobaran Singh* v. *Kulsumunnissa*, 54 I A. 204=49 A. 367=1927 P.C. 113=31 C.W.N 853=52 M.L.J. 658=29 Bom. L.R. 877=25 A.L J. 617=1927 M W N. 444.

(*s*) *Rajendra* v. *Ganganand*, 4 Pat. 788 =22 L W. 645=1925 P.C. 213=52 I.A. 279 =30 C.W.N. 169=1925 M.W N. 549=50 M.L J. 194.

(*t*) *Palaniappa* v. *Chockalinga*, 1930 M. 109 30 L W. 1040..57 M.L J. 817.

(*u*) *Surendronath* v. *Mt. Heeramonee*, 12 M.I A. 81; *Chunni* v *Raftunnissa*, 1931 A.L.J. 411 1931 A. 547.

(*v*) *Narayan* v. *Niranjan*, 51 I.A. 37=3 Pat. 183=1924 P.C. 5=28 C.W.N. 351.

(*w*) *Rajkishen* v. *Ramjoy*, 1 C. 188 (P.C.).

(*x*) *Mynae Boyee* v. *Ootaram*, 8 M.I.A. 420.

immoral or opposed to public policy is unenforceable and cannot be sanctioned.(y)

19. Family Usage.—A family usage differing from the law of the District in which the family is resident can be established(z) by proof that it has been continuous, invariable and certain.(a) A well established family custom cannot be defeated by the fact that in one instance it was not observed.(b) But such a family usage, unlike a local custom, can be discontinued so as to let in the ordinary law, and well established discontinuance either from accidental causes or by the concurrent will of the family must be held to destroy the family usage.(w)

Distinction between Custom and Usage.—Though usage and custom are often used as convertible terms, the antiquity, the uniformity and the notoriety which are required in the case of a custom are not necessary in proving a valid usage. It is sufficient if it is shown that the usage is so well known and acquiesced in that it may be reasonably presumed to have been tacitly imported by the parties into their transactions.(c)

20. Onus of Proof.—Where a person admittedly governed by the Hindu Law pleads a custom in derogation of that law, the onus of proving that custom is upon that person,(d) but in the case of persons who were originally non-Hindus and adopted the Hindu usage only in part the onus becomes shifted.(e) But a Hindu does not become a non-Hindu simply because he departs from the standard of orthodoxy.(f)

21. Court's Duty.—The duty of the Court is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular School which governs the District and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage outweighs the written text of the law.(g) This,

(y) *Bau Mancharam* v. *Regina*, 32 B. 581=10 Bom L.R. 318.

(z) *Basantrav* v. *Mantappa*, 1 B.H.C. App. 42 (2nd Edn.).

(a) *Rajkishen* v. *Ramjoy*, 1 C. 186 (P.C.); *Chandika* v. *Muna*, 29 I.A. 70=24 A. 273=6 C.W.N. 425=4 Bom. L.R. 376 (P.C.).

(b) *Ekradeshwar* v. *Janeshwari*, 42 C 582=1 L.W. 863 1914 P.C 76=41 I.A. 275 12 A.L.J. 1217=17 Bom L.R. 18=18 C.W.N. 1249=27 M.L.J. 373=1914 M.W.N. 807 (P.C.), *Amina Khatun* v. *Khalil*, 8 Luck. 445=1933 Oudh. 246.

(w) See p. 18 foot note (w).

(c) *Jugga* v. *Manik*, 7 M I.A. 263.

(d) *Chandika* v. *Muna*, 29 I.A. 70 24 A. 273 6 C W N 125=4 Bom L.R 376 (P.C.). *Ladha* v. *Mt. Viran*, 1932 L 452=13 L. 375, *Sundrabai* v. *Hanmant*, 56 B 298=31 Bom. L.R. 802=1932 B. 398

(e) *Faninda* v. *Rajeswar*, 12 I.A. 72=11 C 463 (P C).

(f) *Bhagwan* v. *Bose*, 31 C 11=30 I.A. 249 7 C W N. 895=5 Bom. L.R 845=13 M L J. 381 (P.C.)

(g) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M I.A. 397.

however, does not mean, that countenance should be given to the contention that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. To put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted upon, would go far to deny the existence of any general Hindu Law, and to disregard the broad foundations which are common to all the Schools, though divergences have grown out of them. To do so would be to invert the processes by which law is to be ascertained and administered.(h) But Hindu Law and customs have not stood still, and what Courts are now concerned with is the law which obtains at present on the matter in dispute.(i) In other words, a Court is not justified in imposing upon the Hindus a rule of law simply because it finds a place in the texts without ascertaining whether it is dead letter or living law; so also when a custom which is not in accordance with the ordinary law governing the Hindu community is giving way to enlightenment in order to bring it in line with other communities, Courts would not be justified in giving effect to it and thereby compelling the unwilling community to be bound by the custom which it has already abandoned, since a judicial recognition of a custom which the community is prepared to jettison is neither necessary nor just.(j) Besides, if the custom is a barbarous one, it must be rejected as repugnant to natural justice, equity and good conscience and cannot be given effect to in a milder form, unless in that milder form it is recognised by the community as regulating the relations of its members *inter se*.(k)

22. Immoral Custom.—A custom which is immoral cannot be recognised by the Courts, and the injunction of the sacred texts enjoining strict observance of custom does not apply to such a case. A custom permitting divorce by mutual agreement between the husband and wife and remarriage of the wife with another is not invalid,(l) but a custom by which a woman can marry again during the life-time of the first husband without the first marriage

(h) *Bhagwan Singh* v. *Bhagwan Singh*, 26 I.A. 153=21 A. 412=3 C.W.N. 454=1 Bom. L.R. 311.

(i) *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*, 40 B. 270=3 L.W. 259=1915 P.C. 41=43 I.A. 56=14 A.L.J. 185=18 Bom. L.R. 172=20 C.W.N. 702=30 M.L.J. 193=(1916) 1 M.W.N. 258 (P.C.).

(j) *Vannia Kone* v. *Vannichi*, 51 M. 1=27 L.W. 611=1928 M. 299=54 M.L.J. 174 (F.B.).

(k) *Eshugbayi Ebko* v. *Government of Nigeria*, 61 M.L.J. 975=35 C.W.N. 755=1931 P.C. 248=1931 A.L.J. 466=1931 M.W.N. 683=34 L.W. 607.

(l) *Sankaralingam* v. *Subban*, 17 M. 479.

being annulled by divorce or in some formal manner recognised by caste usage as equivalent to divorce (the mere wish of the woman against that of the husband being insufficient) is void as an immoral one, because if a wife could leave her husband whenever she pleased and without any forms whatever, the marriage tie would have no force at all, and the intercourse of the sexes, in a caste in which such a state of society was allowed, would reduce its members to the level of the beasts of the field.[m] So also the adoption of a daughter by a Dancing Girl according to the usage of her caste is valid if it has not for its immediate object the prostitution of the adoptee during her minority so as to leave her no choice of married life when she is over 16 years, and the usage if established will be enforced when no such immoral result is contemplated.[n] But an adoption for the purpose of prostitution is void and neither estops the adopter from pleading its invalidity nor confers any right on the adoptee.[o] See also S. 180

(m) *Reg* v. *Karsan*, 2 Bom. H.C.R 124; *Reg* v. *Bai Rupa*, 2 Bom. H.C.R. 117; *Uji* v. *Hathi*, 7 Bom. H.C.R. 133; *Budansa Rowther* v. *Fatma Bi*, 26 M.L.J. 260=1914 M.W.N. 278; *Gedalu Narayana, in Re*, 36 L.W. 237=1932 M.W.N. 1082=1932 M. 561.

(n) *Ex parte Padmavati*, 5 M.H.C.R. 415; *Venku* v. *Mahalinga*, 11 M. 393; *Kamalakshi* v. *Ramasami Chetty*, 19 M. 127; *Sanjivi* v. *Jalajakshi*, 21 M. 222=8 M.L.J 126; *Manjamma* v. *Seshagiri Rao*, 26 B 491-4 Bom. L.R. 116.

(o) *Kamalakshi* v *Ramasami Chetty*, 19 M. 127.

CHAPTER II.

OPERATION OF HINDU LAW

23. Operation of Hindu Law.—From the year 1774, the Legislature, British and Indian, has affirmed, time after time, the absolute enjoyment by the Hindus of their laws and customs so far as they are not in conflict with the statutory laws.[a] But before applying the Hindu Law, the question who is a Hindu requires to be answered. Hinduism is a mass of fluctuating faiths and opinions embracing within itself all the intermediate stages of thought and belief from the wandering fancies of savage superstition and the highest insight of daring thought. It is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections, exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the Chamars who profess Hinduism, but who eat beef and the meat of dead animals, are, however low in the scale, included within its pale. But the people know the difference well and can easily tell who are Hindus and who are not.[b] This being the scope and nature of the creed, it is not surprising that it holds within its ambit men of divergent views and traditions who have nothing in common except a vague faith in what may be called the fundamental of the Hindu religion, namely, a belief in the unity of Spirit under a plurality of forms. The question to whom the Hindu Law applies can be considered under seven heads: (*i*) Persons of Aryan descent who profess Hinduism, (*ii*) Persons who profess to be Hindus, but are of non-Aryan stock, (*iii*) Unorthodox Hindus, (*iv*) Hindu Dissenters, (*v*) Illegitimate Children of Hindus, (*vi*) Converts to Hinduism, and (*vii*) Converts from Hinduism.

24. Hindus of Aryan Descent.—There is really no difficulty in the application of Hindu Law to those persons who profess to be Hindus and are Aryan in descent. The difficulty comes in only in the case of those persons who profess to be Hindus but who are really of non-Aryan stock.

(*a*) *Vidyavaruthi* v. *Baluswami*, 44 M 831 15 L.W. 78=1922 P C 123=26 C.W N 537 24 Bom L.R. 629=41 M L J 316 1921 M.W.N. 449=48 I A. 302 =20 A.L J. 497.

(*b*) *Bhagwan* v. *Bose*, 30 I.A. 249=31 C 11 13 M L J 381 :7 C.W.N. 895=5 Bom L R. 845. See also *Doman* v. *Buka*, 12 P L T 105=1931 P. 198.

25. Hindus of Non-Aryan Stock.—The question as to how far the Hindu Law as expounded in the Smrities and Commentarics is to be applied to the Dravidian and other communities of non-Aryan descent is one which has given rise to a lot of controversy. Some of the earlier Judges and jurists thought it unreasonble to apply the Hindu Law to them, as the whole scheme of the Hindu Law was based upon religious and spiritual considerations alien to the thoughts, habits and culture of the aboriginal inhabitants of the country; while others were of opinion that, in view of the centuries that have elapsed between the conquest of the country by the Aryans and the assimilation that has been going on, the Hindu Law should be applied to them except in cases where there is clear proof of custom to the contrary. But it can now be taken as settled that the Hindu Law applies even to these communities who can in a sense be called Hinduised aborigines. Thus Hindu Law has been held to apply to the Yadhavas of Madura,[c] the Ezhuvas of Palghat,[d] the Thiyyas of Malabar,[e] the Maravars of Tinnevelly,[f] the Santals of Assam,[g] Raj Chaurasis of Lachmipur,[h] the Kurmi Mahtons of Chota Nagpur,[i] the Korkus of the Central Provinces,[j] the Raj Bansis of Bengal,[k] and the Aborigines of Assam.[l] In *Sahdeo* v. *Kusum Kumari*,[h] the Privy Council, after considering its previous decision in *Fanindra* v. *Rajeswar*,[m] observes that when a question arises whether an aboriginal family professing Hinduism is to be presumed to follow a particular incident of Hindu Law the proper enquiry is whether the said family can be said to have become so far Hindu as to throw the burden of proof upon the party alleging that that incident has been excluded or whether the opposite conclusion should be come to, which would throw the burden upon the other party.

26. Unorthodox Hindus.—Mere lapses from orthodox practice cannot have the effect of excluding from the category of Hindu a person who was born within the Hindu fold and who

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(c) *Vanna Kone* v *Vannichi*, 51 M L J 27 L W. 611—1928 M 299 54 M L J 174 (F.B.)

(d) *Balakrishnan* v *Chittoor Bank*, 41 L.W. 480 71 M L J 766 1936 M 937 1936 M.W N 812.

(e) *Kuttayatha Kutti* v *Atchuthan* 13 L.W. 101 1921 M. 71; *Chakkutti* v. *Chandukutti*, 1927 M 877—53 M.L J. 368.

(f) *Muthu Vizia* v. *Dorasinga*, 6 M.H. C R. 310.

(g) *Alli* v *Aidew*, 24 C.W N 173—54 I.C 695.

(h) *Sahdeo* v. *Kusum Kumari*, 50 I.A. 58—25 Bom. L.R. 560—27 C.W.N. 901—44 M L J 476 1923 M W.N. 377 2 Pat. 230 18 L W 597—1923 P C 21 See also *Vithoba* v *Lal Singh*, 1923 N 317—19 N L R 101 (a case of Gonds)

(i) *Ganesh* v *Shib Charan*, 11 Pat. 139—12 P L T 513 1931 P. 305.

(j) *Ishakalli* v *Thakur Prasad*, 20 N.L.J. 159

(k) *Narendra* v. *Nagendra*, 1929 C 377. *Santala* v *Badaswari*, 50 C 727—1924 C 98 27 C W.N. 669

(l) *Neeram* v. *Ardaram*, 1921, C. 558 (2)

(m) *Fanindra* v. *Rajeswar*. 11 C. 463 12 I.A 72

never became otherwise separated from the religious communion in which he was born. They may involve the social ban but do not amount to renunciation of religion. They may entail excommunication and require religious expiation for purification, but he cannot be said to have ceased to be a Hindu on that account.[n]

27. Hindu Dissenters.—The Hindu Law applies in the absence of a custom to the contrary even to dissenters from the orthodox Hinduism such as the Sikhs, the Jains, the Brahmos etc.,[o] the reason being that there is no separate law governing these sects. The essential distinction between unorthodox Hindus and Hindu dissenters is that in the case of the former, the orthodox precepts are not disowned, though there is a lapse from orthodox conduct, while in the case of the latter, there is adherence neither in principle nor practice to the canons of orthodoxy.

28. Illegitimate Children.—The fact that a person is an illegitimate child is no bar to the applicability of the Hindu Law,[p] but in that case either both the parents must be Hindus,[q] or at least the mother must be a Hindu and the child brought up as a Hindu, though the father is a Christian.[r] If the mother is a non-

(n) *Bhagwan* v *Bose* 30 I A 249=31 C. 11 13 M L J. 381=7 C.W N. 895=5 Bom. L R. 845 ; *Ma Yait* v. *Maung Chit* 48 I.A 553=49 C. 310 =42 M.L.J. 193 =1922 P.C. 197 ; *Nalinaksha* v *Rajani* 58 C. 1392=35 C.W N. 726=1931 C. 741 ; *Ishwari* v. *Rai Hari*, 6 Pat. 506=1927 Pat 145 =8 Pat. L.T. 34.

(o) *Ma Yait* v. *Maung Chit Maung* 48 I A. 553=49 C. 310=42 M.L J 193 = 1922 P.C. 197 (P.C.)

Jati Vaishnave. -Nalinaksha v. *Rajani*, 58 C 1392=35 C.W N 726=1931 C. 741

Jains.—Sugandhabai. v. *Kesarbai*, 15 N.L.J 51=1932 N. 162 ; *Mt. Lado* v *Banarsi*, 14 I . 95 . 33 P.L.R. 801=1932 L. 546 ; *Bhikubai* v. *Manilal*, 32 Bom L.R. 1217=54 Bom. 780 =1930 B. 517 ; *Prem Sagar* v. *Ram Gopal*, 1929 L 814 ; *Mt. Bulagan* v. *Ratan*, 1928 A. 656=26 A L.J 1196 ; *Gateppa* v *Eramma*, 50 M. 228=51 M.L.J. 757= 26 L.W. 408—1927 M. 228; *Sheokuarbai* v. *Jeoraj*, 25 C.W.N. 273=1921 P.C. 77—1920 M.W.N. 627 ; *Parshotam* v. *Venichand*, 45 B. 754=23 Bom. L.R. 227=1921 B. 147. See also Chapter XVIII.

Sikhs.—Bhagwan v. *Bakshi*, 1933 L. 494 ; *Sohan* v. *Ishar*, 16 L. 320=1934 L. 800 *Bhagwan* v. *Bose*, 30 I.A. 249= 31 C 11=13 M.L.J. 381=7 C.W.N. 895=5 Bom. L.R. 845.

Aryasamajists Ganga Saran v *Mt. Sirtaji*, 1935 A L J 1174=1935 A. 924.

Nambudris -Thathamangalath v *Krishna*, 57 M. 725 .39 I. W. 370—67 M.L.J. 511—1934 M. 286 ; *Narayanan* v. *Ravunni*, 47 M L.J. 686—20 L.W 876—1924 M.W.N. 792—1925 M. 260.

Lingayats.- -Somasekhara v. *Mahadeva*, 53 M. 297 .1930 M. 496=31 L.W. 476 . 59 M L.J 151 affd. in 43 L.W. 105= 1936 P.C. 18—40 C.W.N. 243—38 Bom. L.R. 317=70 M.L J. 159=1936 M.W.N. 21 -1936 A.L.J. 96.

Jats—Basant Singh v. *Brijraj*, 62 I.A. 180=57 A. 494=1935 P.C. 132=1935 M.W.N. 768—1935 A.L.J. 847=39 C W.N. 1057=42 L.W. 231=69 M.L.J. 225

Brahmos.—Bhagwan v. *Bose*, 30 I.A. 249=31 C. 11=13 M.L.J. 381=7 C.W.N. 895 .5 Bom. L.R. 845.

(p) *Dattatraya* v. *Matha Bala*, 1934 B 36 58 Bom. 119.

(q) *In the matter of Ram Kumari*, 18 C. 264.

(r) *Myna Boyee* v. *Ootaram*, 8 M.I.A. 400.

Hindu, for instance, a Christian [s] or a Mahomedan,[t] Hindu Law has no application to the illegitimate child,[u] the reason being that the religion of the children is to be fixed by the religion to which the mother belongs.[s]

But the Hindu Law of coparcenary cannot apply to the case of a family consisting of a putative father and his illegitimate children, whether the said father is a non-Hindu[r] or a Hindu.

Dancing Girls.—In spite of the promiscuity of their moral lives, the Dancing Girls are Hindus, having a recognised status in Hindu Law. There can be a coparcenary of Dancing Girls with rights of survivorship, though there is no case which goes the length of saying that daughters of Dancing Girls acquire an interest by birth in the ancestral property.[w]

29. Converts to Hinduism.—Hindu Law would apply even to converts to Hinduism and it is not necessary for its application that a person should be a Hindu by birth.[v] But the mere fact that a non-Hindu professes a theoretical allegiance to the Hindu faith or is an ardent admirer and advocate of Hinduism does not make him a Hindu. Long residence in India, abdication of the original religion by a clear act of renunciation, adopting the Hindu religion by a formal conversion thereto, assuming a Hindu name, marrying a Hindu according to Hindu rules and taking to the Hindu modes of life are proofs that a non-Hindu has become a Hindu. The real test of conversion is not domicile but religion.[w] But it is not necessary that every one of these tests should be fulfilled before an alleged conversion to Hinduism can be established;[x] for instance, it is not necessary that there should be established a formal conversion to Hinduism[x] except, perhaps, in the case of reconversion to Hinduism where the reconversion is into the Brahmin community of the Hindus.[y] But a mere conversion to any particular

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(s) *Lingappa* v. *Esudasan*, 27 M. 13.

(t) *Charanjit* v. *Amir Ali*, 2 Lah. 243 = 1921 L. 121 (2). See also the *quære* in *Bhaiya Sher Bahadur* v. *Bhaiya Ganga*, 41 I.A. 1 (14)=36 A. 101=12 A.L.J. 188=16 Bom. L.R. 306=18 C.W.N. 401=26 M.L.J 291=1914 M.W.N. 184.

(r) See p. 22 foot note (r).

(u) *Kokilambal* v. *Sundarammal*, 1925 M. 902=21 L.W. 259; See also *Vishwanath* v. *Doraiswami*, 1925 M.W.N. 813=1926 M. 1.

(v) *Kamawati* v. *Digbijai*, 48 I.A. 381=43 A. 525=15 L.W. 1=24 Bom. L.R. 626=26 C.W.N. 490=42 M.L.J. 87=1922 M.W.N. 336=1922 P.C. 14. *Morarji* v. *Administrator General*, 55 M.L.J. 478=52 M. 160=28 L.W. 674=1928 M. 1279=1928 M.W.N. 848. *Sahdeo* v. *Kusum Kumari*; 50 I.A. 58=25 Bom. L.R. 560=27 C.W.N. 901=44 M.L.J. 476 =1923 M.W.N. 377=2 Pat. 230=18 L.W. 597=1923 P.C. 21.

(w) *Morarji* v. *Administrator-general*, 55 M.L.J. 478=52 Mad. 160=28 L.W. 674 =1928 M. 1279=1928 M.W.N. 848.

(x) *Ramayya* v. *Josephine*, 44 L.W. 854=1937 M. 172; *Guruswami* v. *Irulappa*, 40 L.W. 502=67 M.L.J. 389=1934 M. 630.

(y) *Administrator-General of Madras* v. *Anandachari*, 9 M. 466; *Guruswami* v. *Irulappa*, 40 M.L.W. 502=1934 M.W.N. 1197=67 M.L.J. 389=1934 M. 630.

religion may not necessarily involve the adoption of the laws as to inheritance and succession obtaining among the followers of that religion, but when the convert identifies himself with those followers, strong evidence must be forthcoming to show that he kept his own laws unaffected by the rules of law obtaining among the other adherents of his new faith.[z] A Hindu who has renounced Hinduism is not debarred from coming back to his original faith so as to be governed by Hindu Law[a] and since there are no ceremonies prescribed in the Smrities for conversion or reconversion to the Hindu religion, one has to look to the sense of the community into which the convert or reconvert is alleged to have been let in, and if the members of that community are prepared to receive him as one of themselves, the fact that there has been no purificatory or expiatory ceremonies, does not militate against that person being treated in law as a member who has been duly admitted into the Hindu fold.[x] But a mere declaration by a non-Hindu that he is a Hindu does not make him a Hindu in the absence of evidence showing that he has adopted the ways and modes of life of a Hindu.[b]

30. Converts from Hinduism.—The general rule for the applicability of the Hindu Law is that the person concerned must profess to be a Hindu and the mere fact that he is a Hindu by birth is not sufficient. If he becomes a convert to Mahomedanism or Christianity, though by birth a Hindu, he will be governed by the Mahomedan law or the Indian Succession Act of 1925, as the case may be. The decision of the Privy Council in *Abraham* v. *Abraham*[c] to the effect that a Hindu renouncing his Hindu religion and becoming a convert to Christianity could still choose to be governed in the matter of succession by the Hindu Law would be of no authority after the Indian Succession Act of 1865,[d] though there is still a conflict between the Madras High Court[e] and the Bombay High Court[f] as regards the applicability of the rule of survivorship to Hindu converts to Christianity continuing to live as members of a joint family even after conversion, the Bombay High Court holding in favour of, and the Madras High Court against, its application. This conflict is due to the different interpretations given by the two Courts to the

(z) *Vannam Kone* v. *Vannichi*, 51 M. 1 27 L.W. 611 1928 M. 209 54 M.L.J. 174 (F.B.).

(a) *Kusum* v. *Satya*, 30 C. 999-7 C.W.N. 784.

(x) See p. 23 foot note (x).

(b) *Ramayya* v. *Josephine*, 44 I.W. 854 - 1937 M. 172.

(c) *Abraham* v. *Abraham*, 9 M.I.A. 195.

(d) *Kumaswati* v. *Digbijai Singh*, 48 I.A. 381–13 A. 525–15 L.W. 1–1922 P.C. 14–24 Bom. L.R. 626–26 C.W.N. 490=42 M.L.J. 87- 1922 M.W.N. 336.

(e) *Tellis* v. *Saldhana*, 10 M. 69. See also *Dwarka* v. *Raj Rani*, 1932 Oudh 85; *Muhammad* v. *Gnana*, 66 M.L.J. 671= 1934 M. 327 39 L.W. 551.

(f) *Francis Ghosal* v. *Gabri Ghosal*, 31 B. 25–8 Bom. L.R. 770.

word "succession" used in the Succession Act, the Madras High Court interpreting the word as including the incident of survivorship and the Bombay High Court as excluding that incident from its connotation and thus leaving the Hindu rule of parcenership untouched by the said enactment. But the decision of the Privy Council in *Kamawati* v. *Digbijai Singh*[d] seems to set the matter at rest against the view taken by the Bombay High Court since their Lordships of the Privy Council use the expression "succession" as embracing both succession by inheritance and succession by survivorship. In rejecting an argument that notwithstanding the fact that the deceased was a Hindu convert to Christianity, he had by his acts made such an indication as the law would respect, to the effect that his succession was not to be governed by the Indian Succession Act, but by the Hindu Law of succession, their Lordships observe :—

"A situation of nothing but confusion could be thus produced. The plain law of Succession Act would be eviscerated and in each case inquiry might have to be entered upon as to whether a deceased subject of the Crown wished, or by his acts compelled, that the law of the land should not apply to his case. A particular subject can settle that in India, as in other parts of the Empire by exercising—whatever be his religion—his power of testacy, and definitely declaring how he desires his affairs to be regulated so far as his own individual property is concerned In this case Kunwar Randhir Singh did not do so, and it is not for a Court to enter upon an examination of his conduct so as to prevent the Indian law of intestate succession getting its full and proper application".(d)

As regards a Hindu convert to Mahomedanism, he is bound by the law of the new religion which he has embraced and cannot claim after such conversion to conform to the Hindu laws and usages.(g) His case is distinguishable from that of *Abraham* v. *Abraham*,(h) where it was ruled by the Judicial Committee that a convert from Hinduism can retain his old law. "There the parties were Native Christians, not having, as such, any law of inheritance defined by Statute; and in the absence of one, this Committee applied the law by which, as the evidence proved, the particular family intended to be governed. But the written law of India has prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to the Hindus, and the Mahomedan Law to the Mahomedans; and in the judgment delivered by Lord Kingsdown in *Abraham* v. *Abraham*,(h) p. 239, it is said that 'this rule must be understood to refer to Hindus and Mahomedans, not by birth merely, but by religion also.'"

(d) See p. 24 foot note (d).
(g) *Jowala* v. *Dharam*, 10 M. I.A. 511.
(h) *Abraham* v. *Abraham*, 9 M.I.A. 195.

But Hindus in many parts of India, though they had been converted to Islam, frequently retain some of their Hindu customs and in particular those relating to marriage and inheritance.[i] Thus there are among Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion and were then converted to Islam, among whom may be reckoned, as is shown by the decided cases, the Bale Sultans,[j] the Khojas, Suni Boras, Molesalam Girasias, Cutchi Memons, Nassapooria Memons and Halai Memons;[k] in these groups the converts had retained their Hindu Law relating to the exclusion of females from succession, and that law has been engrafted as a custom on the Mahomedan Law, although the same is not in accordance with the rules of the Koran.[l] But the application of the rules of Hindu Law to the Cutchi Memons is limited to the rules of inheritance and succession[m] and does not extend to the rules relating to the joint family property applicable to Hindus.[n] Hence a son of a Cutchi Memon has no vested interest by birth in the ancestral property of his father.[o] A contrary view was taken in Madras[p] as regards the applicability of the Hindu Law rule of joint family property and coparcenary. The principles laid down in the cases with reference to this matter may be thus stated:

(*i*) though the Mahomedan Law generally governs converts to that faith from the Hindu religion, yet,

(*ii*) a well established custom of such converts following the Hindu Law of inheritance would over-ride the general presumption:

(*iii*) this custom should, however, be confined strictly to cases of succession and inheritance;

(*iv*) and if any particular usage, at variance with the general Hindu Law applicable to these communities in the matter of succession, be alleged to exist, the burden of proof is on the party alleging such special custom.[q]

(i) *Bimak Dai* v. *Ghafur* 1927 Oudh. 442; *Ibrahim* v. *Muhammed*, 39 M. 664—30 I.C. 806—29 M.L.J. 763=1915 M.W.N. 866.

(j) *Khalil* v. *Mohamad*. 1928 Oudh 269.

(k) *Adambhai* v. *Allarakhia*=37 Bom. L.R. 686. 1935 B. 417; *Aisha* v. *Noor*, 10 R. 461 1932 R. 179.

(l) *Khatubai* v. *Mahomed*, 50 I.A. 108 =47 B. 146=17 L.W. 208=1922 P.C. 414=25 Bom. L.R. 127 27 C.W.N. 774—44 M.L.J. 35

(m) *Elia Sait* v. *Dharanayya*, 10 Mys. L.J. 33.

(n) *Bai Sakar* v. *Ismail*, 38 Bom. L.R. 1034.

(o) *Haji Cooman* v. *Harroon Saleh Mahmed*, 47 B 369—1923 B. 148—24 Bom. L.R 978.

(p) *Hajee* v. *Ebrahim*, 1921 M. 571.

(q) *Bai Baiji* v *Bai Santok*, 20 B. 53; *Ahmed* v. *Cassum*, 13 B. 534.

The recent Cutchi Memons Act, X of 1938, which received the assent of the Governor-General on the 8th April 1938 and which comes into force on the 1st day of November 1938 has made the Hindu Law inapplicable to the Cutchi Memons even in matters of succession and inheritance. The Act runs as follows :—

THE CUTCHI MEMONS ACT. 1938.

Act X of 1938.

[*8th April, 1938.*

An Act to provide that All Cutchi Memons shall be governed in matters of Succession and Inheritance by the Mahomedan Law.

Whereas it is expedient that all Cutchi Memons be governed in matters of succession and inheritance by the Mahomedan Law : It is hereby enacted as follows :

1. *(1) This Act may be called the Cutchi Memons Act, 1938.*

(2) It shall come into force on the 1st day of November, 1938.

2. *Subject to the provisions of S. 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Mahomedan Law.*

3. *Nothing in this Act shall affect any right or liability acquired and incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability ; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.*

4. *The Cutchi Memons Act, 1920, is hereby repealed.*

31. Effect of conversion.—A member of a Hindu family who has become a convert to Christianity becomes at once severed as an out-caste from the family and the tie which bound the family together, is, so far as he is concerned, not only loosened, but dissolved, with the result that the obligations consequent upon and connected with that tie also become dissolved with it (r). No one after his conversion from Hinduism to an alien faith can claim to retain any incident of the Hindu Law if the same is repugnant to the Code of his adopted faith. Thus a Hindu on his conversion to Mahomedanism cannot have more than four legal wives, since the same is prohibited by the Islamic religion, though sanctioned by the Hindu Law. Under the Hindu Law the renunciation by a

(r) *Abraham* v. *Abraham*, 9 M.I.A. 195.

member of a joint family of the Hindu religion involves the forfeiture of civil rights to the extent of depriving the convert of his share in the joint estate.[s] But this disability was removed by the Caste Disabilities Removal Act of 1850, enacting that "so much of any law or usage now in force as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts . . . . . "[t] But this Act does not enable a convert to free himself from the obligations imposed upon him by the Hindu Law prior to his conversion.[u] If this were not so, one has only to renounce his religion every time he wants to free himself from his obligations. Thus the wife, the infant son and the aged parents must be maintained by a Hindu even after his conversion, except that in the case of his wife, a husband can get his marriage dissolved under the Native Converts Marriage Dissolution Act of 1866 and terminate his obligation to maintain her under an order of Court. Besides, the effect of this Act is not to preserve to the convert the privileges peculiar and incidental to the caste to which he belonged prior to conversion[v] or to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. Hence a member of a Malabar tarwad who had become a convert to another religion was held not entitled to claim partition and delivery to her of her share of the tarward property[w] on the ground that no member was entitled to claim such partition if he were a Hindu. Again, the provision in the Act for the removal of the disabilities applies only to the apostate and not to his descendants, and hence when a convert leaves behind him descendants born in the new faith, they cannot claim to succeed to the Hindu relatives of the convert.[x] Besides, the Act operates only to protect the rights of the convert so that where his property has, on his death, passed to his descendants in accordance with the law of the new religion, the Act does not entitle his Hindu relatives to succeed to that property by virtue of this Act.[y] Conversion of a Hindu coparcener to another religion operates to sever him from the coparcenary and Act XXI of

(s) *Kunni Lal* v *Gobind*, 38 I A 87—33 A. 356 21 M.L.J. 645 :15 C W N. 545 8 A.L J 552 13 Bom. L.R. 427 (1911) 1 M.W N 432 10 I C. 477.

(t) See the explanation as to the scope of the Act in *Nalinaksha* v. *Rajani*, 58 C 1392—35 C W.N. 726=1931 C. 741

(u) In re *Ram Kumari*, 18 C. 264.

(v) *Subbaraya* v *Ramaswami*, 23 M. 171.

(w) *Paru* v. *Raman*, 44 M. 891=14 L.W. 257 1921 M. 224—41 M L J 243—1921 M W.N. 594.

(x) *Vaithilinga* v *Ayyathorai*, 40 M. 1118—37 I C 753

(y) *Mitar Sen* v. *Maqbul*, 57 I.A. 313 = 32 L W 413—1930 P.C. 251—60 M.L.J. 275 33 Bom L R 1—1930 A.L.J. 1257 = 1930 M.W N. 1161=35 C.W.N. 89; *Bhagwan* v. *Digbijai*, 6 Luck. 487=1931 O 301.

1850 does not assist him to claim rights of survivorship since by his conversion he has chosen to separate and he therefore cannot claim to retain rights which flow from non-separation.[z] But there are decisions to the effect that if all the members of a Hindu joint family become converted to Christianity, they may still adhere to the old Hindu Law so as not to affect their rights of coparcenership.[a] A decision of the Madras High Court holds that if the converted members continue to live jointly with those not converted, and continue to enjoy property as before, it may be presumed that they have impliedly contracted to share the properties alike.[b] See S. 30.

Illustrative cases.

(*i*) The stepson of a deceased Hindu widow sued as her heir for possession of certain property left by her. The defendant raised the plea that as the said widow became degraded by reason of her having lived away from her husband in adultery with another, the plaintiff's right of inheritance was in consequence destroyed. Held:—that the degradation of the widow by reason of her unchastity did not affect the plaintiff in respect of his right of inheritance to her and the Caste Disabilities Removal Act was inapplicable to a case where the question was not the degraded person's right to inherit to another but another's right to inherit to a degraded person "Here we must not be understood as laying down that the Act places the outcaste in every respect in the position which he would occupy if he had not been put out of caste or restores to him all the rights which he as a casteman could have civilly enforced. It does not contemplate the restoration of privileges the granting of which would amount to interference with the autonomy of the caste". *Subbaraya* v. *Ramaswami*, 23 M. 171.

(*ii*) A member of a Marumakkattayam tarwad became a convert to Mahomedanism and claimed a partition of his share in the tarwad property. Held:—that as was pointed out in *Mayangini* v. *Ram Rutton*. 19 C. 289 (F.B.) the effect of the Caste Disabilities Removal Act was not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject and as the right to partition claimed was a new right which did not exist in the family prior to the conversion it could not be claimed by the convert. *Paru v. Raman*, 44 M. 891=14 L.W. 257=1921 M. 224=41 M.L.J. 243=1921 M.W.N. 594 (F.B.)

(*iii*) A became a convert to Christianity from Hinduism. The plaintiffs who were his great-grandsons sued to recover certain property as reversionary heirs of B a Hindu who was the grandson of A's brother who remained and died a Hindu. Held:—that the Act did not apply to the descendants of persons relieved by the Act and hence such descendants had no interest in property of their unconverted Hindu relatives. *Vaithilinga* v. *Ayyathorai*, 40 M. 1118=37 I.C. 753 dissenting from *Bhagwant* v. *Kallu*, 11 A. 100.

(*iv*) A Hindu became a convert to Mahomedanism and his property descended to his children born in the new faith. On the death of one of such

(z) *Subbayya* v. *Rangayya*, 26 L.W. 361 =1927 M. 883.

(a) *Jalbhai* v. *Louis*, 19 B. 680; *Kulada* v. *Haripada* 17 C.W.N. 102=40 C. 407=17 I.C. 257. See contra in *Telita* v. *Saldana*. 10 M. 69.

(b) *Jogi* v. *Chinnabai*, 22 L.W. 116= 1925 M. 1195.

descendants, a Hindu descendant of an ancestor of the convert claimed the property on the ground that the succession to the property of the deceased though a Mahomedan, was governed by Hindu Law and that he was entitled to succeed as the nearest heir under that law. Held: -that the Caste Disabilities Removal Act in terms only applied to protect the actual person who renounced his religion or was excluded from caste from losing any right of property or of succeeding as heir, and when once a person had changed his religion and his personal law, the new law would govern the rights of succession of his children. Hence the plaintiff could not succeed. The contrary view would lead to this absurd position that if a Hindu became a Mahomedan, then the descendants of that Mahomedan throughout the ensuing generations, without any limit, would always derive their succession under the Hindu Law of succession and not under the Mahomedan Law of succession. *Mitar Sen* v. *Maqbul*, 57 I.A. 313=32 L.W. 413=1930 P.C. 251 -60 M.L.J. 275= 33 Bom. L.R. 1 = 1930 A.L.J. 1257 - 1930 M W.N. 1161 = 35 C.W.N. 89

(*n*) A and B were brothers constituting a Hindu joint family . A became a convert to Christianity, purchased a property **X** in his name and then died leaving a son C. B claimed that in spite of A's conversion the coparcenary remained undissolved and that therefore he was entitled to claim a half share of X by right of survivorship on the footing that X was joint family property. Held: that since by his conversion A had become separated by force of law B could not claim the right of survivorship flowing from nonseparation and that the Caste Disabilities Removal Act had not the effect of keeping alive the coparcenary. *Subbayya* v. *Rangayya*, 26 I.W 361=1927 M 883

32. Migrating Families.—In India every person is governed by the law of his personal status and carries that law with him wherever he goes.(c) But the law of the Province wherein he resides *prima facie* governs him,(d) and in this sense and to this extent only is the law of domicile of relevance or importance; but if it is shown that he came from another Province, the presumption will be that he is governed by the law or the special custom by which he would have been governed in his original home at the time of migration.(e) In other words, the law which, subject to renunciation, governs an emigrated family, is the law of the original abode as it was when the family left it. A subsequent judgment declaratory of the law of the original abode as having always been as declared would be binding on the family but not subsequent customs introduced into that law.(f) Mere transfer of territory from one Province to another

(c) *Mailathi* v *Subbarayn* 21 M. 650 - 11 M L J 309 ; *Abdur Rahim* v *Hulimabhai*, 43 I A. 35=18 Bom. L.R. 635 20 C W N 362 30 M L.J. 227. (1916) 1 M W N. 176=1915 P C. 86 ; *Parbati Kumari* v *Jagadis Chander*, 29 I.A. 82 = 29 C 433=6 C W N 490=4 Bom L.R. 365 . *Vasudevan* v *Secretary of State*, 11 M 177.

(d) *Ram Das* v. *Chandra*, 20 C 409.

(e) *Basanta Kumar* v. *Ram Shankar*, 59 C. 859=1932 C. 600 ; *Balwant Rao* v. *Baji Rao*, 48 C. 30 . 12 L.W. 679=47 I.A. 213 22 Bom L R 1070=25 C.W.N. 243= 29 M L J 166=1920 M.W.N. 483=1921 P.C. 59 . *Rutchepulty* v. *Rajander*, 2 M.I.A. 132 . *Soorendronath* v *Mt. Heeroomonee*, 12 M I A. 81 ; *Manik Chand* v. *Jagat Settani Pran Kumari*, 17 C. 518.

(f) *Balwant Rao* v *Baji Rao*, 48 C. 30 =12 L W. 679=47 I A. 213=22 Bom. L R 1070=25 C W N 243 . 30 M.L.J. 166 =1920 M W N. 483=1921 P.C. 59.

governed by a different school of law does not effect a change in the original personal law of the person resident in that territory.(g) But where a family migrates to another country and is shown to have so acted as to cut itself off from its old environment, the presumption that it has adopted the law of the people among whom it has settled is more readily drawn.(h) If a twice-born Hindu migrates across the sea to Burma and marries a Burmese woman, that in itself may not necessarily deprive him of his Hindu status in the eye of the law. But if he has descendants who have been born and have always lived in Burma, and who have intermarried with its people, then, even though they may form a community of their own which inherits many traces of Hindu usage, if their usages and religion are of a character very divergent from Hinduism, their community cannot be regarded as Hindu.(i) Where a family is proved to have adopted the law and the usages of the place to which it has migrated and to have abandoned the law of its original abode, it is not open to a member of that family to disclaim the new law and to revive the old law or adopt another at his choice; if this were permissible, it will only lead to much confusion and abundant litigation.(j) But though there is no *lex loci* in India and every person is governed by his own personal law, yet, if a Hindu contracts a marriage in a foreign country in accordance with the law of that country, the foreign Court will not invalidate the marriage on the ground of a disability imposed by the Hindu Law;(k) it is not yet decided whether the Indian Court would treat such a marriage as valid, though presumably it should.

A lucid exposition of the law governing migrating families is contained in a recent judgment of the Nagpur High Court in *Keshao Rao* v. *Sadasheo Rao*(l) where the question that arose was "whether a Maharashtra Brahmin, resident in the Central Provinces, is to be governed by the Bombay or the Benares interpretation of the Mitakshara when migration is not proved in the sense that the exact origin of the family cannot be traced." Stone C. J. and Vivian Bose J. decided that the person concerned being a Maharashtra, he must be held to be governed by the Bombay School in the absence of proof establishing that he had adopted the

(g) *Somasekhara* v. *Muhadeva*, 53 M. 297—1930 M. 496—59 M.L.J. 151—31 L.W. 476 affirmed in 43 L.W. 105—1936 P.C. 18—40 C.W.N. 243—38 Bom. L.R. 317—70 M.L.J. 159—1936 A.L.J. 96—1936 M.W.N. 21.

(h) *Abdur Rahim* v. *Halimabai*, 43 I.A. 35—18 Bom. L.R. 635—20 C.W.N. 362—30 M.L.J. 227=(1916) 1 M.W.N. 176—1915 P.C. 86; *Parbati* v. *Jagadis*, 29 C. 433—29 I.A. 82—6 C.W.N. 490—4 Bom. L.R. 365; *Babu Mottisingh* v. *Durgabai*, 53 B. 242—1929 B. 57—30 Bom. L.R. 1615.

(i) *Ma Yait* v. *Maung Chit*, 48 I.A. 553 42 M.L.J. 193—49 C. 310—1922 P.C. 197.

(j) *Sarada* v. *Uma*, 50 C. 370=1923 C. 485—37 C.I.J. 233.

(k) *Chetti* v. *Chetti*, (1909) P. 67.

(l) 1938 Nag. 163.

law of the place where he was residing. The following is the material portion of the judgment:—

Vivian Bose J.—The question in this appeal is whether a Maharashtra Brahmin, resident in the Central Provinces, is to be governed by the Bombay or the Benares interpretation of the Mitakshara when migration is not proved in the sense that the exact origin of the family cannot be traced. The property in dispute which is situate in Chhatisgarh in the Central Provinces belonged to one Madhobhat. He died leaving two daughters, Mt. Salubai and the plaintiff, Mt. Mainabai. Salubai mortgaged her half share to the defendants on 22nd July 1921 and the mortgagees obtained a final decree for foreclosure against Salubai's daughter, Salubai then being dead, and obtained symbolical possession. Mainabai now sues for a declaration that Salubai having died the property has passed to her by survivorship. If the Benares view obtains, then she must succeed, but if Madhobhat was governed by the Bombay law then the plaintiff's suit must fail. Therefore what I have to determine is whether the Bombay or the Benares interpretation of Mitakshara is to apply. Mt. Mainabai was a party to the previous litigation and she carried the matter up to the Judicial Commissioner's Court where it was decided that as Mainabai's share was not mortgaged, she could not be affected by the suit, and so the suit was dismissed against her and the question of her rights including the question now at issue, was left at large. The judgment is not clear on these points but that is the interpretation which both sides accepted in their pleadings and it was the assumption on which the appeal was argued before us.

It appears from para 3 of the appellate judgment in the previous suit, (Ex. D. 8) that the proceedings were conducted there on the assumption that Madhobhat was a Maharashtra Brahmin and this also seems to have been the assumption throughout the present litigation though it was denied before us by the learned counsel for the plaintiff respondent We find for instance that the defendants made the following statement on 8th March 1932.

"That the family of Dadaji Joshi migrated from Bombay Presidency and they being Maharashtra Brahmins their family is governed by the Bombay School of law."

The plaintiff's reply to this was.

"It is denied that the plaintiff or her ancestors were governed by the Bombay School of law. They were not persons who migrated to these Provinces from the Bombay Presidency but they were governed by the *lex loci* namely the Mitakshara."

It will be seen then that the defendants made two distinct assertions in their statement, namely (1) that the family had migrated from the Bombay Presidency and (2) that they were Maharashtra Brahmins. The plaintiff when replying to this did not challenge the second assertion though she did the first, and this seems to have been the position in the lower Appellate Court as well, for the learned Judge writes as if this was an accepted fact. After holding that migration had not been proved he continued:

"The fact that the plaintiff's families are Maharashtra Brahmins and had settled in Berar still does not make them as governed by the Mayukha."

In a country like India where the people generally are so intensely community-conscious and where the usual reply to the question 'who are you

is not a name but a caste, we have no doubt that an allegation of this kind would have produced an immediate retort if untrue. The question is of such vital importance to them. Whether a daughter gets a limited interest or an absolute estate is only a side issue, but the caste or community to which a man belongs, that is an entirely different matter. It affects not only his social status but that of his family. It affects their dinings and their marriages and their deaths: it affects their social and religious customs and beliefs, and in a sense even what they conceive to be their life after death. I therefore think it is now too late to challenge through the mouth of counsel at the stage of argument in second appeal the assertion that Madhobhat was a Maharashtra Brahmin. Consequently what I have to determine is exactly what that phrase connotes. It is clear that it cannot mean one of the original residents of the locality, for, it is historically incontrovertible that the place where this family resides and has its domicile, namely Chhattisgarh, is not and never has been known as Maharashtra, though the Maharattas did penetrate as far as that and were in power there for a short time; in fact the British obtained this stretch of land from them. It is equally beyond doubt historically that a race or tribe of people known as Maharashtrians were not there first, and even now are not so numerically or politically predominant in this tract as to justify the inference that they have so impressed their particular phase of Hindu ideas and usages upon the people as to make that the prevalent law of the locality so far as Hindus resident there are concerned. Their advent to this part of India can be traced to comparatively modern times, and though it is possible that a few stray families may have been there even in the earliest times, they could not have come except as immigrants.

Whatever else the term Maharashtra may mean, it must connote either a geographical entity or a race or tribe of people. If it is clear that Chhattisgarh was never known as Maharashtra, and if it is equally beyond doubt that a race or tribe of people known as Maharashtrians never inhabited this area as a race or tribe, then it follows that any Maharashtrian who was found in these parts must have come as an immigrant, either he himself or his ancestors, and the fact that his family has retained its individuality intact as Maharashtrians must mean that they have not been absorbed into the particular strata of Hindu society prevalent and predominant in the locality. It must mean that they have carried with them their own law and their own usages from wherever it is that they came and preserved them as carefully as they have their own identity. Another thing is also clear. These provinces were not either a geographical or a political unit till the advent of the British, and even then were not taken over wholesale, but were slowly amalgamated by the addition of tracts of territories from time to time from different persons and for different reasons. On the other hand Hindu religion and culture, its laws and traditions, with its varying usages and differing interpretations, had crystallised as entities long before this time. Therefore we have to visualise the scene as it existed before the British Era. It does not follow that the ideas then prevailing in one section of the area now known as the Central Provinces were equally prevalent in another. It is impossible to make a sweeping assertion that this or that is the *lex loci* of the Provinces as a whole without finding out whether the influences at work which impressed themselves upon a particular locality to such an extent as to make them the predominating factors in determining its law and usages were also at work elsewhere and were equally successful.

The origin of the term Maharashtra is obscure. Russel in his Tribes and Castes of the Central Provinces, Vol. 4. p. 129, is of opinion that the balance of authority favours the view that it was the native name of Bombay and that it was derived from that of the caste which resided there. He quotes Wilson in support of this. On the other hand he puts forward an alternative theory which he considers less probable, namely that it is a corruption of Maha Rashtrakuta and came to be so called after the Rashtrakuta Rajput Dynasty of the 8th and 9th Centuries. His objections to this alternative view have weight. He points out that countries or tracts are seldom named after ruling dynasties and also that the name Maharashtra was known in the 3rd century B. C. long before the Rashtrakutas became prominent. As against this, is the fact that countries often receive the names of the races who inhabit them. The name India itself is the most prominent illustration of that; the land of the Hindus. Gajarashtra or as it is now known Gujrat, the country of the Gujars, and Saurashtra or Surat, the country of the Sauras, are other examples. But none of this is conclusive and no historian of repute seems to be willing to commit himself to a definite conclusion. See Cambridge History of India, pp. 602 and 603: The Imperial Gazetteer of India, p. 439: Grant Duff's History of the Mahrattas (S. M. Edward's Edition, 1931) Vol. 1, pp. 42 and following. The question is also complicated by a large outflow of propaganda in which the Mahrattas have been putting forward claims to Rajput origin with growing insistency, and the matter has been litigated in the Courts on more than one occasion. See 48 Mad. 1,[a] where such claims were doubted and 52 Bom. 497[b] where they were accepted. In this state of uncertainty, I feel it is impossible to decide this case on historical or ethnographical grounds. In fact, as Madgavkar J. remarked at p. 502 of the Bombay decision just cited:

"The difficulty is so great as perhaps to justify a doubt if the ordinary Courts of law are fitted to decide such questions unless the Legislature is prepared to lay down general rules for application in cases such as the present."

All we can hope to do here is to evolve a sound working rule which will fit in with the customs, ideas, and feelings of the peoples it is to affect and at the same time conform to general legal principles. These general principles have often been expounded by their Lordships of the Privy Council. In 16 N.L.R. 187[c] at p. 189 they state:

"It is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question."

Then they quote a passage from Mayne's Hindu Law which is to the following effect:

"Prima facie any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu law recognized in that province . . . . But this law is not merely a local law. It becomes the personal law, and part of the status of every family which is governed by it;

(a) *Maharaja of Kolhapur* v. *Sundaram Ayyar*, (1925) 12 A.I.R. Mad. 497—93 I.C. 705=48 Mad. 1.

(b) *Subrao Hambirrao* v. *Radha Hambirrao*, (1928) 15 A.I.R. Bom 295—113 I.C. 497—52 Bom. 497—30 Bom. L.R. 692.

(c) *Balvant Rao* v *Baji Rao*, (1921) 8 A.I.R. P.C. 59—57 I.C. 545=47 I.A. 213=48 Cal. 30=16 N.L.R. 187 (P.C.).

consequently where any such family migrates to another province governed by another law, it carries its own law with it."

After this their Lordships proceed:

"Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicile of importance. But if more is known, then in accordance with that knowledge his personal law must be determined, unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated."

In an earlier case in 29 Calcutta 433,(d) their Lordships remarked at p. 452 that:

"The tenacity of such customs, even under the strain of migration, has been repeatedly recognized by the law in questions such as the present. Accordingly the question being; primarily one of personal as distinguished from geographical custom it is of the first importance to inquire into the origin of the family."

Migration in that case had been more than a hundred years back (see p. 440); so far back indeed that all that the parties had to go on was tradition, and yet the learned Judges of the High Court whose judgment was upheld remarked that once migration is established

"strong proof is required from the person making the assertion that they have abandoned the one and adopted the other." (See p 440).

So great is the tenacity with which Hindus hold to their ancient usages and follow their traditions and customs that mere length of time in itself makes no difference. In 29 Cal. 433(d) as I have observed, the migration was over 100 years back and the family had settled down in its new environment for four generations. In 2 M.I.A. 132(e) it was six generations. In 50 Cal. 898(f) eight or nine centuries had elapsed and in 50 Cal. 370(g) four centuries. In 12 M.I.A. 81(h) it was "many generations ago" and their Lordships remarked that . . . "an adherence to family usages is a strong oriental habit" and that "generally the love of them increases with their long prevalence."

Bearing this in mind what is the significance of a family continuing to call itself Maharashtrian even though settled in a land which is not Maharashtra and among, what for these purposes may be termed, an alien people? What do we mean when we refer to a man in this connexion, as a Chinaman or an Englishman or a Maharatha or a Bengali? Surely this: that it indicates his racial origin, using the word "racial" in a loose and popular sense; that it shows either that his ancestors originated in the geographical area from which his racial or tribal name is derived or that he belongs to a particular racial group or at any rate to a particular community. This is especially so among Maharashtrians who are not one whit behind the rest of India in their homogeneity and pride of race, in their love of their own great tra-

(d) *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*, (1902) 29 Cal. 433=29 I.A. 82 -6 C.W.N. 490 - 8 Sar. 205 (P.C.).

(e) *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*, (1837-41) 2 M.I.A. 132—2 Suth 1=1 Sar. 161 (P.C.).

(f) *Ramesh Chandra*. v. *Mohammed Elahi Buksh*, (1924) 11 A.I.R. Cal. 383= 79 I.C. 309—50 Cal. 898.

(g) *Sarada Prasanna Roy* v. *Umakanta Hazari*, (1923) 10 A.I.R. Cal. 485=77 I.C. 450—50 Cal. 370=37 C.L.J. 233.

(h) *Soorendranath Roy* v. *Mt. Heeramonee Burmonean*, (1867-69) 12 M.I.A. 81 10 W.R. 35=1 Beng. L.R. 26=2 Suth 147—2 Sar 372 (P.C.).

ditions and in what one might almost term their clannishness, using that term in its finer sense. When therefore we find the great bulk of Maharashtrians governed by the view of Mitakshara prevailing in Bombay, what does it indicate? Surely this: that these people wherever they came from, whatever their origin, carried with them from place to place this particular law and that it has now become predominant in certain parts of Bombay only because they are the predominant people there. In fact, Russel and Wilson, whom I have already quoted, consider that the term "Maharashtra" is itself derived from the caste which resided there.

Their Lordships of the Privy Council point out in 16 N.L.R. 187[c] at p. 191 that the reason why the Courts in Bombay and those in other parts of India have arrived at different results is because of the dominating influence of particular commentaries and then they explain:

"Further it must always be remembered that the commentaries are only commentaries. They do not enact; they explain and are evidence of the congeries of customs which form the law."

Their Lordships then correct Drake Brockman A.J.C, who thought that the law had been enunciated for the first time by a Bombay decision "as if it were a statute." They point out that it was nothing of the sort and that it was only declaratory of the law as it had existed, and quote earlier Bombay decisions which refer to the Bombay view of the Mitakshara as in accordance with "pre-existing tradition in that Court and in the local profession in Bombay." It must follow from this that the Mayukha did not create the Bombay view and that even though it was written by Nilkanth in the 17th century he merely recited the customs and usages which he found in vogue around him and knowing "the tenacity with which oriental races cling to their age-long traditions" it can only mean that this was always the law of the Maharashtrians, whoever they were, wherever they came from.

If that is so, then wherever we find a family clinging to its individuality and retaining its identity as Maharashtrian, it must be presumed until the contrary is shown that it hailed from the race or group of people known as Maharashtrians and carried the law of Maharashtra with them; the law which according to the reasoning of their Lordships has always been their law and which has been as characteristic of them as their racial or communal identity, as distinct as their name. I am fortified in this by the fact that not one single case has been cited from other parts of India to show that any single family of Maharashtrians has ever been governed by the Benares school. Even in these provinces beyond Second Appeal No. 270 of 1877, there is not a single case which is based on an examination of evidence showing that there is a large volume of custom or usage or tradition in respect of Maharashtrians generally in a particular locality, or even in respect of any particular family, which makes them subject to the Benares view... ..... The result is that the appeal succeeds. The Bombay rule applies and so the plaintiff's claim must fail. The decree of the lower Appellate Court is accordingly reversed and that of the first Court restored.

(c) See p. 31, foot note (c).

CHAPTER III.

MARRIAGE.

33. Nature of Hindu Marriage.—Marriage which involves the transfer of dominion over the damsel from the father to the husband and which has always been the foundation of peace and order in any civilised society was, amongst Hindus, a settled institution with a religious character attached thereto even at the Vedic period. It is defined by Raghunandana as the acceptance by the bridegroom, of a girl as his wife, the girl being given away by her guardian. It is considered an essential sacrament with the Hindus and as a holy union between a man and a woman for begetting a son necessary for salvation and for the performance of religious duties,[a] a samskara obligatory upon all Hindus who do not desire to adopt the life either of a perpetual Brahmachari or of a Sanyasi.[b] It is not a civil contract and does not become invalid on the ground that it is effected during the minority of either the bride or the bridegroom but a strictly religious institution, to which the famous definition of marriage in Roman Law is fully applicable. It is, indeed, as in ancient Rome, an association for life, and productive of full partnership, both in human and divine rights and duties. The wife is not merely her husband's helpmate in all wordly affairs but she assists him in the performance of the regular sacrifices, and helps him to gain Heaven. A legitimate wife, is therefore called *Dharmapatni*, i.e., as the commentators explain, *Dharmartham Patni*—a wife married for the fulfilment of the Sacred Law. An English writer (Grady) designs the law of marriage as "the great point to which all Hindu Law converges." It is certainly not too much to say that marriage is the one decisive event in the life of a Hindu woman. No other of the Hindu Samskaras or sacraments than the marriage ceremony can be performed for a woman but the performance of this ceremony for her is obligatory.[c]

34. Polygamy and Polyandry.—Though monogamy is recommended by the texts, a Hindu can marry any number of wives even during the lifetime of one or more wives,[d] the rules of Hindu Law laying down the conditions for taking a second wife

(a) *Sundrabai* v. *Shivanarayana*, 32 B. 81. 9 Bom. L.R. 1366; *Gopalakrishnan* v. *Venkatanarasa*, 37 M. 273.=23 M.L.J. 288 =(1913) M.W.N. 903=17 I.C. 308 (F.B.).

(b) *Gopalakrishnan* v. *Venkatanarasa*, 37 M. 273=23 M.L.J. 288=1912 M.W.N. 903=17 I.C. 308 (F.B.); *Kameswara* v. *Veeracharlu*, 34 M. 422=8 I.C. 195; *Srinivasa* v. *Thiruvengada*, 38 M. 556; *Sundrabai* v. *Shivnarayana*, 32 B. 81.

(c) Dr. Jolly's Hindu Law page 71.

(d) *Virasvami* v. *Appasvami*, 1 M.H.C. 375; *Thapita Peter* v. *Lakshmi*, 17 M. 235 (F.B.)

being held as not mandatory but only as directory.[e] But single-husbandedness is the lot prescribed for a woman under Hindu Law which does not countenance polyandry, and hence a second marriage for the woman during the lifetime of her first husband is invalid unless there has previously been a valid divorce in accordance with the custom, if any, of the caste, to which the parties belong.

35. Capacity to give in marriage.—The texts prescribe only the persons who are to give the girl in marriage and these are :

(*i*) that of Yagnyavalkya (i. 63-64) which runs as follows:—

"*The father, the paternal grandfather, the brother, a sakulya or member of the same family, the mother likewise ; in default of the first the next in order, if sound in mind, is to give the damsel in marriage*"

and (*ii*) that of Narada (xii-20-21) which says :—

"*A father shall give his daughter in marriage, or a brother with the father's consent, or a grandfather, maternal uncle, kinsman or relatives. In default of all these, the mother if qualified ; if she is not the remote relatives should give the girl in marriage.*"

In the Mitakshara School the order of persons authorised to dispose of a girl in marriage is (*i*) the father, (*ii*) the paternal uncle, (*iii*) the brother, (*iv*) other paternal relations of the girl in the order of kinship and (*v*) the mother; while according to the Dayabhaga School, the maternal grandfather and the maternal uncle come before the mother. This order of guardianship for purposes of giving the girl in marriage appears to be more an order of persons on whom the *duty* of giving the girl is imposed than an order indicating persons to whom an inviolable right to give the girl belongs. No doubt the primary duty to give the girl in marriage rests with the father and his natural preferential claim to give the girl away is not lost by his conviction for theft or any other offence unconnected with the family relationship.[f] The above order of guardianship of the girl for the purpose of giving her in marriage has been held as only directory and to refer only to the ceremonial competence of the persons mentioned and not to affect the legal right vested in the mother as the girl's legal guardian to select a husband for her and to give the girl in marriage to him even in the presence and without the concurrence of the girl's paternal grandfather.[g] For the same reason a marriage

(e) *Thapita Peter* v. *Lakshmi*, 17 M. 235 (F.B.)

(f) *Nanabhai* v. *Janardhan*, 12 B. 110.

(g) *Bai Ramkore* v. *Jamnadas*, 37 B. 19=14 Bom. L.R. 768=17 I.C. 95; *Ranganayaki* v. *Ramanuja*, 35 M. 728 21 M L.J. 600=11 I.C. 570 ; *Jiwani* v. *Mula Ram*, 3 L. 29=1922 L. 112 ; *Ghasi* v. *Sukru*, 19 A. 515.

would be held valid even though the girl was given away by the mother without the concurrence of the father,[h] or even consulting him,[i] and the doctrine of *factum valet* would cure the want of consent of a guardian with a preferential claim to give the girl away.[j] But so long as the marriage has not taken place a stepmother cannot claim the right in the presence of the paternal grandmother.[k] Nor can a maternal relative claim to give the girl in marriage during the existence of competent paternal relatives. But if the paternal relatives disqualify themselves from acting or refuse to act, the maternal relatives can contract a valid marriage on the girl's behalf.[l] If a suitable husband has been chosen for the girl by a natural or legal guardian acting in her interest and with due regard to her welfare, and the performance of the ceremonies has consecrated the said choice, neither the fact that the marriage was in contravention of an order of Court,[m] nor the absence of consent of a guardian with a preferential right will invalidate the marriage.[n] The principle is that what Courts of justice should consider is not so much whether the preferential guardian gave his consent or gave the girl away at the marriage ceremony as whether the action of the person who actually gave the girl in marriage was *bona fide* and substantially in the interests of the minor. "There is also another reason why, when the marriage rite is once duly solemnised, the marriage should not be set aside except on clear proof of fraud. The religious theory is that when an adoption or a marriage which is forbidden is consecrated by a Vedic text and the religious ceremony is thereby defiled, a servile state supervenes, and not that the prior status remains untainted".[o] The mother's position as an interested guardian of the girl's welfare has been recognised by various decisions and it has been held that a girl cannot be given in marriage without her mother's consent by a divided paternal uncle.[o] Though under the Hindu Law, no one but the father, while he is alive, can give the girl in marriage, yet he can delegate his autho-

(h) *Jagan Nath* v. *Basant*, 1923 L. 595 (2); *Mulchand* v. *Bhudhia*, 22 B. 812.

(i) *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316=1 M.L.J. 85.

(j) *Mulchand* v. *Bhudhia*, 22 B. 812; *Brindabun* v. *Chundra* 12 C. 140; *Ram Harakh* v. *Jagar Nath*, 53 A. 815=1931 A.L.J. 816=1932 A. 5; *Khushalchand* v. *Bai Mani*, 11 B. 247; *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316=1 M.L.J. 85; *Ghazi* v. *Sukru*, 19 A. 515; *Bai Diwali* v. *Moti*, 22 B. 509; *Surjyamoni* v. *Kali Kanta*, 28 C. 37=5 C.W.N. 195; *Kasturi* v. *Chiranjilal*, 35 A. 265=11 A.L.J. 272=18 I.C. 927.

(k) *Ram Bunsi* v. *Soobh*, 7 W. R. 321.

(l) *Kasturi* v. *Pannalal*, 38 A. 520=14 A.L.J 754 36 I.C. 245.

(m) *Bai Diwali* v. *Moti*, 22 B. 509.

(n) *Venkatacharyulu* v *Rangacharyulu*, 14 M. 316=1 M.L.J. 85; *Mulchand* v. *Bhudhia*, 22 B. 812; *Ram Harakh* v. *Jagar Nath*, 53 A. 815 1931 A.L.J. 816=1932 A. 5; *Kasturi* v. *Chiranji*, 35 A. 265=11 A.L.J. 272 18 I.C. 927; *Brindabun* v. *Chandra*, 12 C. 140; *Gajja Nand* v *Crown*, 2 Lah. 288=1922 Lah. 139.

(o) *Bai Ramkore* v. *Jamnadas*, 14 Bom. L.R. 766=17 I.C. 95 37 B. 18; *Mt Jivani* v. *Mula Ram*, 3 Lahore 29=1922 L. 112.

rity to another and this delegated authority can also be presumed from the circumstances of the case.(p)

36. Interference by Court.—So long as the marriage has not been performed and the matter rests only in the stage of negotiation and contract, any person in whom the right to give the girl in marriage vests can sue to restrain by an injunction the attempt on the part of any unauthorised person to give her away in marriage and the Court is competent to grant the prayer.(q) Even when a marriage is contemplated by a proper guardian, the Court, as representing the supreme guardian, the Sovereign, can interfere to prevent its taking place, if improper and interested motives actuate the guardian's conduct and the marriage is injurious to the girl's interests, though such interference is permissible only in exceptional and extreme cases where that guardian is the girl's father.(r) Besides, a marriage brought about by force or fraud will be set aside by the Court, though it has been performed with the necessary ceremonies as in such a case there is really a fraud on the policy of religious ceremony.(s) But if the marriage, though brought about by force or fraud, has been consummated and the spouses have acquiesced in their forced status and have continued voluntarily to live as husband and wife, no court will be disposed to help either party to get a declaration that the marriage was a nullity,(t) except when, owing to their relationship within the prohibited degrees or for reasons of the identity of their *Gotra* or *Pravara*, there is an insurmountable impediment to their contracting a valid marriage.

37. Forms of Marriage.—Marriages as prevalent to-day are of various forms and may be classified as (1) Sastraic, (2) Customary and (3) Statutory. Originally eight forms of marriages were recognised by the ancients, namely, the Brahma, the Daiva, the Arsha, the Prajapatya, the Asura, the Gandharva, the Rakshasa and the Pisacha forms, and of these, the first four were the approved forms and the last four unapproved. "The gift of a daughter, clothed only with a single robe, to a man learned in the Veda, whom her father voluntarily invites, and respectfully receives, is the nuptial called Brahma. The rite which sages call

(p) *Golamee Gopee Ghose* v *Juggessur Ghose*, 3 W.R. 193. See Contra in *Atma Ram* v. *Bankumal*, 11 L 598 :1930 L 561 See also *Ram Bunsee* v *Soobh*. 7 W.R 321.

(q) *In re Kashi* 8 C. 266 ; *Kasturi* v. *Pannalal*, 38 A. 520—14 A.L.J. 754—36 I.C 245 ; *Nanabhai* v *Janardhan*, 12 B. 110; *Shridhar* v. *Hiralal*, 12 B. 480.

(r) *Shridhar* v. *Hiralal*, 12 B. 480.

(s) *Venkatacharyulu* v *Rangacharyulu*, 11 M 316 1 M L J 85; *Mulchand* v *Bhudhu*, 22 B 812 : *Ankamma* v. *Bamenappa*, (1937) 1 M L.J. 192. 1937 M. 332 45 L W 61. 1937 M.W.N. 115. See also S 60 A.

(t) *Ankamma* v *Bamenappa*, (1937) 1 M.L.J. 192—45 L W. 61 1937 M.W.N. 115—1937 M. 332

Daiva is the gift of a daughter, whom her father has decked in gay attire, when the sacrifice is already begun, to the officiating priest, who performs that act of religion. When the father gives his daughter away, having received from the bridegroom one pair of kine, or two pairs for uses prescribed by law, that marriage is termed Arsha. The nuptial rite called Prajapatya is when the father gives away his daughter with due honour, saying distinctly, 'May both of you perform together your civil and religious duties.' When the bridegroom having given as much wealth as he can afford, to the father and paternal kinsmen, and to the damsel herself, takes her voluntarily as his bride, that marriage is named Asura. The reciprocal connection of a youth and a damsel with mutual desire is the marriage denominated Gandharva, contracted for the purpose of amorous embraces, and proceeding from sensual inclination. 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. When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage, called Pisacha, is the eighth and the basest."* Of these the Brahma and the Asura, which are respectively the most respectable of the approved and the least objectionable of the unapproved forms, are the only forms now recognised, and they are practised among all castes, but the others have become obsolete. (u)

The Rakshasa form of marriage in which the maiden is seized from her house by force is still practised among certain classes of Gonds of Berar and Betul. (v)

38. The Brahma Form.—It will be seen from the description of Manu quoted above, in which the bridegroom in the Brahma form is described as "a man learned in the Vedas," that this form was originally prevalent among the Brahmins and was inapplicable in the case of the Sudra or the other two castes, the Kshatria and the Vaisya, who were denied access to the Vedas. But this form in the long run ceased to be the monopoly of the Brahmins and is now practised by all the other castes including the Sudra. (w) The chief feature of this form is that the parents do not receive any consideration for giving the girl in marriage, their choice of the bridegroom not being determined by a desire to trade on their daughter.

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* Manu. III—20—42.

(u) *Maharajah of Kolhapur v. Sundaram Ayyar*, 48 M. 1=1925 M. 497.

(v) *Garab v. Emperor*, 1927 N. 279.

(w) Mad. Dec. of 1859, 44.

39. The Asura Form.—This form of marriage, the striking feature of which is the receipt of pecuniary benefit by the bride's parents, amounts to a virtual sale of the bride and is practised widely amongst the Sudras of Southern India. It is the paying of consideration to the bride's parents that distinguishes the Asura form from the Brahma form,[x] and not the circumstance that the marriage was amongst the Sudras or amongst the Brahmins[y] or that it was performed with or without the rites prescribed for the *Brahma* form of marriage ;[z] but the money must be paid for the benefit of the parents and not for the benefit of any other person.[a] A marriage does not become one in the Asura form by the mere fact of the bridegroom giving the bride or her mother a present as a token of compliment.[b] The test being the receipt of pecuniary benefit by the parents, the defraying by the bridegroom of all the expenses of the marriage which the girl's father is in law bound to meet will make the marriage one in the Asura form,[c] if the bridegroom has met those expenses in pursuance of a contract with the bride's parents, but if the bridegroom has defrayed the marriage expenses voluntarily or in pursuance of an alleged custom of the caste, the marriage which is otherwise clearly in the Brahma form cannot be said to have become converted into the *Asura* form, as in such a case the payment of a bride-price, which implies a contract between the payer and the payee, cannot be postulated.[d]

40. Gandharva Form.—This form of marriage which implies an inconsistency with the father's *patria potestas* over the girl was prevalent amongst the Kshatrias in days of yore, but its existence and validity have been much controverted in these days. Its validity amongst the Kshatrias was upheld by the Bengal Sudder Court but denied by the Allahabad High Court in a case between Rajputs.[e] The Madras High Court holds such marriages legal if celebrated with nuptial rites having as their essential part the

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(x) *Authikesavalu* v. *Ramanuja*, 32 *M.* 512—3 I.C. 541—19 M.L.J. 656.

(y) *Viswanathan* v. *Saminathan*, 13 M. 83.

(z) *Chunilal* v. *Suraj Ram*, 33 B. 433—11 Bom. L.R. 708.

(a) *Hira* v. *Hansi*, 37 B. 295—14 Bom. L.R 1182—17 I.C. 949 ; *Kailasanatha* v. *Parasakthi*, 58 M. 488—1935 M.W.N. 249—41 M.L.W. 336—69 M.L.J. 142—1935 M. 740.

(b) *Chunilal* v. *Suraj Ram*, 33 B. 433=11 Bom. L.R. 708=3 I.C. 765 ; *Authikesavalu* v. *Ramanuja*, 19 M.L.J. 656=32 M. 512=3 I.C. 541 ; *Govind* v. *Savitri*, 43 B. 170—17 I.C. 883—20 Bom. L.R. 911; *Kailasanatha* v *Parasakthi*, 58 M. 488=1935 M.W.N. 249—41 M.L.W. 336=69 M.L.J 142=1935 M. 740 ; *Reverend Gabriel* v. *Valliammai*, 10 L.W. 491=1920 M.W.N 158=53 I.C. 423 ; *Jaikisondas* v. *Harkisondas*, 2 B. 9.

(c) *Rathnathanni* v. *Somasundara*, 41 M L J. 76—13 L.W. 582=1921 M.W.N. 635=1921 M. 608 ; *Samu Asari* v. *Anachi Ammal*, 49 M.L.J. 553—22 L.W. 462=1926 M. 37.

(d) *Sivanagalingam* v. *Ambalavana*, 47 L W. 300=1938 M.W.N. 161.

(e) *Bhaoni* v. *Maharaj Singh*, 3 A. 738.

ceremony of *homum*.[f] The Oudh Chief Court holds this marriage to be now obsolete.[g]

41. Ceremonies.—The laws of every nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the matrimonial bond,[h] and the ancient Hindu texts also prescribe certain forms to be gone through for a valid marriage. There are really three stages in the ritual of a Hindu marriage whether in the Brahma form or in the Asura form, and they are, (i) the betrothal, (ii) the formalities including the recital of holy texts before the sacred fire and (iii) the *Saptapatigamana*. Of these the betrothal, though in some cases celebrated with much ceremony and ostentation, is only a promise to marry and is revocable.[i] Even the second stage of the ritual consisting of the invocation before the sacred fire and *Kannikkadhana* does not form the operative part of the transaction which is really the completion of the *Saptapati*, or the taking of the seven steps by the bridal pair in the marriage ceremony: (Manu., viii—226, 227). It is on the completion of the last step that the marriage takes place and till then the transaction is incomplete and can be revoked.[j] But the fact that more than seven steps have been taken does not render the marriage invalid.[k] These rituals, however, are not necessary in every case and there may be other forms recognised by the custom of the caste or community as equally effective to complete a marriage, in which case the adoption of that form will be sufficient to make the marriage irrevocable.[l] But consummation is not necessary for the validity or the completion of the marriage.[m] In some communities a custom exists that the marriage actually performed does not have the effect of a complete and irrevocable marriage till some further ceremony is undergone or some further condition fulfilled sub-

(f) *Brndavana* v. *Radhamani*, 12 M 72. See also *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1—1925 M. 497 where this form of marriage has been held to have become obsolete. See also *Viswanthaswamy* v. *Kamulu Ammal*, 24 M L J. 271—21 I.C. 724; *Kamdeb* v. *Raja Brajasunder*, 17 Pat. 134

(g) *Ram Peary* v. *Kallasha*, 1930 Oudh 426 7 O.W.N. 753.

(h) *Warrender* v. *Warrender*, 2 Clark and Finnelly 531.

(i) *Umed* v. *Nagindas*. 7 Bom. H.C.R. 122; *In the matter of Gunput Naraln*, 1 C. 74, *Khimji* v. *Narsi*. 39 B 682—17 Bom. L.R. 225.

(j) *Chunilal* v. *Suraj Ram*. 11 Bom. L.R. 708=33 B. 433—3 I.C. 765; *Brindaban* v *Chundra*, 12 C. 140; *Authikesavalu* v. *Ramanuja*, 32 M. 512=3 I.C. 511—19 M L J. 656; *Bai Appibai* v. *Khimji*. 60 Bom 455 1936 B. 138=38 Bom. L R. 77.

(k) *Dulli Appana* v. *Subamal*, 1938 R. 111.

(l) *Kalliychurn* v. *Dukhee*, 5 C. 692; *Muthusami* v *Masilamani*, 20 M.L.J. 49= 33 M. 312 =5 I.C. 42; *Rampiyar* v. *Deva*, 1 R. 128—1923 R. 202; *Harschurn* v *Nimae*, 10 C. 138; *Benode* v. *Shashi*, 24 C.W.N. 958 59 I.C. 882; *Mahammad* v. *Mt Sundar*, 1934 A. 884.

(m) *Administrator General of Madras* v. *Anandachari*, 9 M 466; *Munshi Ram* v. *Emperor*—58 A 402—1936 A. 11=1935 A.L.J. 1166—1935 A.W.R. 1150; *Dadaji* v *Rukmabai*. 10 B. 301.

sequent to the actual marriage.[n] Besides, the said Sastraic rituals are not necessary in the case of marriages of widows,[o] or customary marriages of women released or deserted or relinquished by their husbands,[p] though some customary ceremony is usual and necessary to distinguish them from mere concubinage.[e]

42. Presumptions as to marriage and its forms.—Marriage can be presumed from long cohabitation and repute. But before such presumption can arise it is imperative to make out that the conditions necessary for its existence do exist. First of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Secondly, the habit and repute which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage.[q] This presumption of a valid marriage in the case of a man and a woman who have been living together and whose children have been acknowledged by the former, is rebuttable by proof that no marriage could at all have taken place.[r] Every marriage which is proved to have taken place in fact, will not only be presumed to be valid in law[s] and to have been performed with all the necessary ceremonies, [t] but that it was in the Brahma form as distinguished from the Asura form,[u] and this presumption holds good even when the parties are Sudras.[v] But in the case of customary marriages which are valid, but which do not fall within the eight forms of marriage known to the Smritikars, this presumption in favour of the Brahma form cannot apply.[w] Where a marriage *de facto* has been established and supported by the recognition of the children by the husband, the very strongest evidence would be required to show that the law denied to them

(n) *Boolchand Kolita* v. *Janakee*, 25 W R. 386 ; *Bai Ugri* v. *Patel Purshotam*, 17 B 400

(o) *Ram Rakhi* v *Daulat Ram*, 1926 L 31. (See Sec. 6 of the Hindu Widows Remarriage Act of 1856). *Lalchand* v. *Thakur Devi*, 49 P.R 1903

(p) *Vira* v. *Rudra*, 8 M. 440 ; *Jukni* v *Queen Empress*, 19 C 627, *Manu*, viii–226, 227.

(e) See p. 42, foot note (e)

(q) *Ma Wun Di* v. *Ma Kin*, 35 I.A. 41 . 5 A L J. 63–10 Bom. L.R. 41–35 C. 232 .18 M.L.J. 3–12 C.W.N. 220.

(r) *Chellammal* v. *Ranganatham*, 34 M. 277 12 I C. 247.

(s) *Inderun* v. *Ramasami*, 13 M.I.A. 141 ; *Fakirgouda* v. *Gangi*, 22 B. 277 ; *Bai Appbai* v. *Khimji*, 60 Bom. 455=1936 B. 138 38 Bom. L.R. 77.

(t) *Moujilal* v *Chendrabuti*, 38 I.A 122 38 C 700 11 I.C. 502–13 Bom. L R 534–15 C W N. 790–21 M.L.J. 933 ; *Bai Dhali* v *Moti*, 22 B. 509 ; *Administrator General* v. *Anandachari*, 9 M. 466.

(u) *Kishen Dei* v. *Sheo Pattan*, 48 A. 126 26 A.L.J. 99–1928 A 1 ; *Authikesavalu* v *Ramanuja*, 32 M. 512 · 3 I.C. 541 19 M L J. 656 ; *Hira* v. *Hansi*, 14 Bom. L R 1182–37 B. 295–17 I.C. 949 ; *Mt Thakoor Dayhee* v. *Rai Balack Ram*, 10 W.R. 3 ·11 M I A. 139 (P.C.) ; *Kamla Prasad* v. *Murli*, 13 P. 550–1934 P. 398 ; *Mt Kishan* v *Sheo Phaltan*, 48 A. 126–= 23 A L J. 981–1926 A 1. (Case of widow remarriage). *Jagannath* v. *Runjit*, 25 C. 354.

(v) *Authikesavalu* v. *Ramanuja*, 32 M. 512 ·3 I.C. 541–19 M.L.J. 656 ; *Reverend Gabriel* v. *Valliamnai*, 10 L W. 491–1920 M W N. 158: 53 I.C. 423 ; *Jagannath* v. *Narayan*, 34 B. 553 .12 Bom. L.R. 545.

(w) *Mt. Kishan Dei* v. *Sheo Pattan*, 48 A 126–1926 A. 1 · 23 A.L.J. 981. But see *Hira* v *Hansi*, 37 B. 295–14 Bom. L.R 1182.

their presumable legal status on the ground of their mother's incapacity to contract the marriage.[x]

43. Capacity to marry.—Every Hindu, whether male or female, can marry, whatever be his or her age, though it is assumed and recommended by the *sastras* that the husband should be older than the wife,[y] a recommendation which is rarely disregarded. In the case of the twice-born castes there is a restriction that the bridegroom should have had his *Upanayanam* or the investiture with the sacred thread at the time of the marriage.[z] The question as to the capacity of the parties to enter into a marriage under Hindu Law can be considered under the heads of, (i) Minority, (ii) Lunacy, (iii) Impotency and other physical infirmities, (iv) Illegitimacy and (v) Religious disqualifications.

44. Minority.—The foundation upon which the validity of infant marriages under the Hindu system rests, is the religious obligation, which is supposed to lie upon parents, of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children.[a] Marriage according to the Hindus is the performance of a religious duty and is not a contract ;[b] hence the absence of a consenting mind due to minority of either party does not affect the validity of the marriage.[c] This, however, does not mean that a girl can be forced into a marriage which is odious to her,[d] for whatever may have been the view of marriage in the earliest times before Brahmanical influences had fully asserted their supremacy, the present theory of marriage, according to the Brahma form at any rate, repudiates all idea of property by the relations in the damsel, and assumes that, in bringing about her marriage, they act as her guardians in the discharge of the sacred duty of marrying her, to a suitable bridegroom who satisfies the conditions mentioned in the ancient texts.[e] Again if a girl has no competent guardian to give her away in marriage, or if having such a guardian that guardian neglects to provide a husband for her, the girl herself can choose and marry a husband under the Hindu Law.[f]

45. Child Marriage Restraint Act (XIX of 1929).—By this Act the marriage of a male below 18 and a girl below 14 is restrained

(x) *Ramamani v. Kulantlal*, 14 M.I.A. 346.

(y) Yagnavalkya. i—52.

(z) Manu. ii—36.

(a) *Jumoona Dossya Chowdhrani v. Bamasoondevai Chowdhrani*, 1 C. 289 : 3 I.A. 72. P.C.

(b) *Muthusami v. Masilamani*, 33 M. 342=5 I.C. 42=20 M.L.J. 49.

(c) *Purshotamdas v. Purshotamdas*, 21 B. 23 : *Atma Ram v Bankumal*, 11 L. 598 1930 L 561.

(d) *Shridhar v. Hiralal*, 12 B. 480.

(e) *Khushalchand v. Bai Mani*, 11 B. 247

(f) Yagnyavalkya, i —63 ; Manu, ix—89 and 90 : Narada. xii—20 to 22.

by prescribing penalties in respect of parents and guardians who bring about and are parties to the marriage. But the validity of the marriage itself is not affected and is beyond the scope of the Act.[g]

THE CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929).

(As amended upto May 1938.)

An Act to restrain the solemnisation of child marriages.

Whereas it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows :—

Short Title, Extent and Commencement.

1. *(1) This Act may be called The Child Marriage Restraint Act (1929).*

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas and applies also to

(a) all British subjects and servants of the Crown in any part of India ; and

(b) all British subjects who are domiciled in any part of India wherever they may be.

(3) It shall come into force on the 1st day of April, 1930.

Notes. The Act applies to an offence under the Act committed in British India, though the offenders are foreigners or subjects of Native Indian States.[h] Even a child marriage contracted outside British India, but by British Indian subjects, is an offence under the Act since the Act is not limited in its operation and strikes at child marriages contracted by them anywhere.[i] For the purposes of the Act it is the marriage ceremony that has to be considered for determining when or where the marriage has taken place[j] and not any other ceremony like the "*tilak*" ceremony[k] or the ceremony of consummation.[k]

Definitions.

2. *In this Act, unless there is anything repugnant in the subject or context :—*

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age :

(b) "child marriage" means a marriage to which either of the contracting parties is a child :

(c) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnised : and

(d) "minor" means a person of either sex who is under eighteen years of age.

(g) *Munshi Ram* v. *Emperor*, 58 A. 402 =1936 A. 11=1935 A.L.J. 1166.

(h) *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Radha Kishen*, 39 C.W.N. 656.

(i) *Sreeramamurty* v. *Ranganayakulu*, 45 L.W. 210=(1937) 1 M.L.J. 388=1937 M.W.N. 22.

(j) *Matuk Deo* v. *Narain Singh*, 57 A. 83=1934 A.L.J. 681=1934 A. 829.

(k) *Munshi Ram* v. *Emperor*, 1936 A. 11=1935 A.L.J. 1166=58 A. 402.

Punishment for male adult below twenty-one years of age marrying a child.

3. *Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.*

Punishment for male adult above twenty-one years of age marrying a child.

4. *Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.*

Punishment for solemnising a child marriage.

5. *Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.*

Punishment for parent or guardian concerned in a child marriage.

6. *(1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both:*

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that, where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

Notes. Sections 5 and 6 deal with different offences. Section 6 provides for the offence only in a case where a minor himself contracts a child marriage, while section 5 deals with a case in which the marriage is not contracted by a minor as in section 6 but a child marriage is performed, conducted or directed by persons like priests and others who are neither parents nor guardians covered by section 6.(l) Section 5 contemplates that the person who solemnises the marriage must make some reasonable enquiry as to the ages of the parties to the marriage and satisfy himself that neither of the participants is a child, and it is not enough if he merely looks at the bride or bridegroom and forms his own opinion that they are not children within the meaning of the Act.(m) The parents of the bridegroom cannot be convicted under section 6, merely because the bride was under 14 years of age, and they can be convicted, if at all, under section 6 only if the bridegroom, that is their own son who was in their charge, was under 18 years at the time of the marriage. Even if the bridegroom is below 18 years, his father alone

(l) *Ganpat Rao* v. *Emperor*, 1932 N. 174—28 N.L.R. 302; *Public Prosecutor* v. *Ratayya*, 45 L.W. 437=1937 M.W.N. 212. See also *Munshi Ram v. Emperor*, 58 A. 402=1936 A. 11=1935 A.L.J. 1166.

(m) *Public Prosecutor* v. *Ratayya*, 45 L.W. 437=1937 M.W.N. 212=1937 M. 490 See also *Jwla Prasad* v. *Emperor*, 1934 A 331.

in whose charge he has been and who promoted the marriage is liable under section 6, and not also his mother as she has no authority in law to prevent the marriage taking place.(n)

Imprisonment not to be awarded for offences under section 3.

7. *Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.*

Jurisdiction under this Act.

8. *Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a Magistrate of the first class shall take cognizance of, or try, any offence under this Act.*

Notes. The words "Magistrate of the first class" were substituted in 1938 for the words "District Magistrate" in the Original Act (o) A trial under the Act may be a summary one.(p)

Mode of taking cognizance of offences.

9. *No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.*

Preliminary inquiries into offences under this Act.

10. *The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.*

Notes. A Court taking cognizance of an offence under the Act is not bound to hold a preliminary inquiry before issuing summons on the accused.(q)

Power to take security from complainant

11. *(1) Where the court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898; and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.*

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

(n) *Public Prosecutor* v. *Ratayya*, 45 L.W. 437=1937 M.W.N. 212=1937 M. 490.

(o) See Act XIX of 1938.

(p) *Jwla Prasad* v. *Emperor*, 1934 A. 331.

(q) *Emperor* v. *Chand Mal*, 15 L. 63= 35 P.L.R. 8=1934 L. 155. But see contra in *Mangal* v. *Kalu*, 12 L. 383=1931 L. 56.

Notes. This section, prior to its amendment by Act XIX of 1938, made the taking of a security bond from the complainant a rule to be departed from only for reasons to be recorded.(r) But by the said amendment that rule has become the exception to be adopted only for sufficient reasons; even this exception cannot apply in the case of a complaint by a judicial officer.(s)

12. (1) *Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in Ss. 3, 4, 5 and 6 of this Act prohibiting such marriage.*

(2) *No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.*

(3) *The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).*

(4) *Where such an application is received, the Court shall afford the applicant an earlier opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.*

(5) *Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees or with both:*

Provided that no woman shall be punishable with imprisonment.

46. Lunacy.—Though marriage is regarded as a gift of the bride to the bridegroom, idiocy or lunacy on the part of the husband at the time of the marriage would invalidate the marriage if he was prevented at that time from understanding the nature of the transaction. But the objection to marriage on the ground of mental incapacity must depend upon a question of degree, and where the evidence of mental infirmity is wholly insufficient to establish such a degree of that defect as to amount to an incapacity to understand the significance of the marriage ceremony and thus to rebut the extremely strong presumption in favour of the validity of the marriage, the marriage must be upheld and declared valid.(t)

47. Impotency and other physical infirmities.—Marriage does not exist solely for sexual intercourse and a marriage with an impotent person cannot be held invalid though one of the chief objects of marriage, namely, the begetting of children, is defeated

(r) *Kaluram* v *Emperor*, 37 C.W.N. 626-1933 C. 433.

(s) *Sukha* v. *Emperor*, 13 Pat. L.T. 791 -1933 Pat. 87.

(t) *Mouji Lal* v. *Chandrabati*, 38 C. 700-11 I.C. 502=13 Bom. L.R. 534=15 C.W.N. 790-21 M.L.J. 933=38 I.A. 122.

thereby.[u] So also no deformity or disease, however loathsome or contagious, is a bar to the validity of a marriage,[v] though if the marriage has not been performed and the matter rested only in contract, no Court would treat a promise to marry an impotent or diseased person as binding.

48. Illegitimacy.—Illegitimacy of a person does not operate as a disqualification for a valid marriage if the illegitimate person is considered by his castemen as belonging to their caste.[w] Hence a marriage between a boy and a girl who is the illegitimate daughter of a person belonging to the same caste as the boy is not invalid even though the girl's father[x] or mother[y] may belong to a different caste.

49. Religious disqualification.—The Hindu Law imposes certain conditions for the validity of a marriage, and they are: (i) that the persons to be married must be in the same caste,[z] (ii) that they should not belong to the same Gotra or Pravara and (iii) that they must be outside the prohibited degrees of relationship.

50. Inter-caste Marriages.—Marriages between persons of different castes, though once not uncommon, are now very rare and can be considered under two heads: (i) *Anuloma* marriages and (ii) *Prathiloma* marriages. *Anuloma* marriage is one between a man of a higher caste and a woman of a lower caste, while the *Prathiloma* marriage is that between a woman of a higher caste and a man of a lower caste. *Prathiloma* marriages are absolutely void unless sanctioned by custom;[a] but *Anuloma* marriages, though rare, are not invalid.[b] But persons who want to marry each other, though belonging to different castes, can now effect a valid marriage, whether *Anuloma* or *Prathiloma*, under the Special Marriage (Amendment) Act of 1923.

(u) *Purshotamdas* v *Bai Mani*, 21 B 610. See also *Kunahi Ram* v *Biddya Ram*, 1 A. 519.

(v) See the learned discussion of Mahmood J. in *Bindu* v. *Kaunsilia*, 13 A. 126

(w) *In the matter of Ram Kumari*, 18 C. 264; *Emperor* v. *Madangopal*, 34 A. 589=16 I.C. 513 10 A L.J. 82; *Inderun* v *Ramaswamy*, 13 M I.A. 141.

(x) *Emperor* v. *Madan*, 34 A. 589=16 I.C 513 10 A.L.J. 82.

(y) *Bai Gulab* v. *Jivanlal*, 24 Bom. L.R. 5=1922 B. 32—46 B. 871.

(z) *Inderun* v. *Ramaswamy*, 13 M.I.A. 141; *Munni Lal* v. *Shiama*, 48 A 670=1926 A. 656 24 A.L.J. 757.

(a) *Munni Lal* v. *Shiama*, 48 A. 670=24 A L J. 757=1926 A. 656; *Bai Kashi* v. *Jamnadas*, 14 Bom L.R. 547=16 I.C. 133; *Bai Appibai* v. *Khimji*, 60 B. 455=38 Bom L. R. 77. 1936 B. 138; *Ram Lal* v. *Akhoy*, 7 C.W.N. 619.

(b) *Surain* v. *Indar*, 1934 L. 550; *Bai Gulab* v. *Jivanlal*, 46 B. 871—22 Bom. L R 5—1922 B. 32; *Nalinaksha* v. *Rajani*, 58 C. 1392- 35 C.W.N. 726=1931 C. 741 *Morarji* v. *Administrator General*, 52 M 160 55 M.L.J. 478=1928 M.W.N. 848=2 L W 674—1928 M. 1279; *Natha* v. *Mehta* 55 B. 1 1931 B. 89=32 Bom. L.R. 1348 See contra in *Padam Kumari* v. *Sura Kumari*, 28 A. 458=3 A.L.J. 209; *Bai Appibai* v. *Khimji*, 60 Bom. 455=38 Bom L R. 77=1936 B. 138.

But such a marriage affects materially the rights and position of the husband under the Hindu Law. For instance, he cannot adopt a son, he becomes automatically separated from his family, he cannot marry another wife during the lifetime of the first, and succession to his property will be governed by the Indian Succession Act. If he is the only son to his father, the latter will be deemed sonless and can make an adoption. Besides, Arya Samajists and Brahmo Samajists do not observe caste and hence the rule against inter-caste marriages does not apply to them.(c)

51. Marriages within the caste.—The Hindus who are divided into the four castes of Brahma (priestly caste), Kshatriya (warrior caste), Vaisya (trading caste) and Sudra (service caste), have several sub-castes within the said four main castes and marriages between persons belonging to different sub-divisions of the same caste are quite valid,(d) though earlier decisions held they were invalid.(e) A marriage between a Sudra and a Christian woman converted to Hinduism on her marriage was held valid by the Madras High Court on the ground that the woman must be deemed to be a Sudra and was treated by the Sudra caste as such and that a marriage between persons belonging to two classes of the same caste should be held valid.(f) So also a marriage between a Sudra and an Adi-Dravida woman will be considered to be a valid marriage under Hindu Law, the Adi-Dravida woman being regarded as a Sudra belonging to an inferior sub-division.(g) All Hindus are to be considered as Sudras who are not shown to belong to any of the regenerate castes.(g) Upanayanam or the ceremony of the investiture with the sacred thread which is observed among the three higher castes has been held to differentiate them from the Sudra caste wherein such ceremony is not gone through.(h) But a safer test to find out whether a particular community belongs either to one caste or the other seems to be the consciousness of that community as belonging to a particular caste and the acceptance of that consciousness by the other castes taken along with any indication furnished by the customs in vogue in that

(c) *Ratanchand* v. *Anandbai*, 145 I.C. 777.

(d) *Gopi Krishna* v. *Mst. Jaggo*, 44 M.L.W. 84=71 M.L.J. 31=1936 P.C. 198=1936 M.W.N. 652 40 C.W.N. 1007=38 Bom. L.R. 751=58 A. 297=63 I.A. 295=1936 A.L.J. 819; *Inderun* v. *Ramaswamy*, 13 M.I.A. 141; *Bholanath* v. *Emperor*, 51 C. 488=28 C.W.N. 323=1924 C. 616; *Ramanani* v. *Kulanthai*, 14 M.I.A. 346; *Biswanath* v. *Shorashibala*, 25 C.W.N. 639=48 C. 926=1921 C. 48; *Upoma* v. *Bholaram*, 15 C. 708; *Fakir Gauda* v. *Gangi*, 22 B. 277; *Mahantawa* v. *Gangawa*, 11 Bom. L.R. 822=3 I.C. 962=3 B. 693. *Har Prasad* v. *Kewal*, 47 A. 169=22 A.L.J. 1009 1925 A. 26; *Sohan Singh* v. *Kabla Singh*, 10 L. 372=1928 L. 706.

(e) *Narain Dhara* v. *Rakhal Gain*, 1 C. 1

(f) *Muthusami* v. *Masilamony*, 33 M. 342=5 I.C. 42=20 M.L.J. 49.

(g) *Manickam* v. *Poongavanammal*, 1934 M. 323=39 L.W. 439=66 M.L.J. 543. =1934 M.W.N. 185.

(h) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1=1925 M. 497.

community.[1] In the recent case of *Gopi Krishna* v. *Mst. Jaggo*,[2] the Privy Council upheld the validity of a marriage between persons belonging to different subdivisions of the Vaishya caste, which is a twice-born class, and they observed as follows :—

"It is contended on behalf of the appellant that, as the parties to the marriage belonged to two different sub-castes of *Vaishyas*, the man being a Kasaudhan and the woman an Agrahari, they could not, under the Hindu Law, enter into a lawful marriage with each other. Their Lordships are not aware of any rule of Hindu Law, and certainly none has been cited, which would prevent a marriage between persons belonging to two different divisions of the same caste. Indeed, there are several decided cases which have upheld such marriages. It is sufficient to refer in this connection to two judgments of the Board, *Inderun* v. *Ramasawmy*, 13 M.I.A. 141 and *Ramamani* v. *Kulanthai*, 14 M.I.A. 346.

"It is true that both these cases, as well as the judgments of the High Courts which are founded on them relate to the Sudra caste ; and the argument advanced by the learned counsel for the appellant is that they cannot establish the validity of a marriage between persons belonging to two sub-castes of a twice-born class such as the Vaishyas. There can, however, be no doubt, that the texts of the Hindu Law do not enunciate any rule prohibiting the union in marriage of persons belonging to different divisions of the same caste, and not a single case has been declared to be invalid.

"Their Lordships do not think, that the matter requires any elaborate discussion. Put briefly, the position is this. The *Shastras* dealing with the Hindu Law of marriage do not contain any injunction forbidding marriages between persons belonging to different divisions of the same Varna; and neither any decided case nor any general principle can be invoked which would warrant such a conclusion. Then, what is it upon which the appellant, on whom the onus rests, can sustain the invalidity of the marriage. It is said that marriages between members of different sub-castes of the same caste do not ordinarily take place, but this does not imply that such a marriage is interdicted and would, if performed, be declared to be invalid. Indeed, there is, at present a tendency to ignore such distinctions, if they ever existed. There exists no doubt a disinclination to marry outside the sub-caste, inspired probably by a social prejudice, but it cannot be seriously maintained that there is any custom which has acquired the force of law. It is, however, unnecessary to pursue the subject, as in the Court below no such custom was set up or proved as would render the marriage invalid.

"For these reasons their Lordships hold the marriage to be valid.....".

52. Gotra or Pravara.—*Let not a damsel be married who is of the same gotra or pravara or within five degrees on the side of the mother or seven degrees on the side of the father." Vishnu XXIV -9-10, Yagnyavalkya I-52-53.*

Gotrajas are persons who claim to be descended in the male line from one of the ancient sages after whose name the Gotra is

(1) *Subrao* v. *Radha*, 52 B. 497 30 Bom L.R. 692=1928 B 295; *Kalappa* v. *Shirappa*, 1938 B. 132=39 Bom. L.R. 1282.

(2) *Gopi Krishna* v. *Mst. Jaggo*, 58 A. 397=63 I.A. 295=1936 P.C. 198=40 C.W.N. 1007 38 Bom. L.R. 751=44 L.W. 94=1936 M.W.N. 652=71 M.L.J. 31=1936 A.L.J. 819.

named, and who is either a descendant of or himself one of the eight accredited progenitors of the human race, namely, Agastya, Atri, Bharadwaja, Gautama, Jamadagni, Kasyapa, Vasishta and Viswamitra. Every twice-born or person belonging to the first three castes owns one of these Rishis as the original founder of his family. The fact that persons belonging to different castes can have the same Gotra probabilises the theory that originally there were no castes at all and the institution of castes was only a later development. The three lineal male ancestors of the founders of the Gotras are referred to as Pravara. Pravara is also defined as the group of sages distinguishing the sage who is the founder of the Gotra. The rule is that persons of the same Gotra or Pravara cannot validly marry each other and a marriage celebrated between them is absolutely void. This is known as the rule of exogamy.[k] But since Gotras and Pravaras do not obtain among Sudras, this rule is inapplicable in their case[l] and even in the case of a twice-born the only prohibition that is now observed, especially in South India, is that based on the identity of the Gotra.

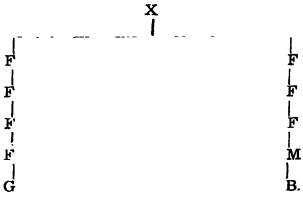
53. Prohibited degrees.—"*Let a man who has finished his studentship of the Vedas or sacred literature, espouse an auspicious woman who is not defiled by connection with another man, is agreeable, non-sapinda, younger in age and shorter in stature, free from disease, is born from a different Gotra and Pravara; and is beyond the fifth and the seventh from the mother and from the father respectively*" (*Yagnyavalkya I-52-53.*)

The rule that the parties to the marriage should not be related to each other as Sapindas has been accepted by both the Mitakshara and the Dayabhaga schools, though there is a difference in the scope and operation of the rule. According to the Mitakshara, the Sapinda relationship for purposes of marriage comprises all descendants, traced through male or female links, up to the seventh degree, of paternal ancestors up to the seventh degree, and similar descendants up to the fifth degree of maternal ancestors up to the fifth degree, the computation being made by counting the person concerned and the common ancestor each as one degree. In this computation the sex of the immediate ancestor alone is to be considered in finding out whether the relationship exceeds the seventh or the fifth degree through that ancestor, and the descendants of the ancestors may be traced indiscriminately through males or females. Another rule is that neither the boy nor the girl should be the

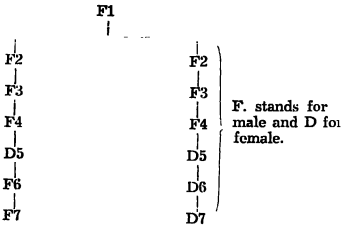
(k) *Ramchandra* v. *Gopal*, 32 B. 619; 10 Bom. L.R. 948; *Maharajah of Jhapur* v. *Sundaram Ayyar*, 48 M. 1—1925 M. 497. As regards custom validating such marriages See *Sri Krishen* v. *Sham Sundar*, 142 I.C. 211=1933 L. 585.

(l) See p. 51 foot note (*h*).

sapinda of the other. The last rule may be illustrated by the following diagram :—



In this diagram G represents the girl and B represents the boy. M represents a female ancestor and F represents a male ancestor. The girl being related to the boy through his mother, the girl is not a sapinda of the boy since she is descended from the common ancestor X who is beyond the fifth degree counting from B as degree one. But being related to G through her father, B is related to G as a sapinda because he happens to be one of the descendants within the seventh degree of the common ancestor X who is also within the seventh degree from the girl G. In this connection it may be interesting to consider the doctrine of *frog's leap* under which the sapinda relationship springs into being between two persons even though they are children of persons between whom that relationship has no existence. This anomaly which prohibits a valid marriage between two persons whose parents, though more closely related to each other, could have legally married can be best illustrated by a diagram :—



It will be seen in this F6 and D6 could have contracted a valid marriage between themselves because, both of them being related

to each other through their mothers, neither of them is the sapinda of the other, applying the relevant five degrees rule. But F7 and and D7 cannot marry each other because, even though F7 is not a sapinda of D7, D7 is really the sapinda of F7 and hence cannot be married by him.

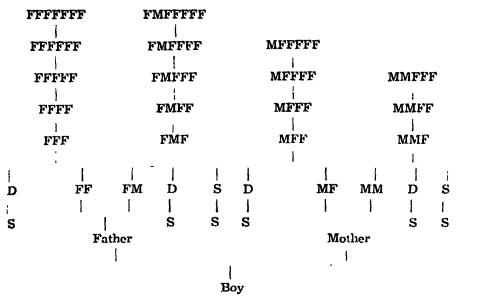
54. Prohibited degrees in the Dayabhaga.—The difference in the method of computation of degrees between the Mitakshara and the Dayabhaga are : (i) that while according to the Mitakshara computation the persons in question are each counted as one degree, the Dayabhaga excludes them from computation and (ii) that in tracing the relationship through the mother, while the Mitakshara counts her as one degree, the Dayabhaga excludes her altogether as not being one of the links to be counted. With this difference in the method of computation for the ascertainment of the sapinda relationship, the Dayabhaga lays down, as observed by Sir Gooroodass Banerjee,* that a girl cannot be married by a man : (i) if she is within the seventh degree in descent from his father or from any of the father's six ancestors in the male line, (ii) if she is within the fifth degree in descent from his maternal grandfather or from any of that grandfather's four ancestors in the male line, (iii) if she is within the 5th degree in descent from his father's bandhus (father's father's sister's son, father's mother's sister's son and father's mother's brother's son) or from one of their six ancestors through whom the girl is related to him and (iv) if she is within the fifth degree in descent from his mother's bandhus (mother's father's sister's son, mother's mother's sister's son and mother's mother's brother's son) or from any of their four ancestors through whom the girl is related. But where the girl is removed by three gotras from the boy, though within the degrees above mentioned, the marriage becomes valid.

The following diagram shows the sapinda relationship according to the Dayabhaga.

This diagram has been adapted from G. Sarkar's "Hindu Law." In this F stands for father, M for mother, D for daughter, S for son, M F for mother's father, F F for father's father, F M F for father's mother's father etc. With this diagram for help, the question whether the girl to be married to the boy is within the prohibited degrees or not can be determined by applying, as the case may be, the five degrees or the seven degrees rule of descent in accordance with the foregoing rules.

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*Banerjee, 5th Ed. pp. 63-70.



55. Reason and Operation of the Prohibitory Rules. -The chief reason for so many prohibitory rules in respect of marriage lies in the constitution of Hindu Society in ancient days. The joint family consisting of relations several degrees removed was the normal condition of such society and in order to guard the chastity of Hindu girls in such family it became necessary to lay down these rules with a religious rigour that they might deter any member of the family from entertaining the idea of marrying another member thereof. It was with this view that the marriage of young girls had been so much insisted on in the texts, and so many restrictions were placed on the ambit of the choice of the spouse among relations. As Bentham observes in his Principles of the Civil Code, Part III, Chap. V, Sec. 1. "If there were not an insurmountable barrier between near relatives called to live together in the greatest intimacy, their contact, continual opportunities, friendship itself and its innocent caresses, might kindle fatal passions. The family —that retreat where repose ought to be found in the bosom of order, and where the movements of the soul, agitated by the scenes of the world, ought to grow calm—would itself become a prey to all the inquietudes of rivalry and to all the furies of passion. Suspicions would banish confidence—the tenderest sentiments of the heart would be quenched—eternal enmities or vengeance, of which the bare idea is fearful, would take their place. The belief in the chastity of young girls, that powerful attraction to marriage, would have no foundation to rest upon; and the most dangerous snares would be spread for youth in the very asylum where it could least escape them." These prohibitory rules relating to the sapinda relationship apply to the Sudras as well as in the case of the other caste Hindus, applying with equal force even in the case of an adopted son so as to prohibit for him a marriage

within the prohibited degrees both in his natural and adoptive family. But the rules prohibiting marriages between persons of the same Gotra or Pravara cannot in the nature of things apply to the Sudras as they have no such thing as Gotra or Pravara.[l] But whether these rules will apply in the case of an illegitimate son and how they should be applied are still unsettled matters for interesting discussion. These prohibitory rules are, however, made inapplicable to a great extent by diverse customs, and the only prohibitory rule which now seems to be observed even amongst the regenerate castes throughout India is that there cannot be a valid marriage between persons belonging to the same Gotra or Pravara and in Southern India the rule of prohibition on the ground of the identity of the Pravara is not always observed. In addition to the prohibitory rules already adverted to, there are several other injunctions against marrying particular persons mentioned in the Sanskrit books, as for instance, against a person marrying his wife's sister's daughter, but such prohibitions are not of a mandatory, but of only advisory character, directed against the undesirability or incongruity of matrimonial alliances which may offend the susceptibility of refined society. [m]

56. Effect of prohibited marriage.— A marriage effected in violation of the rules relating to prohibited degrees, especially the rules relating to Gotra and Pravara, does not bestow on the girl the status of the wife. Her position is singularly unfortunate, for she cannot marry another. But her maintenance should be provided for by the man who was the author of her miserable position.[n] The rigour of these rules is, however, taken away by local customs sanctioning marriages though within the prohibited degrees[o] or within the same Pravara or Gotra.[p] But even apart from custom, it is a matter for earnest consideration whether the original texts in respect of prohibited marriages should be applied in these days in all their rigour so as to prevent the female victims of such marriages, invariably brought about under mistake or by persons over whom they have little or no control, from again contracting valid marriages, or whether they should be allowed, according to the injunction of the ancient texts, to suffer, for no fault of theirs, in the anomalous status of a married woman who is not a wife, a conception abhorrent to all modern jurisprudential ideas, and an insult to the wisdom and magnanimity of our ancient jurists in other matters.

(l) *Maharaja of Kolhapur* v. *Sundaram Ayyar*, 48 M 1=1925 M. 497 ; *Amar Singh* v. *Jai Singh*, 42 I.C. 351.

(m) *Ramakrishna* v. *Subbanna*, 43 M. 830=39 M.L.J. 183=1920 M. W. N. 474=12 L.W. 155=59 I.C. 268.

(n) *Ramachandra* v. *Gopal*, 32 B. 619=10 Bom. L.R 948.

(o) *Mandlik's Hindu Law*, 418-425; *Sri Krishan* v. *Sham*, 1933 Lah. 585 ; *Ragavendra* v. *Jayaram*, 20 M. 283=7 M.L.J. 134.

(p) *Sri Krishan* v. *Sham*, 1933 Lah. 585.

57. Customary forms of marriage.—In addition to the forms of marriage already referred to, there are certain forms of marriage practised by persons in various parts of India which are sanctioned by custom and have absolutely no religious significance. The most important of them are: (i) *Phoolbibaha*, a form resorted to by the Orissa Rajahs when they take to wife women belonging to the ordinary community; the chief ceremony of this form is throwing a garland of flowers around the bride's neck; (ii) *Dang marriage*, a form prevalent among the Raj Bansis of Bengal brought about by a man striking with a stick the roof of the house in which a widow is living and then entering the house and taking possession of the woman;[q] (iii) *Santigrahita marriage* which obtains among the Tipperah castes and consists in taking Santhi water by the worship of the Goddess Tripoora;[r] (iv) *Sarvaswadhanam marriage*, practised by the Nambudris consisting of a special arrangement between the bride's father and the bridegroom under which the bride's first son is recognised as heir to the bride's father;[s] and (v) *Katar or Sword marriage or Kadga Viraha* in which a sword or dagger represents the bridegroom at the time of the marriage; a form of marriage which was practised by only the Kshatrias in ancient days, but which now seems to be prevalent amongst other communities such as the Khumbla Tottiya community.[t] Such sword marriages amongst Mahratta Princes of Tanjore by which women known as sword wives are admitted into the seraglio of the prince, do not confer the status of the wife on the women or legitimacy on their children as they amount only to permanent and exclusive concubinage[u] with the result that a son born of that marriage will be excluded from succession to an impartible estate by the son born of a marriage in the ordinary form.[v]

58. Marriage of Converts to Hinduism.—Converts to Hinduism are deemed to be Sudras and a marriage between a Hindu of the Sudra caste and a Christian woman converted to Hinduism is valid as a marriage between Sudras.[w] So also a marriage between an Australian Christian lady converted to Hinduism and a Vaisya is valid as a marriage in Anuloma form, the woman being considered a Sudra for purposes of caste.[x] Where a Hindu becomes a con-

(q) *Santala* v. *Baduswari*, 50 C. 727=1924 C 98 :27 C.W.N. 669.

(r) *Nobodip* v. *Bir Chundra*, 25 W.R. 404.

(s) *Vasudevan* v. *Secretary of State*, 11 M. 157; *Chemnantha Lakshmi Amma* v. *Pala Kuzhu*, 25 M. 662.

(t) *Ramasami* v. *Sundaralingasami*, 17 M. 422.

(u) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1—1925 M. 497; *Ramsaran* v. *Mahabir*, 39 L. W. 198=1934 P.C. 74—36 Bom. L.R. 262=1934 M.W.N. 304=61 I A. 106—38 C W.N. 511=66 M.L. J. 114.

(v) *Ramasami* v. *Sundaralingasami*, 17 M. 422.

(w) *Muthusami* v. *Masilamani*, 33 M. 342=20 M.L J. 49=5 I.C. 42.

(x) *Morarji* v. *Administrator General*, 55 M.L.J. 478—52 M. 160—28 L.W. 674=1928 M. 1279—1928 M. W. N. 848 (See also *Sita Devi* v. *Gopal Saran*, 111 I.C. 762=9 Pat L. T. 397—1928 P. 375).

vert to Christianity and marries a Christian woman and subsequently becomes reconverted to Hinduism and marries a Hindu woman even during the lifetime of the Christian wife, the second marriage is not void and the question whether any ceremonies are at all necessary for the reconversion is to be answered with reference to the practice and sense of the community in respect of such matters.(y)

59. Marriage between a Hindu and a non-Hindu.—Hindu Law does not recognise a marriage between a Hindu and a non-Hindu as valid, but this disability will not be recognised by the English Courts in respect of a marriage contracted in England between a caste Hindu and an English woman since the *lex loci* of England permits such a marriage.(z) But the courts always presume in favour of the legality of the marriage, where it has been shown to have been performed,(a) and apply the rules of justice, equity and good conscience in cases of marriage between persons belonging to different religions.(b) "A marriage good by the laws of one country is held good in all others where the question of its validity may arise. For the question must always be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract."(c) Hence where a Hindu marries a Christian woman in England in Christian form, it is a valid Christian marriage in spite of the Indian domicile of the husband.(d) The forms necessary to constitute a valid marriage depend on the *lex loci contractus*, that is, the law of the place where the marriage ceremony is performed, but, on marriage, the wife automatically acquires the domicile of the husband, and the status of the spouses and their rights and obligations arising under the marriage contract are governed by the *lex domicili*, that is by the law of the country in which for the time being they are domiciled.(e) Hence a marriage contracted by a Hindu with a Christian woman in England, which is valid according to the law of that country and which must be regarded as a valid marriage even by the courts in India, though Hindu Law does not recognise such a marriage, cannot prevent the husband from validly marrying again in India another woman according to Hindu rites, even during the subsis-

(y) *Gurunwami* v. *Irulappa*, 1934 M. 630=40 L. W. 502=67 M.L J. 389=1934 M.W.N. 1197; *Emperor* v. *Anthony*, 33 M. 371.

(z) *Chetti* v. *Chetti*, (1909) P. 67; *Sainapatti* v. *Sainapatti*, 1932 Lah. 116=33 P.L.R. 339.

(a) *Inderun* v. *Ramasamy*, 13 M.I.A. 141.

(b) *Budansa* v *Fatma Bi*, 26 M.L J. 260=1914 M W N 278.

(c) *Bethell* v. *Hildyard*, 38 Ch. D. 220

(d) *Sainapatti* v *Sainapatti*, 1932 L. 116 33 P.L.R. 339.

(e) *Khambatta* v *Khambatta*, 36 Bom L.R 11=1934 B. 93.

tence of the former marriage, because the law in India, namely, the Hindu Law, allows of such a second marriage, though if that second marriage takes place in England, it may come under the English law prohibition of a bigamous marriage.

60. Factum Valet.—The doctrine of *factum valet* has been applied in favour of the validity of a marriage which has been either irregularly performed or performed in disregard of the Hindu Law texts which are merely directory.(f) Thus the doctrine is applicable to validate marriages with the step-mother's sister, the paternal uncle's wife's sister, the wife's sister or their respective daughters, since the texts prohibiting such marriages have been held to be merely hortatory and not mandatory.(g) Similar effect has been given to the texts prohibiting marriages with the *guru's* daughters, girls having hideous names or brotherless girls(h) or the marriage of the younger brother before that of the elder brother or the marriage of the younger sister before that of the elder sister. The marriage of a girl who has attained puberty is also valid on this ground, but not a marriage of a girl who is pregnant by intercourse with a stranger. The doctrine is equally applicable to cases of marriages performed in violation of a previous agreement to marry another person,(i) or performed without the consent of the proper guardian of the girl(j) or even in contravention of an express order of Court.(k) But where a marriage has been brought about by force(l) or fraud the validity of the marriage can be attacked in Courts of law and the marriage declared void.(m)

60-A. Invalidity of marriage brought about by force or fraud. Fraudulent misrepresentation or concealment of facts relating to the character or position of the spouses does not affect the validity of a marriage to which they freely consented with the knowledge of its nature and with the intention of entering into it, unless one of them is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without any real consent to the marriage. A marriage will also be invalid if the girl is abducted by force or fraud and married against her wish or that of her guardian. The test of validity is whether there was a real

(f) *Bai Ducali* v. *Moti*, 22 B. 509 and *Mulchand* v. *Bhudhia*, 22 B. 812.

(g) *Ramakrishna* v. *Subbamma*, 43 M. 830–39 M.L.J. 183–1920 M.W.N. 474—12 L.W. 155 59 I.C. 268 and *Raghavendra* v. *Javaram*, 20 M. 283 7 M.L.J. 134.

(h) *Veerasami* v. *Appasamy*, 1 M.H.C.R. 375.

(i) *Khooshal* v. *Bhagwan Motee*, 1 Bor. 138; *Khimji* v. *Narsi*, 39 B 682 17 Bom. L.R 225.

(j) *Venkatacharyulu* v. *Rangacharyulu*, 11 M. 316–1 M.L.J. 85, *Ramployar* v. *Deva Rama*, 1 Rang. 129–1923 R. 202; See S 35

(k) *Gaja Nand* v. *Emperor*, 2 Lah. 288= 1922 L. 139; *Bai Ducali* v. *Moti*, 22 B 509.

(l) *Ankamma* v. *Bamaneppa*, (1937) 1 M.L.J 192–45 L.W. 61–1937 M.W.N. 115–1937 M 332

(m) *Anjona* v. *Proladh*, 14 W.R. 403

consent to the marriage by the person competent to give the consent.(n) But even where a marriage has been brought about by force or fraud, it is not void but only voidable,(o) and if the parties subsequently acquiesce and continue to live together as man and wife treating their marriage as binding on them, the marriage becomes an accomplished fact and the law will not lend its aid for having it set aside.(p)

61. Legal effect of marriage.—The marriage as soon as it is completed, becomes indissoluble giving rise to certain rights and obligations. In the eye of religion husband and wife coalesce into one body and become one person, but this unity does not extend to matters other than religious. As regards the husband, he is entitled to the custody and the conjugal society of his wife, (p) wherever he may choose to live, in spite of a prior agreement that he is never entitled to remove her from her parents' house ;(q) but he is bound to maintain her personally by living with her and providing her with a suitable place for residence. While the Hindu Law enjoins upon the wife the duty of attendance to, and veneration for, the husband, it also inculcates that the husband must honour the wife and treat her with affection and courtesy(r) and hence while verbal castigation of the wife would be within the husband's rights, he cannot claim immunity for his assault or battery *against* his wife's person.(s) He is entitled to succeed to her if she predeceases him without issue, and can utilise her Stridhana property to relieve himself in circumstances of extreme distress. As regards the wife, she is bound, even though a minor, to reside with the husband who is her lawful guardian, unless he is guilty of cruelty or misconduct,(t) and is entitled to be maintained by him.

62. Restitution of conjugal rights.—The husband being entitled to the enjoyment of the wife's person and society, he can bring a suit for the restitution of conjugal rights where they are denied.(u) So also can the wife bring a suit for the restitution of those rights, when the husband denies

(n) *Bai Appibai* v. *Khimji*, 1936 B. 138 —38 Bom L. R 77—60 B. 455; *Alfred Robert Jones* v. *Mt. Titli*, 55 A. 185—1933 A. 122; *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316 1 M L.J. 85

(o) *Gajja Nand* v. *Emperor*, 2 Lahore 258 .1922 L. 139

(t) See p. 60 foot note (l).

(p) *Arumuga* v. *Viraraghava*, 24 M. 255—11 M L.J. 69; See *Yamunabai* v. *Narayan*, 1 B 164 regarding husband's suit for damages against a person harbouring the wife.

(q) *Tekait* v. *Basanta*, 28 C 751=5 C. W. N. 673, *Krishna* v. *Balammal*, 34 M. 398 8 I.C. 412; *Bai Appibai* v. *Khimji*, 1936 B. 138—60 Bom 155—38 Bom L.R. 77.

(r) *Matangini* v *Jogendra*, 19 C 84.

(s) *Queen Empress* v. *Hurree Mohun*, 18 C. 49.

(t) *Dular* v *Diwarka*, 34 C. 971—9 C.W. N. 510; See also *Arumuga* v *Viraraghava*, 21 M 255 regarding the custom to detain the bride in the parents' house till she attains puberty.

(u) *Binda* v. *Kaunsilia*, 13 A. 126

them to her.[v] A husband is not entitled to resist the wife's suit on the ground of the wife's ill-health, or inability to afford him the marital rights, or that formerly her parents refused him her company. [w] But in neither case does a decree follow in favour of the plaintiff as a matter of course on the proof of marriage. A husband will not be entitled to the relief claimed, if the wife proves any one of the following: (*i*) that he has been habitually cruel towards her,[x] or has been guilty of a grave matrimonial offence;[y] (*ii*) that he has been suffering from some loathsome disease such as syphilis or leprosy;[z] (*iii*) that he has adopted another religion;[a] and (*iv*) that her feelings are being outraged by the husband keeping a concubine in the house.[b] But defences, such as the minority of the wife,[c] or the infidelity[d] or the second marriage[e] of the husband, or his occasional insults[f] or assaults[g] ordinarily incidental to marital life, or his ugliness or penury[h] or unorthodox life, or that sexual intercourse was never had previously,[i] or is impossible owing to her physical defect,[j] or her unhappiness owing to the presence of husband's relations in the house and his refusal to allow her to frequently visit her own people,[k] will not avail the wife to resist the husband's suit for restitution. The Court will decree the husband's suit only if it is *bona fide*,[l] and will refuse relief where it is brought to coerce the wife into delivering to him some property[m] or relinquishing a claim,[n] or where the marriage had been brought about by him by

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(*v*) *Surjyamoni* v. *Kalikanta* 28 C 37 5 C W N 195.

(*w*) *Kuppammal* v. *Kuppamachari*, 76 M L J. 363 24 I.C. 380

(*x*) *Kondal Rayal Reddiar* v *Ranganayaki Ammal*, 46 M 791 18 L.W 465. 1921 M. 49 45 M L J 186 1923 M W.N 199; *Mst Anis Begum* v *Malik*, 55 A 743 1933 A L J. 1079 1933 A 631 (on the nature of evidence of cruelty)

(*y*) *Dular Koer* v *Dwarka Nath*, 34 C 971 9 C W N 510, *Yamuna Bai* v *Narayan*, 1 B. 164; *Sahadur* v *Rajwanta*, 27 A 96 1 A L J. 433

(*z*) *Prem Kuvar* v. *Bhika*, 5 Bom H C R (A.C.) 209, *Shinappaya* v *Rajamma*, 45 M. 812 43 M L J. 171 16 L W 139 1922 M W N 489 1922 M. 399

(*a*) *Paiji* v. *Sheo Narain*, 8 A 78.

(*b*) *Dular Koer* v. *Dwarka Nath*, 34 C. 971- 9 C.W N 510, *Mt. Chitha* v *Chedi*, 4 Luck 355–115 I.C. 299–1929 Oudh 121; *Mt. Sita Kumbhar* v *Debidin*, 142 I.C. 151–1933 N. 5.

(*c*) *Surjyamoni* v. *Kalikanta*, 28 C 37 5 C W N. 195.

(*d*) *Bindu* v. *Kaunsilla*, 13 A. 126.

(*e*) *Mottilal* v. *Bai Chenchal*, 4 Bom. L. R. 107; *Mst. Kishen* v. *Mangal*, 1935 A. 927. *Arumugam* v *Tulakanam*, 7 B 187; *Nathubai* v. *Jarher*, 1 B. 121

(*f*) *Yamuna* v *Narayan*, 1 B. 164; *Mst. Kishen* v *Mangal*, 1935 A 927

(*g*) *Jogendra* v *Bama*, 5 C 500.

(*h*) *Mt Hira* v *Aye Maung*, 1931 R. 111

(*i*) *Mt. Vithi* v *Pailu*, 1933 N. 186, *Dadaji* v. *Rukmabai*, 10 B 301

(*j*) *Purshotamdas* v *Bai Mani*, 21 B. 610

(*k*) *Rukmani* v. *Chari*, 69 M L J 210–1935 M 616 1935 M.W.N. 869–42 L.W. 702

(*l*) *Busaini* v. *Rustam*, 29 A 22–3 A.L. J. 637, *Bai Jivi* v *Narsingh*, 51 B. 329–1927 B 264. 29 Bom. L R. 332; *Ude Singh* v. *Mst. Daulat*, 16 L. 892–1935 L. 386; For court's power in proper cases to impose conditions in granting restitution, see *Jogendronundini* v. *Hurry Doss*, 5 C. 500; *Surjyamoni* v. *Kalikanta*, 28 C. 37–5 C W N. 195; *Paiji* v *Sheonarain*, 8 A. 78; *Buzloor* v. *Shumsoonissa*, 11 M.I.A. 551.

(*m*) *Khurshedi* v *Khurshedi*, 12 A L.J. 1065 25 I.C. 213.

(*n*) *Buzloor* v. *Shumsoonissa* 11 M.I.A. 551 *See also Bai Jivi* v. *Narsingh*, 51 B. 329–1927 B. 264 29 Bom. L.R. 332 as regards absence of bona fides.

fraud.[k] Where the husband has been guilty of a course of conduct towards his wife which would be regarded as cruel to her and which, if persisted in, would undermine her health, there is sufficient justification for refusing to the husband the wife's conjugal society.[o] But the mere fact that there is a consent order under S. 488 of the Code of Criminal Procedure is not a bar to the husband's suit for restitution of conjugal rights unless the husband has also agreed that the wife should live away from him.[p] Nor will the dismissal of a prior suit by the husband for restitution of conjugal rights against his minor wife of tender years prevent the sustainability of a fresh suit for that relief when the girl has attained puberty and is in a position to be sensible of her marital relations.[q] An agreement not to sue for restitution of conjugal rights and that the spouses should live separate is not a valid defence to a suit for restitution, as the agreement will be viewed as one opposed to public policy, unless there are justifying reasons for separate living.[r]

63. Breach of Marriage Contract.—A contract to marry cannot be specifically enforced,[s] nor will any of the parties be restrained by an injunction from marrying another person.[t] But damages are awardable against the guardian to the party aggrieved by the breach of the contract,[u] and the plea that the girl is unwilling to marry[uu] or that the boy refuses to marry the girl[v] is no defence to the action. The quantum of damages in such cases is always a matter in the discretion of the Court, and when the contract has been broken on justifiable grounds, as for instance, on the ground of chronic ill-health of the boy, only the actual expenses incurred during the betrothal are recoverable.[w] When the girl or boy dies before marriage, the other party is entitled to get back the presents given by him.[x] But a contract of betrothal made in respect of a girl not born at the time of the contract is a nullity and cannot form a basis for damages for breach[y] since Hindu Law does not permit of ante-natal betrothal of children. But the fact that a girl has already been betrothed to a particular person does not render her marriage with another invalid.[z]

(k) See p .62 foot note (k)

(o) *Kondal Rayal* v *Rangannayaki*, 46 M 791-18 L.W. 465—1924 M. 49-45 M.L.J. 186—1923 M.W.N. 499; *Mt. Chilha* v. *Chezi*, 4 Luck. 355. 1929 Oudh 121 (case of husband keeping the wife's sister); *Russel* v. *Russel*, (1897) A.C. 393; *Swatman* v. *Swat man*, 164 E.R. 1467.

(p) *Guruvappa* v. *Thayaramma*l, 54 M. 558—60 M.L.J. 433—33 M.L.W. 423=1931 M.W.N. 364—1931 M. 482.

(q) *Ram Harakh* v. *Jagar Nath*, 53 A. 815—1932 A 5=1931 A.L.J. 816.

(r) *Rajlukhy* v. *Bhootnath*, 4 C.W.N. 488; *Krishna* v. *Balammal*, 34 M. 398=8 I.C. 412.

(s) *Umed* v. *Nagindas*, 7 B H C.R. (O.C) 122, *In re Ganput*, 1 C. 74; *See also Specific Relief Act*, 1877. *S.* 21 (b).

(t) *In re Ganput*, 1 C. 71.

(u) *Purushottam* v. *Purushottam*, 21 B. 22.

(uu) *Short notes*, 33 L.W. p 3.

(v) *Balubhai* v. *Nanabhai*, 41 B. 446—57 I.C. 621 22 Bom. L.R 143.

(w) *Gulabchand* v. *Fulbai*, 3 I C 748—33 Bom. 111—11 Bom. L.R. 649.

(x) *Atma Ram* v *Banku Mal*, 1930 Lah. 561-11 Lah. 598.

(y) *Khimji* v. *Narsi*, 39 B. 682—17 Bom. L. R. 225.

Agreement in Restraint of Marriage.—Under S. 26 of the Indian Contract Act "*Every agreement in restraint of the marriage of any person, other than a minor, is void.*" This means, not that every agreement in restraint of marriage is unenforceable, but only such agreements as operate in general or total restraint of marriage.[a] Where the restriction is only partial, as for instance, a restriction against a marriage with a particular person or limited class of persons,[b] or a restriction against second marriage,[c] the restriction is not void.[d] Hindu Law no doubt permits of plurality of marriages even during the subsistence of an earlier marriage, but this does not mean that that law favours polygamy. Indeed, if one looks into the conditions with which the right of the husband to take a second wife during the life-time of the first wife is hedged in, it is difficult to resist the conclusion that our sages had a jealous partiality for monogamy. Hence, any contention that an agreement by the husband not to marry again during the subsistence of an earlier marriage is opposed to the policy of the Hindu Law is unsustainable.[e] But if the husband's agreement goes further and prevents him from marrying at all even after the death of his former wife, it can be said to offend the policy of the Hindu Law, as in such a case there is a break on the continuity of the flow of religious benefit arising out of *grahasthasramam* or the status of married life.

64. Marriage brocage contracts.—An agreement to assist a Hindu for reward in procuring a wife is void, as being contrary to public policy.[f] Agreements for promoting marriages for reward are void on the ground that every marriage ought to be free and ought not to be affected by mercenary considerations, and they are void even when the persons to receive the reward are parents or guardians of the bride or bridegroom.[g] It is immaterial whether the contract is to procure a marriage with a particular individual, or with one out of a class of persons, or to procure a marriage generally with any person who may be considered suitable. In either case the evil consists in the introduction of a money

(a) *Morley* v *Reynoldson*, (1843) 2 Hare. 570, *Baeker* v *White*. (1590) 2 Vern. 215.

(b) *Jenner* v *Turner*, (1880) 16 Ch D 188

(c) *Allen* v. *Jackson*, 1875 1 Ch. D. 399 C A., *Khalilel* v. *Marian*, 59 I C. 804; *Poonoo* v *Fyez*, 23 W.R. 66

(d) *But see U Ga Zan* v. *Hari Pru*, 24 I C. 777.

(e) *But see Sitaram* v. *Mt Aheree*, 11 B L R. 129- 20 W.R 49. *See also Emperor* v. *Lazar*. 30 M. 530.

(f) *Vaithyanathan* v. *Gangarazu*, 3 M. L. J. 132-17 M. 9; *Surju Pershad* v. *Narain Pershad*, 2 O.C. 365, *Pitamber* v. *Jagjivan*, 13 B. 131.

(g) *Baldeo* v. *Mahamaya*, 15 C.W.N. 447 -9 I C. 652; *Scott* v. *Tyler*, *W and T.L C.* 599; *Hamilton* v. *Mohun*, 1 P. Wms. 118; *Hermann* v *Charlesworth*, (1905) 2 K.B. 123; *Dulari* v. *Vallabhdas*, 12 B. 126; *Pitamber* v. *Jagjivan*, 13 B. 131; *Gulabchand* v. *Fulbai*, 32 B. 411; *Venkata Krishnayya* v. *Lakshmi*, 32 M. 185-18 M. L.J. 403-3 I.C. 554; *Ramchand* v. *Audaito*, 10 C. 1054; *Ram Sumram* v. *Gobind*, 5 Pat. 646=1924 Pat. 582.

payment into that which should be free from any such taint.[h] But if the payment has been made and the marriage has taken place, the money cannot be recovered,[i] and S. 23 of the Contract Act which renders unlawful the consideration of an agreement which is opposed to public policy, does not sanction the recovery of the property which forms such consideration after the object of the agreement has been fulfilled.[j] Even an agreement providing for the payment of a certain amount by way of penalty by the girl's father to the boy's father in case the girl fails to marry the boy is void.[j] But brokerage paid with reference to a marriage which fails to take place is recoverable.[k]

65. Expenses of Marriage.- Marriage being a sacrament with the Hindus, its performance, especially in the case of girls, is an imperative duty upon the manager of the family, and a debt contracted by the manager is one for the family's benefit.[l] Under the Mitakshara the marriage expenses of the male members of a joint family and of their daughters are borne by the family property so long as the family is joint.[m] Even when a son institutes a suit for partition against his father and brothers, his share in the family property cannot escape the liability to share in the expenses of the marriage of his sister who is married after the institution of the suit and of those sisters who are still to be married.[n] But in such a case the expenses of the future marriage of a daughter of the plaintiff would be borne by his own share, and the share of his brother will not be liable for such expenses.[n] This rule that a provision should be made on partition for expenses of future marriages in the family does not apply in the case of unmarried male members of the family, and in a suit instituted for partition, a male member who remains unmarried at the time is not entitled to have provision made for his marriage expenses even though the marriage takes place before the decree in the partition suit.[o]

(h) *Hermann* v. *Charlesworth*, (1905) 2 K. B. 123 C.A. and *Halsbury's Laws of England Vol VII*, page 397 para 823

(i) *Venkata Krishnayya* v. *Lakshmi*, 32 M. 185=3 I.C. 554=18 M.L.J. 403; *Ram Sumram* v. *Gobind*, 5 P. 646 1926 P. 582; *Jagdishwar* v. *Sheo Buksh*, 51 I.C. 656 = 42 M. 644 -36 M.L.J. 455.

(j) *Devarayan* v. *Muthuraman*, 37 M. 393=18 I.C. 515=24 M.L.J. 310=1913 M.W.N. 200.

(k) *Srinivasa* v. *Sesha*, 41 M. 197=34 M.L.J. 282=6 L.W. 42 - 41 I.C. 783; *Bhan Singh* v. *Kaka*, 1933 Lah. 849; *Gulabchand* v. *Fulbai*, 33 B. 411; *Ramchand* v. *Audaito*, 10 C. 1054; *Rambhat* v. *Timmayya*, 16 B. 673.

(l) *Srinivasa* v. *Thiruvenkadathaiyangar*, 25 M.L.J. 644=38 M. 556=23 I.C. 264; *Sundarabai* v. *Shivnarayan*, 32 B. 81=9 Bom L.R. 1366.

(m) *Bhagirathi* v. *Jokhu Ram*, 32 A 575=7 A.L.J. 667; *Gopalakrishnan* v *Venkatanarasa*, 23 M.L.J. 288 - 37 M. 273, *Ranganayaki* v. *Ramanuja*, 35 M. 728=21 M.L.J. 600; *Srinivasa* v. *Thiruvengadathaiyangar*, 25 M.L.J. 644=38 M. 556=35 I.C. 264; *Sundarabai* v. *Shivnarayan*, 9 Bom. L.R. 1366=32 B. 81. *Mitak.* I. 7; *Debilal* v. *Nandkishore*, 1 Pat. 266.

(n) *Subbayya* v. *Ananta*, 53 M. 84=30 L.W. 923=1929 M. 586=57 M.L.J. 826 (F.B.).

(o) *Ramalinga* v *Narayana*, 45 M. 489 =20 A.L.J. 839=24 Bom. L.R. 1209=26 C. W.N. 329 - 43 M.L.J. 428=49 I.A. 168=16 L.W. 639=1922 P.C. 201=1922 M.W.N. 399.

The widowed mother of a girl, who gave her away in marriage without consulting her husband's father, is entitled to recover reasonable expenses of the marriage out of the joint property even though she does not show that her father-in-law or the other members of the joint family wrongly or improperly refused to perform the marriage.(p) So also a daughter of a Sudra is entitled to have her marriage expenses paid out of the father's estate in the hands of her step-mother.(q) For the same reason, where the paternal relatives of the girl refuse to incur the expenses of her marriage, whereupon her maternal uncle who had also been legally appointed her guardian, effected the marriage *bona fide*, he is entitled to recoup himself from the estate of the girl's father in the hands of his collaterals.(r) The property of a Hindu passing into the hands of his collateral heirs after his death, is liable for the reasonable marriage expenses of the daughter of the last holder's predeceased son.(s) In the case of the marriage of a sister, though the duty of giving her in marriage devolves upon the brother in the absence of the father or the grandfather, its expenses are chargeable only upon the paternal estate in his hands and his separate property is not liable for such expenses.(r)

66. Divorce and Dissolution.—"Neither by sale nor desertion can a wife be released from her husband"—Manu, ix-46. In the absence of a custom to the contrary(t) there can be no divorce between a Hindu husband and his wife(u) who by their marriage had entered into a sacred and indissoluble union, and neither conversion, nor degradation, nor loss of caste, nor the violation of an agreement against polygamy, dissolves the marriage tie.(v) The Bombay High Court in *Narayan* v. *Laving*(w) tabooes a custom as immoral which allows the wife to desert her husband at her pleasure and marry another without his consent, and doubts in *Khemkor* v. *Umai Shankar*(x) the validity of even a custom which allows her to re-marry with the consent of her first husband. The same High Court also condemns as opposed to public policy a

(p) *Ranganayaki* v. *Ramanuja*, 35 M. 728=21 M.L.J. 66=11 I.C. 570.

(q) *Bapayya* v. *Rukhamma*, 4 I.C. 1069 =15 M.L.J. 666. On this question see also *Arunachala Reddy* v. *Arunachala Reddy*, 10 I.C. 285; *Sundrabai* v. *Shivnarayan*, 32 B 81=9 Bom. L.R. 1366.

(r) *Khan Chand* v. *Raushan*, 1932 L. 129; *Fulsing* v. *Ganesh*, 14 N L.J. 84=1931 N. 147.

(s) *Ram Labhaya* v. *Mt. Nihal*, 1931 A. 127: See also *Ramcoomar* v. *Ichamoyi*, 6 C. 36.

(t) *Gopi Krishna* v. *Mst. Jaggo*, 44 L. W. 84=1936 P.C. 198=71 M.L.J. 31=40 C.W.N. 1007=38 Bom. L.R. 751=63 I.A. 295=58 A. 397 1936 M.W.N. 652=1936 A. L.J 819

(u) *Sankaralingam* v. *Subban*, 17 M. 479; *Kudomee* v. *Jotee Ram*, 3 Cal. 305.

(v) *R.* v. *Marimuthu*, 4 M. 243; *Administrator-General of Madras* v. *Anandachari*, 9 M. 466; *Subbaroya* v. *Ramaswamy*, 23 M. 171; *Pakkiam* v. *Chelliah Pillai*, 46 M. 839=1924 M. 18=45 M.L.J. 208 (F.B.); *Sitaram* v. *Aheree*, 20 W.R. 49; *Government of Bombay* v. *Ganga*, 4 B. 330; *In the matter of Ram Kumari*, 18 C. 264; *Nandi* v. *Crown*, 1 Lah. 440.

(w) 2 B. 140.

(x) 10 Bom. H.C.R. 381.

custom allowing divorce as a matter of course on payment of a small fine fixed by the caste.(y) But the Madras High Court holds a custom valid which enables either spouse to divorce the other with the latter's consent.(z) In *Sankaralingam* v. *Subban*,(z) Collins C.J. and Parker J., observed "we do not think that the case of *Uji* v. *Hathi Lalu*(a) is in point, since the question there was whether the caste could sanction a woman's remarriage without a *divorce*, i.e., without a proceeding to which both husband and wife were parties. Here the finding is that there has been a divorce according to the custom of the potters in Tinnevelly. The finding further is that divorce in this form is consistent with the 'original' customs of the potters, and, if this be so, the custom is sufficiently ancient We do not see that it is immoral, since it does not ignore marriage as a legal institution, but provides a special mode by which it may be dissolved. The fact that there is a money payment does not make the custom immoral, and among the inferior castes similar customs are known to prevail." A review of the authorities on the question of custom sanctioning remarriage of a woman during the life-time of the first husband leads to the following position: a custom by which a woman can marry again during the life-time of the first husband without the first marriage being annulled by divorce or in some manner recognised by caste usage as equivalent to divorce, as for instance abandonment by the first husband,(b) the mere wish of the woman against that of the husband being insufficient for this purpose, is void as an immoral one, because if a wife could leave her husband whenever she pleased and without any forms or justification whatever, the marriage tie to which ordinarily a special sanctity is lent by the Hindu religion and sentiment, will have absolutely no force at all, and the intercourse of the sexes, in a caste in which such a state of society was allowed, would reduce its members to the level of the beasts of the field to the standing disgrace and mortification of a community which had been very justifiably priding itself on its moral civilisation and culture.(c)

Though conversion does not *ipso facto* operate as a dissolution of the marriage, yet under the Native Converts Marriage Dissolution Act, XXI of 1866, when one of the spouses becomes a convert to Christianity, and the other on that ground has been

(y) *Keshav* v. *Gandi*, 39 B. 538=29 I.C. 952=17 Bom. L.R. 584.

(z) *Sankaralingam* v. *Subban*, 17 M. 479.

(a) *Uji* v. *Hathi*, 7 B.H.C.R. 133.

(b) *Gopi Krishna* v. *Mst. Jaggo*, 1936 P.C. 198=58 A. 397=63 I.A. 295 :44 L.W. 84=1936 M.W.N. 652=1936 A.L.J. 819=71 M.L.J. 31=40 C.W.N. 1007=38 Bom. L.R. 751.

(c) *Gedalu Narayana*, *in re* 36 L.W. 237=1932 M.W.N. 1082=1932 M. 561; *Budansa Rowther* v. *Fatma Bi*, 26 M.L.J. 260=1914 M.W.N. 278=22 I.C. 697; *Uji* v. *Hathi*, 7 Bom.H.C.R. 133; *Reg.* v. *Bai Rupa*, 2 Bom. H.C.R. 117; *Reg* v. *Karsan*, 2 Bom. H.C R. 124.

refusing to live with the convert for a period of six months, the convert may apply to the Court to order the Hindu spouse to live with the convert or in the alternative to dissolve the marriage, and the Court after allowing the Hindu spouse a period of one year after the hearing of the petition shall pass a decree dissolving the marriage if the other spouse still refuses to live with the convert. After dissolution both the parties are at liberty to marry any other they like. In a case where the marriage has not been consummated, the marriage may be dissolved even without allowing the above period of one year *locus penitentiæ*. As regards cases where both the spouses had become converts to Christianity and then one of them applied for divorce of the other alleging one of the grounds for divorce mentioned in the Indian Divorce Act, the Madras High Court held that the Court had no jurisdiction to grant divorce under the Act on the ground that the Divorce Act applied only to monogamous marriages and not to Hindu marriages which are polygamous,[d] while the Calcutta High Court took the view that the Court had jurisdiction in the matter on the ground that the circumstance that the petitioner was a Christian at the time of the petition was sufficient to give the Court jurisdiction under the Divorce Act in spite of the marriage having been a Hindu marriage.[e] The ruling of the Madras High Court appears to be the correct one in view of the fact that the jurisdiction of the English Courts to grant a divorce, which is the jurisdiction conferred on the Indian Courts by S. 7 of the Divorce Act, is confined only to cases of monogamous marriages and does not extend to cases of polygamous marriages like those amongst the Hindus.[f] S. 7 of the Divorce Act does not seem to have been specifically brought to the notice of the Court in *Gobardhan's* case. But the amendment to the Divorce Act introduced by Act X of 1912 has now brought the law in conformity with the view expressed by the Calcutta High Court.

67. Marriages of Widows.—A Hindu widow, even apart from custom, can now contract a legal marriage under the Hindu Widows' Remarriage Act of 1856, and the person she remarries may even be a person of her father's *gotra*, because by her first marriage, her father's gotra had ceased to be hers,[g] but she forfeits on such remarriage any right or interest which she may have in her former husband's property.[h] But the remarriage does not

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(d) *Thapita Peter* v *Lakshmi*, 17 M 235.

(e) *Gobardhan* v *Janadamoni*, 18 C. 232.

(f) *Brinkley* v. *Attorney-General*, L.R. 15 P.D. 76; *Hyde* v. *Hyde*, L.R. 1 P. and D. 130.

(g) *Radha Nath* v. *Shaktipado*, 1936 A. 624 1936 A L J. 970; But see *Lachman* v. *Mardan*, 8 A 143; *Poorunmul* v. *Toolsee*, 3 Agra, 350.

(h) S. 2 of the Act.

disable her from inheriting the property of her daughter,[i] or her son.[j] *See* S. 512.

68. Statutory Marriages.—Special kinds of marriages authorised by Statutes fall under four enactments.

(1) Anand Marriage Act (VII of 1909). This Act validates the peculiar kinds of marriages of the Sikhs without Hindu rites about the validity of which there were formerly some doubts.

(2) The Malabar Marriage Act (VI of 1896). Malabar marriages known as Sambandhams are merely polyandrous sexual unions, on which no rights to property or inheritance are founded, terminable at the will of either party, subject at best to certain conventional restraints among the more respectable classes such as money payment and the control of the relations.[k] By this Act, alliances which will be recognised as valid marriages, with the usual incidents of guardianship, maintenance and the right to succeed to either spouse's property, are allowed to be contracted by the registration of the Sambandhams with the Marriage Registrars. (This Act is now repealed and replaced so far as Hindus following Marumakkathayam Law are concerned by Mad. Act XXII of 1933. *See* Ch. XVII.)

(3) The Hindu Widows' Remarriage Act. Under this Act, marriages of Hindu widows are legalised, the only restriction being that if the widow is a minor, her guardian's consent is necessary for the marriage. But if the marriage does take place without his consent, his right to avoid the marriage can be exercised only before consummation, and in the absence of such avoidance the marriage will continue to be valid.[l]

THE HINDU WIDOWS' REMARRIAGE ACT (XV OF 1856).

Preamble.

WHEREAS it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property ; and

Whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience ; and

(i) *Bhiku* v. *Keshav*, 1924 Bom. 360=26 Bom. L.R. 235.

(j) *Basappa* v. *Rayava*, 29 B. 91=6 Bom. L.R. 779 ; *Lakshmana* v *Siva*, 28 M. 425=15 M.L.J. 245; *Kundan* v. *Secretary of State*, 7 L 543 =1926 L. 673.

(k) *Korapa* v. *Reg.* 6 M. 374; *Subbu Heyadi* v *Tongu*, 4 M.H.C.R. 196.

(l) See S. 67.

Whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare ; It is enacted as follows :—

Marriage of Hindu widows legalised.

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding.

Rights of widow in deceased husband's property to cease on her remarriage.

2. 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, 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 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.

Applicability of the Act. On the question of the applicability of the Act in the case of remarriage of a Hindu widow by the custom of the caste allowing such a remarriage, there has been a divergence of judicial views, one view being that the forfeiture enacted by S. 2 applies even in such a case,(m) while the contrary view is that the forfeiture under the Act will come into operation only if remarriages of widows are under the provisions of the Act when there is no caste custom sanctioning the remarriage.(n) But when the generality of the wording of S. 2 which embraces all Hindu widows, i.e., persons who become widows when they are Hindus, is considered, it is difficult to support the latter construction. S. 2 lays down as an express enactment applicable to all Hindu widows what was at the time of the enactment generally known to be the law, namely, that a remarrying widow ceased to have any interest in her former husband's property and that the next heir of that husband should succeed to the same. After such an express enactment, express both in its deprivation and in its conferment, it is difficult to contend that any custom permitting a remarrying widow to retain her former husband's property was or could be saved. For the same reason, namely, that the Act applies in the case of remarriage of a widow who was a Hindu at the time she became a widow, it stands to sense that even where she remarries after becoming a convert to some other religion, she forfeits the estate inherited by her from her Hindu husband(o) and the argument against forfeiture in such a case, namely, that the Act is inapplicable to the case of a remarriage of a

(m) *Gajapathi* v. *Jeevammal*, 30 L.W. 338=57 M.L.J. 253 : 1929 M. 765; *Santala* v. *Badaswari*, 50 C. 727 : 27 C. W.N. 669= 1924 C. 98 *Vijiaraghava* v. *Ponnammal*, 62 M.L.J. 131=1932 M. 120=1932 M.W.N. 1257—34 L.W. 967; *Raghunath* v. *Lakshmi*, 59 B. 417 : 37 Bom L.R. 150=1935 B. 298; *Murugayi* v. *Viramakali*, 1 M. 226; *Matungini* v. *Ram Rutton*, 19 C. 289; *Rasul* v *Jehan*, 22 C. 589; *Vithu* v. *Govinda*, 22 B. 321; *Suraj* v. *Atar*, 1 Pat. 706=1922 Pat. 378; *Nawab* v. *Gauri*, 1935 Pat. 58.

(n) *Bhola Umar* v. *Mst. Kausilla*, 55 A. 24=1932 A.L.J. 941—1932 A. 617 (F.B.); *Gajadhar* v. *Mst. Sukhdei*, 5 Luck. 689= 1931 Oudh 107.

(o) *Raghunath* v. *Lakshmi*, 59 B. 417=37 Bom. L.R. 150=1935 B. 298; *Vitta* v. *Chatakondu*, 41 M. 1078=35 M.L.J. 317=8 L.W. 480=1918 M.W.N. 625; See contra in *Abdul Aziz* v. *Nirma*, 35 A. 466=11 A.L.J. 678= 20 I.C. 335

Hindu widow who ceased to be Hindu at the time of the remarriage overlooks the well-known principle of law that a Hindu widow does not cease to be the widow of her Hindu husband merely on account of her conversion. But she can, even after remarriage, succeed to the property of her son(p) or daughter(q) by the first marriage on the death of the son or daughter subsequent to the remarriage, but she cannot succeed as a gotraja sapinda to the relations of her first husband.(r) It has also been held that an unqualified gift to a widow from her father-in-law is not forfeited by her on her remarriage on the ground that such a gift is not one of the modes of the acquisition of rights and interests by a widow within the meaning of S. 2 of the Act.(s)

Guardianship of children of deceased husband on the remarriage of his widow.

3. On the remarriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father paternal grandfather or the mother or paternal grandmother of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have no property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

4. Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of rights of widow marrying, except as provided in sections 2 and 4.

5. Except as in the three preceding sections is provided, a widow shall not, by reason of her remarriage, forfeit any property or any right to which she would otherwise be entitled; and every widow who has remarried shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

(p) *Mt. Patti* v. *Nirdhan*, 1924 Pat. 233; *Basappa* v. *Rayava*, 29 B. 91=6 Bom. L.R. 779; *Lakshmana* v. *Siva*, 28 M. 425=15 M. L.J. 245; *Kundan* v. *Secretary of State*, 7 Lah. 543=1926 L. 673.

(q) *Bhiku* v. *Keshav*, 26 Bom. L.R. 235=1924 B. 360.

(r) *Pranjivan* v. *Bai Bhikhi*, 45 B. 1247 =23 Bom. L.R. 553=1921 B. 57.

(s) *Sesha* v. *Venkamma*, 47 M.L.J. 1= 1924 M. 600=19 L.W. 510=1924 M.W.N. 158.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

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

Consent to remarriage of minor widow.

7. If the widow remarrying is a minor whose marriage has not been consummated, she shall not 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 brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section.

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

Effect of such marriage Proviso.

And all marriages made contrary to the provisions of this section may be declared void by a Court of law. Provided, that in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to remarriage of major widow.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

Notes. There can be no valid marriage without a substantial performance of the requisite religious rites.(t)

(4) The Special Marriage Act (III of 1872). Under this Act a marriage which is of a purely civil nature without the accompaniment of any of the religious rites takes place before a Registrar of Marriages by the parties subscribing themselves to a declaration that neither of them professes the Christian, Jewish, Hindu, Mahomedan, Parsi or the Jain religion. But the circumstance that two Hindus are married under this Act does not make them cease to be Hindus for purposes of their other rights and obligations under the Hindu Law,(u) excepting those expressly affected by the Act itself.

The Special Marriage Amendment Act of 1923. This Act dispenses in the case of Hindus, Buddhists, Sikhs and Jains, with the necessity for a declaration required by the main Act of 1872 and effects important changes in the parties' status and rights under the Hindu Law.(v)

(t) *Padayachi v. Ammal*, 1938 R. 59. 1069 1923 C. 265.=26 C.W.N. 799.
(u) *Jnanendra Nath Ray, In re* 49 C. (v) See S. 50.

THE SPECIAL MARRIAGE ACT (III OF 1872).

As amended by Act XXX of 1923.

Preamble.

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion, [and for persons who profess the Hindu, Buddhist, Sikh or Jaina religion] and to legalise certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

Local extent.

1. This Act extends to the whole of British India. [*Commencement.*] *Rep. by the Repealing Act, 1874 (XVI of 1874).*

Conditions upon which marriages under Act may be celebrated.

2. Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish, or the Hindu or the Muhammadan, or the Parsi or the Buddhist, or the Sikh or the Jaina religion, [or between persons each of whom professes one or other of the following religions, that is to say the Hindu, Buddhist, Sikh, or Jaina religion] upon the following conditions:—

(1) neither party must, at the time of the marriage, have a husband or wife living;

(2) the man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar;

(3) each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage;

(4) the parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

1st Proviso.—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

2nd Proviso.—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

* * * *

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

Marriage how to be solemnized.

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and the hearing of the Registrar and witnesses, "I, [*A*], take thee, [*B*], to be my lawful wife (*or* husband)."

* * * *

Certificate of marriage.

13. When the marriage has been solemnized, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose and to be called the "Marriage Certificate Book under Act III of 1872," in the form given in the third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

Penalty on married person marrying again under Act.

15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code, as the case may be; and the marriage so solemnized is void.

Punishment of bigamy.

16. Every person married under this Act who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the life-time of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

Indian Divorce Act to apply.

17. The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clause (1), (2), (3) or (4) of section 2 of this Act.

Law to apply to issue of marriages under Act.

18. The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisos to section 2 of this Act shall apply to them.

Saving of marriages solemnized otherwise than under Act.

19. Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions, nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but, if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

* * * * *

Effect of certain marriages on coparcenary.

22. The marriage under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family.

Rights of succession in certain cases of marriage under Act.

23. A person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have the same rights and be subject to the same disabilities in regard to any right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850, applies:

Provided that nothing in this section shall confer on any person any right to any religious office or service, or to the management of any religious or charitable trust,

Succession to the property of parties married under Act.

24. Succession to the property of any person professing the Hindu, Buddhist, Sikh or Jaina religion, who marries under this Act, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act, 1865.

Person marrying under Act not to have right of adoption.

25. No person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have any right of adoption.

Adoption by father of person marrying under Act.

26. When a person professing the Hindu, Buddhist, Sikh or Jaina religion marries under this Act, his father shall, if he has no other son living, have the right to adopt another person as a son under the law to which he is subject

CHAPTER IV.

SONSHIP AND LEGITIMACY

"Endless are the heavenly regions for those having sons, but a sonless man has no heavenly region."—Vasishta.

"A Brahmin by birth is a debtor in three ways: to the rishis for reading their sacred books, to the Gods for performing sacrifices and to the paternal ancestors for progeny: he is free from these debts, if he has a son, performs these sacrifices and studies the sacred books"—Revelation.

69. Kinds of sons.—Sons now recognised are of three kinds, (i) Aurasa or legitimate son, (ii) *Dasiputra* or illegitimate son and (iii) Dattaka or adopted son. Legitimate son is one born to a person of his legally married wife, illegitimate son is one born to him of a woman kept by him and an adopted son is one taken in adoption either by him or for him as his son. In ancient days, when society was very much unsettled and the sexual relationship between men and women was very loose, all kinds of sons, some of whom were not the sons of the father and others not even born to his wife, were recognised for the protection of his own house and land which, in the absence of men superior in strength and number, were often threatened with deprivation by his neighbours. Hence we find in primitive society the following kinds of sons being recognised as lawfully belonging to a Hindu: (i) Aurasa or legitimate son, (ii) Putrikaputra or the son of an appointed daughter, (iii) Kshetraja or the son begotten on the wife by another, (iv) Gudaja or the son born to the wife by secret intercourse with another, (v) Kanina or the son of an unmarried woman passing on to her husband on her marriage. (vi) Sahotha, the son of a pregnant bride, (vii) Paunarbhava or the son by a twice married woman, (viii) Nishada or the son by a Sudra woman, (ix) Parasava or the son by a concubine, (x) Dattaka or the adopted son, (xi) Kritrima or the son made, (xii) Krita or the son bought, (xiii) Apavidda or the son abandoned by his own parents and (xiv) Swayamdattaka or the son self-given.[a]

But with the settlement of the society to peace and order and the recognition and enforcement by some superior power of the mutual rights of the people, the idea of family relationship received a better refinement and definition, and all the sons excepting the Aurasa, the Dattaka and the son by a permanently and exclusively kept concubine (Dasiputra) have become obsolete. But the Putrikaputra form of adoption, perfectly natural and consistent with the feelings of affection which a Hindu has towards his

(a) Mayne, pp. 80-82—Yagnyavalkya, II, 128-132.

daughter's son, is still prevalent in Malabar, though in other parts of India it has become obsolete.

70. Maintenance.—Every child whether legitimate or illegitimate is entitled to be maintained by his father or his estate[b] with this qualification that an illegitimate son must be obedient to the head of the family,[c] and when governed by the Dayabhaga school he is not entitled to such maintenance after he attains majority,[d] though under the Mitakshara he is entitled to it for his life.[e] The claim of an illegitimate son to maintenance is not affected by the son being born of a casual[f] or an adulterous intercourse.[g] But it is purely personal to him and is not heritable.[h] The amount of maintenance is dependent upon the circumstances of each case and should be awarded on a liberal scale and not merely as a compassionate allowance,[i] though in no case should it exceed the income of the share which he would receive as a dasiputra.[j] *See* also S. 212.

71. Illegitimate son's heritable capacity.—An illegitimate son is entitled only to maintenance and takes no part in the inheritance in the three regenerate castes.[k] But amongst Sudras, if the illegitimate son is born to a permanently and exclusively kept concubine[l] who is not a non-Hindu[m] and does not belong to a higher caste[n] and he is not the offspring of an incestuous[o] or an adulterous intercourse with a married woman,[p] he gets a

(b) *Chunturya* v. *Sahsb Purhulad*, 7 M. I A 18; *Roshan Singh* v *Balwant Singh*, 22 A. 191 27 I A. 51 4 C.W.N. 353-2 Bom. L.R. 529 (P C); *Vellayappa* v *Natarajan*, 50 M. 340 25 L W. 493 52 M.L.J. 229 -1927 M. 386 and in 55 M. 1. (P.C) -58 I A. 402 -1931 P C. 294 1931 M.W N. 848-35 C.W N. 1278-61 M.L.J. 522 34 L.W. 589 .1931 A.L.J. 1123-33 Bom. L R. 1526.

(c) *Hargobind* v. *Dharam Singh*, 6 A. 329 (P.C.)

(d) *Vellaiyappa* v. *Natarajan*, 50 M. 340 —25 L.W. 493 —52 M.L.J. 229—1927 M. 386; *Nitnaney* v. *Baneshur*, 4 C. 91.

(e) *Kuppa* v. *Singaravelu*, 8 M. 325.

(f) *Muttuswami* v *Venkataswara*, 12 M.I.A. 203.

(g) *Rahi* v. *Govind*, 1 B. 97; *Viramuthi* v. *Singaravelu*, 1 M. 306; *Muttuswamy* v. *Venkataswara*, 12 M.I.A. 203; *Kuppa* v. *Singaravelu*, 8 M. 325; *Venkatachella* v. *Parvatham*, 8 M.I.C.R. 134; *Subramania* v. *Valu*, 34 M. 68—5 I.C. 919—20 M.L.J. 350—1910 M.W.N. 138.

(h) *Roshan Singh* v. *Balwant Singh*, 22 A. 191—27 I.A. 51—4 C.W.N. 353—2 Bom. L.R. 529 (P.C.).

(i) *Rathinasabapathy* v. *Gopala*, 56 M. L.J. 673—1929 M. 545—29 L.W. 696.

(j) *Chamava* v. *Iraya*, 33 Bom. L.R. 1082—1931 B. 492.

(k) *Roshan Singh* v. *Balwant Singh*. 22 A. 191—27 I.A. 51 4 C.W.N. 353—2 Bom. L.R 529 (P.C.); *Chuudurya* v. *Sahsb Purhulad*, 7 M. I A. 18, Mit 1-12-3.

(l) *Soundararajan* v. *Arunachalam*, 39 M. 136 2 L.W. 1247 29 M L J. 793.-33 I C. 858 (1916) 1 M.W.N 31 (F.B); *Rajani* v. *Nitai*, 48 C. 643—1921 C. 820 -25 C.W.N. 433 (F B).

(m) *Sitaram* v *Ganpat*, 1923 B. 384—25 Bom. L R. 429; *Linqappa* v *Esudasan*, 27 M. 13.

(n) *Ramachandra* v. *Hanamnaik*, 1936 B. 1—60 B. 75 —37 Bom. L.R. 920 ; *Datti Parisi* v. *Bangaru*, 4 M.H C. R. 204.

(o) *Datti Parisi* v. *Bangaru*, 4 M.H.C.R 204; *Soundararajan* v. *Arunachalam*, 39 M. 136—2 L.W. 1247—29 M.L.J. 793—33 I.C. 858 —(1916) 1 M.W.N. 31 (F.B.); *Rajani* v. *Nita*, 48 C. 643—1920 C. 820—25 C.W.N. 433 (F.B.).

(p) *Rajani* v. *Nitai*, 48 C. 643—1921 C. 820—25 C.W.N. 433 (F.B.); *Rahi* v. *Govind*, 1 B. 97; *Soundararajan* v. *Arunachalam*, 39 M. 136—2 L.W. 1247—29 M L J. 793— 33 I.C. 858 (1916) 1 M.W.N. 31 (F B.); *Annayan* v. *Chinnan*, 20 M.L.J. 355—33 M. 368—5 I.C. 84; *Dalip* v. *Ganpat*, 8 A. 387; *Pichai* v. *Gopal*, 1921 M. 647—15 L.W. 15—42 M L J. 276.

heritable capacity in respect of his Sudra putative father's estate. "The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality." If he is the issue of an illegal connection with a married woman, even the consent of her husband would not confer on the illegitimate son a heritable capacity,[q] though he will be entitled to maintenance against the putative father or his estate.[r] The same will be the position even if the woman's husband had left her without providing for her maintenance,[s] or was indifferent to her living with her paramour, since her husband's conduct cannot be construed as amounting to a valid divorce of the wife so as to make her connection with her paramour other than adulterous.[q] But if the connection, though adulterous at the beginning, ceased to be adulterous at the time the illegitimate son was conceived, by the woman losing her husband, his heritable capacity is not affected,[t] nor is it affected by the fact that subsequent to his birth, his mother led a promiscuous life and did not continue as the exclusively kept concubine of his putative father, the reason being that once he gets a heritable right with reference to his putative father's property, it cannot be defeated by the conduct of his mother over which he can have no control. The onus of proving that the illegitimate son is the offspring of an incestuous or adulterous connection is on the person pleading it.[u] The right of an illegitimate son to inherit to his father is a transmissible and not a purely personal one and hence in a competition between a divided brother of the putative father and a son of an illegitimate son who had predeceased the putative father, the latter will exclude the former.[v] It is however submitted that the illegitimate son's heritable right is transmissible only to his legitimate male issue. This position was adverted to but not decided by Bhashyam Ayyangar J. in *Ramalinga* v. *Pavadai*[v] where he observed as follows:—

"The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons, may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died. This is the view maintained by Messrs. West and Buhler in their treatise

(q) *Vithabai* v. *Pandu*, 28 Bom. L.R. 795=96 I.C. 358=1926 B. 301.

(r) *Subramania* v. *Valu*, 34 M. 68=5 I.C. 919=20 M.L.J. 350=1910 M.W.N. 138.

(s) *Sheonandan* v. *Pransingh*, 64 I.C 897=1922 N. 244.

(t) *Tukaram Krishna* v. *Dinkar*, 33 Bom. L.R. 289=1931 B. 221.

(u) *Palani* v. *Kuppusami*, 13 L.W. 511=1921 M. 291.

(v) *Ramalinga* v. *Pavadai*, 25 M. 519=11 M.L.J. 399.

on Hindu Law (3rd Edition, pages 72, 82, 83, 390) and also by Mr. Jolly in his work on Hindu Law (pages 185, 186), and I fully concur in that opinion. The expression 'legitimate son' (*i.e.*, son of a wedded wife) in the text of Mitakshara which entitles an illegitimate son to a half share when there are legitimate sons, evidently includes a grandson and great-grandson and similarly the expression 'illegitimate son' (*i.e.*, a son begotten by a Sudra on a female slave) occurring in the same text, applies not only to the illegitimate son, but also to the grandson and great-grandson by the illegitimate son, at any rate when they are his legitimate descendants. It may be doubtful whether the illegitimate issue of the illegitimate son can, on the principle of *jus representationis*, represent the illegitimate son, if before the inheritance opened, the latter predeceased his father. But it is unnecessary to consider that question as the respondent is the legitimate son of his father."

Both the texts of the Mitakshara and the Dayabhaga lay down the heritable capacity of a son begotten by a Sudra on a *Dasi* (Mitak. i—12—1, 2 : Dayabhaga ix—29). After the abolition of slavery in India, *Dasiputra* in the strict sense of the term, *i.e.*, the son of a female slave, cannot exist. Though the word *Dasi* means ordinarily a slave girl, it also means a Sudra woman,[w] and the term *Dasiputra* used in the texts means an illegitimate son who is the issue of a permanent mistress as distinguished from the offspring of a casual connection.[x] But the permanent mistress must be a Hindu and not a non-Hindu for bringing her son under the description of *Dasiputra*,[y] though she may be a widow,[z] or one between whom and the putative father no valid marriage could have taken place[a] owing to their being within the prohibited degrees of relationship But the illegitimate son's right to inherit does not arise when his putative father dies joint with his coliaterals and leaving no separate property of his own. When the putative father dies undivided from his brothers or other collateral relations, his illegitimate son is not entitled to claim any right in the joint property except that of maintenance, though he is entitled to claim the right of inheritance in respect of the father's separate property.[b] Besides, any relationship between a Sudra male and a Brahmin female, whether it purports to be a relationship by so-called

(*w*) *Soundararajan* v. *Arunachalam*, 39 M. 136—2 L.W 1247—29 M.L.J 793 =33 I.C. 858 (1916) 1 M W N. 31 (F.B); *Rajani* v. *Nitai*, 48 C. 643 =1921 C. 820=25 C.W.N. 433 (F.B.)

(*x*) *Gangabai* v. *Bandu*, 40 B. 369= 18 Bom L.R. 70—32 I.C. 986 ; *Ram Kali* v. *Jamma*, 30 A. 508 =5 A.L.J. 629; *Rajani* v. *Nitai*, 48 C. 643 1921 C. 820=25 C.W.N. 433 (F.B.); *Soundararajan* v. *Arunachalam*, 39 M. 136=2 L.W. 1247—29 M.L.J. 793—33 I.C. 858—(1916) 1 M.W.N. 31 (F.B.).

(*y*) *Lingappa* v. *Esudasan*. 27 M. 13; *Sitaram* v. *Ganpat*, 25 Bom. L.R. 429=1923 B. 384.

(*z*) *Gangabai* v. *Bandu*, 40 B. 369—32 I.C. 986—18 Bom. L R 70.

(*a*) *Rajani* v. *Nitai*, 48 C. 643=1921 C. 820=25 C.W.N. 433 (F B.); *Soundararajan* v. *Arunachalam*, 39 M. 136 =2 L.W. 1247 — 29 M.L.J. 793 - 33 I.C. 858 = (1916) 1 M.W.N. 31 (F.B.).

(*b*) *Vellaiyappa* v. *Natarajan*. 50 M. 240=25 L.W. 493=52 M.L.J. 229—1927 M. 386; affirmed in *Vellaiyappa* v. *Natarajan*, 55 M. 1—34 L W. 589—1931 P.C. 294—58 I.A. 402 =35 C.W.N. 1278=33 Bom. L.R. 1526—1931 M.W.N. 848=1931 A.L.J. 1123= 61 M.L.J. 522 (P.C.).

marriage, or a state of concubinage, is not recognised by Hindu Law ; children begotten by such couples are regarded as *chandalas* and outcaste and are not *dasiputras*, and hence they cannot claim any right to a share in the property of their father.[c] In *Vellaiyappa* v. *Natarajan*,[d] on a consideration of the texts and the cases on the subject of the illegitimate son's right against the estate of the putative father, their Lordships of the Privy Council expressed their opinion "that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family ; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son ; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint property in their hands, but he is entitled as a member of the family to maintenance out of that property ; that his position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and that the Court may, as in their case, award not only future but also past maintenance, so far as it is not barred by the law of limitation, and may direct the same to be secured by a charge on the joint family property. Their Lordships express no opinion as to whether the illegitimate son would have any rights of maintenance out of the joint family property, if the father left separate property or if such property was not sufficient for his maintenance."

72. Extent of his heritable right.—Where a Sudra dies leaving behind him only an illegitimate son and neither an aurasa son, nor a widow, nor his daughter or daughter's son, the illegitimate son is entitled to succeed to the whole estate of his putative father.[e] But if any of them exists he would be entitled only to ½ of what he would have taken had he been legitimate,[f] and hence on the death of the putative father, the illegitimate son is entitled to ¼ of the estate as against one aurasa son, ⅓ as against two aurasa sons, ½ as against the widow,[f] ½ as against a legitimate daughter, ½ as against the daughter's son.[g] He can also enforce his right to inherit against the legitimate son who is in possession of the

(c) *Ramachandra* v. *Hanamnaik*, 1936 B. 1.=60 B. 75=37 Bom. L.R. 920; *Datti Parlsi* v. *Bangaru*, 4 M.H.C.R. 204; See also *Raoji Rupa* v. *Kunjalal*, 54 B. 455=57 I.A. 177=1930 P.C. 163=34 C.W.N. 627=32 Bom. L.R. 808=58 M.L.J. 720=32 L.W. 1.

(d) 58 I.A. 402=55 M. 1=35 C.W.N. 1278=33 Bom. L.R. 1526=1931 A.L.J. 1123 =61 M.L.J. 522—1931 M.W.N. 848=34 M.L.W. 589=1931 P.C. 294.

(e) *Sarasuti* v. *Mannu*, 2 A. 134.

(f) *Kamulammal* v. *Viswanathaswami*, 46 M. 167=17 L.W. 298=44 M.L.J. 465=50 I.A. 32=25 Bom. L.R. 577=27 C.W.N. 1021 =1923 P.C. 8.

(g) *Parvathi* v. *Thirumalai*, 10 M. 334.

properties, and the latter cannot resist his claim on the ground that the property was ancestral property even in the hands of the deceased father.[h] In the application of this rule, the fact that there are two or more widows or daughters or daughter's sons would not make any difference as regards the share that the illegitimate son takes, for in all these cases he would be treated as an aurasa son for purposes of computation of his share and would be given ½ of what he would be getting on that footing, namely ½ of the whole. This principle is to be applied even when subsequent to a partition between the illegitimate son and the legitimate son in which a share is given to their father's widow, the widow dies and the property reverts to the husband's sons, and the illegitimate son is then entitled to claim his share in the property thus reverting, along with the legitimate sons.[i] But in competition with an adopted son, though the adopted son's rights are inferior to those of an aurasa son, the adopted son himself would be treated as an aurasa son and the illegitimate son would be given only ¼ and the adopted son ¾ of the estate and the fact that the adoption was made subsequent to the birth of an illegitimate son does not affect the question.[j]

73. Inheritance to Mother.—An illegitimate son is entitled to inherit to his mother in respect of her Stridhana property.[k]

74. Collateral Succession.—An illegitimate son, though entitled to succeed to his parents, cannot claim to succeed to his father's collaterals. His right to inherit is derived from special texts and cannot be extended beyond what is prescribed by those texts.[l] Hence he is not entitled to inherit to the ancestors or descendants[m] or collaterals of his putative father.[m-a] Nor is he entitled to claim his father's share in the joint family property when the father dies undivided from his own brothers or collaterals, the reason being that on the father's death undivided his collaterals get his share by the operation of the rule of survivorship.[n] *In Ramalinga* v. *Pavadai*,[o] Bhashyam Ayangar, J. defined the rights of an illegitimate son as follows :—

(h) *Karuppannan* v. *Bulokam*, 23 M. 16.

(i) *Bhagwantrao* v. *Punjaram*, 1938 N. 1.

(j) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1=1925 M. 497.

(k) *Ganga* v. *Ghasita*, 1 A. 46 (F.B.); *Hiralal* v. *Tripura*, 40 C. 650=19 I.C. 129 = 17 C.W.N. 679; *Mayna Bai* v. *Uttaram*, 2 M.H.C.R. 196; See S. 508.

(l) *Krishnayyan* v. *Muthusami*, 7 M. 407; *Dharma* v. *Sakharam*, 44 B. 185=55 I.C. 306=22 Bom. L.R. 52; *Ramalinga* v. *Pavadai*, 25 M. 519 :11 M.L.J. 399; *Shome Shankar* v. *Rajeswar*, 21 A. 99; *Gopal* v. *Eroja*, 34 C.W.N. 944=1931 C. 105,

(m) *Zipru* v. *Bomiya*, 23 Bom. L.R. 1195 46 B. 424=1922 B. 176.

(m-a) *Ayisvaryanandaji* v. *Sivaji*, 49 M.L.J 568.=19 M. 116=1926 M. 84; *Raj Fateh* v. *Baldeo*, 3 Luck. 416=1928 O. 233.

(n) *Vellayappa Chetti* v. *Natarajan*, 55 M. 1=34 L.W. 589. 1931 P.C. 294=61 M.L.J. 522=58 I.A 402 :35 C.W.N. 1278= 53 Bom. L.R 1526=1931 A.L.J. 1123=1931 M.W.N. 848; *Nagarathnammal* v. *Chinnu Sah*, 53 M.L.J. 861=1928 M. 127=1927 M. W.N. 750; *Rathinasabapathy* v. *Gopala*, 1929 M. 545=29 L.W. 696=56 M.L.J. 673.

(o) 25 M 519=11 M.L.J. 399.

"The author of the Mitakshara defines the rights of an illegitimate son in chapter I, section xii. He lays down that a son begotten by a Sudra on a female slave can be given a share by the father's choice; but that after the death of the father leaving legitimate male issue, they must allow their illegitimate brother half a share. But if the father died without leaving legitimate male issue but leaving a daughter or daughter's son, the illegitimate son takes half a share along with the daughter or daughter's son as the case may be. But in default of a daughter or daughter's son the illegitimate son takes the whole estate.

The rights of an illegitimate son in the paternal estate when the father has died a separated householder have now been clearly defined by judicial decisions. If the father left legitimate sons, the illegitimate son is a co-sharer with them, the extent of his share being one-half of what it would be if he were a legitimate son, and he can enforce a partition of his share [*Thangam Pillai* v. *Suppa Pillai*(*p*) and *Karuppannan Chetti* v. *Bulokam Chetti*(*q*)] though he cannot, like a legitimate son, claim a share as against his father, during the father's lifetime, even in respect of ancestral property. If the father left a widow, daughter or daughter's son, but no legitimate male issue, the illegitimate son succeeds as a co-heir with the widow, daughter or daughter's son as the case may be, and as sole heir in default of any other heir down to a daughter's son. It is also tolerably well established that an illegitimate son, though he may succeed as heir to his paternal and maternal estate, has no claim to inherit to collaterals [*Shome Shanker Rajendra Varere* v. *Rajesar Swami Jangam*(*r*) and *Krishnayyan* v. *Muttusami*(*s*)]"

75. Succession to illegitimate son.—There is heritable blood between the illegitimate son and his putative father and the latter can, therefore, succeed to the former among the Sudras. (*t*) But as the illegitimate son does not inherit to the legitimate son of a Sudra, it cannot be that the legitimate son can inherit to the illegitimate son. (*u*) Hence even the son of the legitimate son or any other collateral cannot inherit to the illegitimate son. (*v*) But where a woman has two illegitimate children, a son and a daughter, the latter is entitled to succeed to the son as his sister, though born of adulterous intercourse. (*w*) So also the mother of the illegitimate son is entitled to succeed to him, as such succession is not only in consonance with the scheme of the Mitakshara law but is also in accordance with the principles of justice, equity and good conscience. (*x*)

76. Illegitimate son and impartible estate.—In the case of succession to an impartible estate an illegitimate son is excluded by the

(*p*) 12 M. 401.
(*q*) 23 M. 16
(*r*) 21 A 99
(*s*) 7 M. 407.
(*t*) *Subramania* v *Rathnavelu*, 41 M. 44—6 L.W 149—33 M.L.J. 221 1917 M.W.N. 688 42 I.C 556. (F.B.).
(*u*) *Zipru* v. *Bomtya*, 46 B. 424=23 Bom. L.R 1195 1922 B 176.
(*v*) *Zipru* v. *Bomtya*, 46 B. 424 23 Bom. L.R. 1195 1922 B 176; *Maharaja of Kolhapur* v *Sundaram Ayyar*. 48 M. 1 .1925 M. 497
(*w*) *Dattatraya* v. *Matha Bala*, 1934 B. 36 35 Bom. L.R. 1131—58 B. 119.
(*x*) *Jagarnath* v. *Sher Bahadur*, 57 A. 85 1935 A.L.J 150=1935 A. 329.

widow of the last holder,[a] but if a legitimate son who had succeeded his father to an impartible estate had been living jointly with his illegitimate brother, then the illegitimate brother would succeed to the estate on the death of the legitimate brother without male issue.[b]

77. Right to Partition.—*"The son begotten by a Sudra of a female slave (Dasiputra) obtains a share by the father's choice. But after the father's death leaving anurasa sons, let these allow the Dasiputra half of an anurasa son's share" Mitak. 1-12-2.*

An illegitimate son is entitled only to maintenance in the twice-born castes so long as he remains obedient to the head of the family.[a] Even among Sudras he is not a coparcener with his father,[b] and he does not get any right by birth in the ancestral property in his father's hands[c] so as to be able to enforce partition of the property as against him.[d] But the father's death leaving also legitimate sons gives the illegitimate son the right to enforce partition as against these sons[e] provided they have not received the estate by transfer from the father before his death,[f] and the mere fact that the putative father had given during his lifetime certain properties describing them as self-acquired to his illegitimate son does not amount to a partition during the father's life-time so as to extinguish the illegitimate son's right to claim a share against the legitimate son after the father's death[g] But if, without coming to such partition the legitimate and the illegitimate sons continue to live together, the illegitimate son will take the whole properties by survivorship on the death without male issue of the legitimate brother, even excluding the latter's widow.[h] The reason is that on the death of the father, the illegitimate sons form a coparcenary with the legitimate sons, and the ordinary incident of survivorship would also apply in favour of illegitimate children, subject, of course, to the limitation that if there is a partition between the illegitimate son and the legitimate son, the illegitimate son takes only half of what he would have taken if he were legitimate.[i] Though an illegitimate son is entitled to

(a) *Viswanathaswami* v *Kamulammal*, 24 M.L.J. 270. 18 I.C. 1008 1913 M.W.N 182.

(b) *Jogendra* v *Nityanund*. 17 I.A. 128 18 C. 151 (P.C.).

(a) *Roshan Singh* v *Balwant Singh*, 22 A 191 27 I A 51 4 C.W.N. 353—2 Bom. L.R. 529 (P.C.), *Chuoturya* v. *Sahub Purlulad*, 7 M.I.A 18.

(b) *Shamu* v. *Babu*. 52 B. 300=1928 B. 153 30 Bom L.R 438

(c) *Packiriswamy* v *Dorasawmy*, 9 R. 266 -1931 R. 216

(d) *Nathamuni* v. *Parthasaradhi*, 6 L. W. 188—33 M.L.J 203—40 I.C. 830.

(e) *Sadu* v *Baiza*, 4 B 37. *Jogendra* v. *Nityanund*, 18 C. 151 17 I.A. 128 (P.C.); *Ram Saran* v. *Tek Chand*, 28 C 194; *Sakharam* v. *Shamrao*, 1932 B 234—31 Bom L.R. 191.

(f) *Ram Saran* v. *Tek Chand*, 28 C. 194

(g) *Sakharam* v. *Shamrao*, 34 Bom. L R 191 1932 B 234.

(h) *Jogendra* v. *Nityanund*, 18 C. 151—17 I A 128 (P.C.)

(i) *Sakharam* v *Shamrao*, 34 Bom L. R 191—1932 B 234. *Bhagwantrao* v. *Punjaram*, 1938 N. 1; *Sadu* v. *Baiza*, 4 B. 37; *Jogendra* v. *Nityanund*, 18 C. 151=17 I A. 128.

enforce a partition against his legitimate brother, he has no such right against his father, or his father's coparceners.(j) But in Bengal, if the partition takes place during his father's life-time or after his death as per his directions, an illegitimate son may be allotted a share equal to that of a legitimate son. *See* also Ss. 72 & 349.

(j) *Thangam Pillai* v. *Suppa Pillai*, 12M. 401.; See also S. 71.

CHAPTER V.

ADOPTION.

78. Adoption and its object.—The origin of the custom of adoption is lost in antiquity, and may well have been no more than the natural desire for a son as an object of affection, a protection in old age, and at the last an heir. However this may be, it is certain that through all the centuries which have seen the spread of Brahminical influence, and among all classes which have come under its sway, a peculiar religious significance has attached to the son. He is so essential to the spiritual welfare of the souls of his immediate ancestors that an extensive class of subsidiary sons was admitted to the family, all of whom could perform the necessary ceremonies, though only some of them were allowed full rights of inheritance. Of these, among the orthodox classes, only the adopted son is now recognised, and he, in the absence of an *aurasa* or natural born son, is clothed with all the attributes of a son, and is from the date of adoption regarded as having been born in his adoptive family. The 9th Chapter of Manu's Code, which has always been regarded as of paramount authority, is instinct with this doctrine and it is clear that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary rites. [a] Adoption may be defined as the formal affiliation as a son of a person, of one who is in fact not his son, and this was one of the means adopted by the primitive Aryans for satisfying the necessity for the male offspring which they felt so keenly in days when the security of person and property depended much upon the number of males which a family could claim as its members. But as days went on, and better order reigned in society, the number of subsidiary sons mentioned in the previous chapter diminished with the increasing abhorrence to the sexual looseness which characterised the recognition of many of them, and the importance of the adopted son began to increase. The rise of the adopted son in the estimation of the society was further accelerated by the Brahmin priests who advocated the institution of adoption as absolutely necessary for every sonless man's spiritual salvation both here and in the world beyond. Added to this, the natural craving of a man for the celebration of his name and the due perpetuation of his lineage, which increased with the desire for partition and self-acquisition becoming more and more common, gave an added impetus to the growth of this institution. It can

(a) *Amarendra* v. *Sanatan*, 38 L.W. 1 203=1933 A.L.J. 710=1933 M.W.N. 769=14 =12 P. 642- 1933 P C. 155=60 I A. 242=35 P.L.T. 399.
Bom. L.R. 859=37 C.W.N. 938=65 M.L.J.

therefore be said that the practice of adoption as it obtains to-day is due not only to the timorous superstition of the Hindus that by leaving a male child in this world, one can secure himself from the torments of the next, [b] but also to the secular desire for the perpetuation of family properties and names.[c]

79. Texts on Adoption.—The whole Sanskrit law of adoption is evolved from two texts and a metaphor (Mayne, 137). The texts are those of Manu and Vasishta and the metaphor is that of Saunaka. Manu says "He whom his father or mother gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water." (Manu, IX. S. 168). Vasishta's text is in greater detail and runs "A son formed of sexual fluids and of blood, proceeds from his father and mother as an effect from its cause. Both parents have power to sell, or to desert him. But let no man give, or accept, an only son since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son unless with the assent of her lord. He who means to adopt a son must assemble his kinsmen, give humble notice to the King and then having made an oblation to fire with words from the Veda, in the midst of his dwelling house, he may receive, as his son by adoption, a boy nearly allied to him, or on failure of such, even one remotely allied. But if doubt arise, let him treat the remote kinsman as a Sudra. The class ought to be known, for through one son the adopter rescues many ancestors" (XV—1—8). These two texts read along with the metaphor of Saunaka that "the adopted son must be the reflection of a son" have given rise to numerous rules for observance in the case of a valid adoption, and the Dattaka Mimamsa of Nanda Pandita and the Dattaka Chandrika of Devanda Bhatta, two treatises on the particular subject of adoption enjoying the highest reputation and respected all over India, are the chief authorities governing questions of adoption, though when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be an infallible guide in the Mithila and Benares Schools.[d]

80. Agreement not to adopt.—An agreement not to adopt made by a Hindu widow authorised by her husband to adopt is un-

(b) *Satrugna* v *Savitri*, 2 Knapp 237—1 Suth 36; *Nayammal* v *Sankarappa*, 33 L W. 269=61 M L J 19=1931 M.W N 501=51 M. 576=1931 M 264.

(c) *Sri Balasu* v *Sri Balasu*, 26 I A. 113=21 A. 460=22 M. 398 3 C.W.N. 427 9 M L J 67—1 Bom L R 226 (P.C.); *Bal Gangadhar Tilak* v. *Shrinivasa Pandit*, 39 B 141 13 A L J 570 17 Bom L R. 527 . 19 C W N 729 29 M L J. 34 1915 M W N 154 42 I A 135 2 L W 611—1915 P C. 7; *Sitaram* v *Harihar*, 35 B. 169=8 I C 625=12 Bom L R 910

(d) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M I A 397.

enforceable against her[e] except perhaps when it is in favour of her co-widow, [f] nor will an agreement not to adopt bind the sons of parties to the agreement.[g] In *Suriya Rau* v *Rajah of Pittapur*,[g] two brothers Suriya Rau and Kumara entered into an agreement on 26th April 1845 at a time when Suriya Rau had a son by name Gangadhara, by which they agreed that the properties belonging to them should not be alienated by an adoption being made in the line of either of them, and the question before the Privy Council was as to the validity and binding character of this agreement. Their Lordships of the Judicial Committee, while leaving open the question as to the enforceability of the agreement as between the parties thereto, held that the agreement was not binding upon Gangadhara, the son of Suriya, and made the following observations:

"The case having now been thoroughly sifted, it appears that the only point to be decided is, what was the legal effect of the agreement of the 26th of April 1845 between Suriya Rau and his brother Kumara. At that time Gangadhara, the son of Suriya was living. The estate was governed by the Mitakshara law. It is clear that Suriya, the father, could not by the agreement of 1845, so bind the estate that an adopted son of his son Gangadhara should not take by descent. The agreement is contained in the 10th article, by which the two brothers stipulated as follows.

"As to the immovable property belonging to us both, the said immovable property shall in case of the failure of 'aurasa' (self-begotten) male issue in either of these two lines, i.e., either for yourself or in your line of aurasa sons, or in my line of aurasa sons, be put in possession of the other line, but it shall not be alienated by making adoption and the like." It is unnecessary for their Lordships to determine whether that agreement was or was not binding between the parties who made it. It is clear that the father of Gangadhara could not bind his son, who was then in existence, not to adopt or legally stipulate that if he should adopt, the son so adopted should not inherit. The words are: "In case of the failure of self-begotten male issue." Mr Mayne was forced to admit that those words meant an indefinite failure of issue; and that an adopted son should not ever take by descent from his father. It appears to their Lordships that that would be entirely altering the law of descent, and contrary to the principle laid down in the *Tagore* case."[h]

As was already observed, the question whether the agreement would be binding upon the parties to the agreement was not decided by the Privy Council. But if one should have regard to the principle underlying the Hindu theory of adoption, namely the duty of ministering to the spiritual cravings of a Hindu and his ancestors, there can be little doubt that an agreement by which a person bargains away his religious duty of bringing a son into

(e) *Gajapati* v. *Kunta Bihari*, 49 I.C. 929; 9 L.W. 385-1919 M.W.N. 52.

(f) *Sadashiv* v. *Reshma*, 39 Bom. L.R. 1115-1938 B 1

(g) *Suriya Rau* v *Rajah of Pittapur*, 9 M. 469-13 I.A. 97 (P.C.).

(h) 9 Beng. L.R. 377, 403

existence cannot be binding even upon him. But a father who has an absolute power of disposal over his property is not prevented from guiding and controlling his son's discretion to make an adoption by devising his estate to his son on condition that he does not make an adoption until he attains his eighteenth year.(i) Again it has been recently held by the Bombay High Court that there can be a valid relinquishment by the senior widow of her preferential "right" of adoption, in favour of her junior co-widow, so that if, after such relinquishment, the senior widow makes an adoption, that adoption will be invalid even though the junior widow has not made any adoption in the meanwhile.(j) It is, however, respectfully submitted that this view is difficult to sustain if one is to have due regard to the spirit of the Hindu Law underlying the institution of adoption. The correct position is that the senior widow having authority to adopt is under a sacred obligation to do so for the salvation of her husband's soul and it is not accurate to talk of her as having, strictly speaking, a "right" or "power" to make the adoption. No doubt she cannot be forced to make the adoption if she is not willing to adopt and there is nothing to prevent her from refusing to make the adoption. She can also consent to the junior widow making the adoption. But whether she refuses to make the adoption or consents to the junior widow making it, the spiritual welfare of the deceased husband cannot be said to be in jeopardy. In the former case the widow may at any time change her attitude of indifference to that of solicitude for the husband's beatitude by herself making the adoption, or in case she persists in her refusal to make the adoption, the junior widow can save the situation by making the adoption herself. In the latter case of the senior widow consenting to the junior widow adopting, obviously the adoption by the junior widow will extricate the husband's soul from the tribulations of the other world. Thus in neither of such cases can it be posited that the husband's chance of being redeemed in the other world by the adoption of a son in this is taken away. But to go further and say, as the Bombay ruling abovementioned has done, that the senior widow can validly preclude herself from ever making an adoption by reason of her relinquishment in favour of the junior widow, even though the junior widow has not made an adoption or even refuses to make the adoption, is in effect damning the husband's soul to eternal perdition by obscuring the spiritual import of the ancient texts in the employment and implications of modern legal terminology.

81. Custom against adoption.—There can be a valid custom against the right of adoption, but this custom must be strictly prov-

(i) *Hurrosoondery* v. *Cowar*, 1 Fulton 393.

(j) *Sadashiv* v. *Reshma*, 39 Bom. L.R. 1115=1938 B. 1 explaining *Padajirav* v.

ed by the person alleging it. [k] But where a Hindu family has been converted to Islamic faith, [l] or is of non-Hindu origin having adopted Hindu institutions only in part,[m] the onus of proving that the former still retains the Hindu institution of adoption or that the latter has adopted it among its other Hindu incidents is upon the person setting up the adoption.

82. Who can adopt.—"*By a sonless person only should always a substitute of a son be anxiously made, for the sake of funeral oblations, libations of water and obsequial rites,*" Atri cited in Mandlik's Hindu Law. Every Hindu male who has neither a son, a grandson or great-grandson, aurasa or adopted,[n] at the time of adoption, [o] and is not then otherwise disqualified, can adopt a son to himself. But the mere physical existence of the son, grandson, or great-grandson is not sufficient to preclude the father from making an adoption, unless the son is in a position to render the spiritual services necessary for the father's salvation. Thus if an only son has been given away in adoption, his existence does not preclude his natural father from making an adoption, [p] except when he has been given away in the *dvyamushyayana* form. Nor does the existence of a son in embryo invalidate an adoption. [q] Except in the case of kritrima adoption, an adoption is always made to a male, though it can be made as mentioned in S. 101 by a woman.

83. Ascetic Son.—The existence of a son who has become a Sanyasi or Fakir with no possibility of returning to civil life is no bar to the father adopting a boy, but in that case the renunciation must be complete, for otherwise he does not forfeit his capacity to offer spiritual benefit. [r] But where a son has merely become a Bairagi, who is not an ascetic, his father cannot make a valid adoption, since the Bairagi's capacity to confer spiritual benefit still continues. [s]

84. Apostate Son.—So also a son who has become a convert to an alien faith, thereby losing his ceremonial capacity, becomes as good as civilly dead to his father, and the father can make a legal adoption in spite of his existence. The Caste Disabilities

(k) *Verabhai* v. *Bai Hiraba*, 27 B. 492=5 Bom. L.R. 534. 30 I A 231=7 C.W.N 716 (P.C.); *Suriya Rau* v. *Rajah of Pittapur*, 9 M. 499 -13 I A 97 (P.C.).

(l) *Bai Machhabai* v. *Bai Hirbai*, 35 B. 264=10 I C. 816=13 Bom. L.R. 251.

(m) *Fanindra* v. *Rajeswar*, 12 I A 72=11 C. 463 (P.C.)

(n) *Bhujangouda* v. *Babu*, 44 B. 627 . 57 I.C. 573=22 Bom. L.R. 817.

(o) *Mohesh Narain* v. *Taruck Nath*, 20 C. 487=20 I.A. 30 (P.C.); *Gopee Lal* v. *Chandraolee*, I A Sup. 131 (P.C.); and *Rungama* v. *Atchama*, 4 M. 1 A. 1

(p) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 =26 I A. 113 21 A. 460=3 C.W.N. 427=9 M L.J. 67 -1 Bom L.R. 226 (P.C.).

(q) *Daulat* v *Ram Lal*, 29 A 310; *Hanmant* v. *Bhimacharya*, 12 B 105.

(r) *Mahrn* v *Moti*, (1875) P R. 52.

(s) *Khoodeeram* v. *Rookhinee*, 15 W R. 197; *Teeluk Chunder* v *Shamachurn*, 1 W. R. 209.

Removal Act which protects the rights of an apostate son does not militate against his father's power to make the adoption since the son becomes severed from his father by his conversion leaving the father an absolute owner of a moiety of the family property.

85. Illegitimate Son.—A person is not precluded from adopting by the existence of an illegitimate son because an illegitimate son is incapable of ministering to the father's salvation by his religious offerings.(t) The presence of sons by sword marriage wives(t-a) is no bar to a legal adoption(t) since such a marriage does not confer on the offspring the status of legitimacy.

86. Disqualified Son.—Since the chief purpose of an adoption is the spiritual advancement of the adopter by the religious services rendered by a son qualified to render them, the existence of a son who is disqualified from rendering these services by reason of insanity,(u) or any congenital disease such as virulent leprosy,(v) cannot operate as a bar to his father making a valid adoption. Hence an adoption made while the adopter had a son living, who, however, had been suffering from an ulcerous and virulent type of leprosy rendering him unfit for social intercourse would be valid.(w) Even the passing of the Hindu Inheritance (Removal of Disabilities) Act of 1928, does not, it is submitted, affect this question in the case of a person having a disqualified son, because, the Act which only removes the disability to inherit in the case of certain persons, does not prevent the father from making, by means of an adoption, provision for his beatitude. Again, the existence of a son who has contracted a marriage under the Civil Marriage (Amendment) Act is no bar to the father's adoption (x) The reason why the existence of a disqualified son has been held not to preclude his father from making a valid adoption has been well brought out by the Madras High Court in the case of *Nagammal* v. *Sankarappa*,(v) where the ruling of the Bombay High Court in *Bharmappa* v. *Ujjangowda*(y) was dissented from with the following observations :—

"Moreover, the main purpose of adoption according to authoritative texts on Hindu Law being the due performance of obsequial ceremonies and the oblations of food and water given in sraddhas and such other rites for the benefit of the adopter's soul and the perpetuation of his lineage, if the existence of a son incompetent to perform such religious ceremonies and sacrifices is treated as a bar to an adoption, one of the aforesaid main purposes which

(t) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1=1925 M. 497 (F.B.).

(t-a) S. 57.

(u) *Ram Bijai* v. *Jagatpal*, 18 C. 111=17 I A 173 (P C.).

(v) *Nagammal* v. *Sankarappa*, 54 M. 576=33 L.W. 269=1931 M. 264=61 M.L.J. 19.

(w) *Nagammal* v. *Sankarappa*, 33 L.W. 269=54 M. 576=1931 M.W.N. 501=1931 M. 264=61 M.L.J. 19, dissenting from *Bharmappa* v. *Ujjangowda*, 46 B. 455=1922 B. 173=23 Bom. L R. 1320.

(x) See S. 68 where the Act is given.

(y) 46 B. 455=23 Bom. L.R. 1320=1922 B. 173.

necessitate an adoption becomes frustrated. This aspect does not seem to have been given due weight in the reasoning adopted by the learned Judge in that decision. There is almost a consensus of opinion among the modern text-writers on this question, as I have already pointed out. Some of the persons who are excluded from inheritance as disqualified heirs may be competent to perform obsequial and other ceremonies. Perhaps the existence of such a son may be held to be a bar to an adoption; but, I am clear that the existence of a son, who is not only disqualified for inheritance but also incompetent to perform the aforesaid ceremonies, should be deemed to bear only the semblance of a son, and his father can be very well treated as sonless for the purpose of enabling him to make an adoption. With due deference, I am unable to follow the decision of the Bombay High Court and apply it to the present case."

87. Pregnancy of Wife.—Power to adopt cannot be suspended by the mere fact of the pregnancy of the adopter's wife or the wife of his son or son's son, since there is no knowing till the child in the womb is delivered whether it is a male or a female. Such a remote and contingent possibility cannot be a ground for suspending the very valuable right of adoption.(z)

"It may doubtless be contended that when the wife is in a state of pregnancy there may be a son in the womb at the moment of adoption; but the possibility that the child *in utero* may be a female, would, if the power to adopt were to be deemed suspended by the mere fact of pregnancy, always imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legitimate son. A man in bad health or on his deathbed, as in the present case might not live till the child was born; and yet, if the rule be as contended for by the appellant, the suspension must *ipso facto* take place in all cases during pregnancy; for we entirely agree with the Madras High Court that it would be impossible to make the validity of an adoption dependent on knowledge or ignorance of the fact of pregnancy". See 12 B. 105 at pp. 107-8.

88. Brother's son and Daughter's son.—It is only the existence of the natural or the adopted son that precludes the father from making an adoption, and the existence of the brother's son who is declared by Manu as the son of all the brothers (ix—182) or the existence of the daughter's son who is said to be the equivalent of the son's son does not operate as a bar to a valid adoption.

89. Adoption by minor.—Minority of the adopter does not stand in the way of his making a valid adoption provided he has arrived at the age of discretion,(a) and such a minor can also authorise his wife to adopt.(b) The Indian Majority Act is inapplicable to cases of adoption. But, for the introduction of a stranger

(z) *Hanmant* v. *Bhimacharya*, 12 B. 105; *Nagabhushanam* v. *Seshammagaru*, 3 M. 180; *Daulat Ram* v. *Ram Lal*, 29 A. 310.

(a) *Sattirafu* v. *Venkatasvami*, 40 M. 925—32 M.L.J. 119—40 I.C. 518=5 L.W. 603; *Rajendro Narain* v. *Sarada*, 15 Suth. W.R. 518; *Jumoona* v. *Bamasoondari*, 3 I.A. 72=1 C. 289 (P.C.); *Patel* v. *Manilal*, 15 B. 565.

(b) *Jumoona*, v. *Bamasoondari*, 3 I.A. 72—1 C. 289 (P.C.); *Patel* v. *Manilal*, 15 B. 565; *Mata Baksh* v. *Ajodhiya*, 1936 Oudh. 340.

into the family which an adoption entails, there must be an exercise of discretion in the matter by the person adopting, and the question whether in a particular case the adopter has an understanding sufficiently mature to judge of the nature and the consequences of his act is for the Court to decide.[c]

90. Adoption by Bachelor.—It is not a condition precedent to the validity of an adoption that the adopter should have previously failed in the legitimate mode of procreation, namely, marriage. Hence an adoption by a bachelor is perfectly competent and valid and cannot be nullified on the ground that the adopter is not a Grahasta or a married man.[d]

91. Adoption by widower.—An adoption by a widower is also valid and cannot be questioned on the fanciful ground that a wifeless man cannot have a son.[e]

92. Adoption by Ascetic.—Complete abandonment of worldly interests by becoming an ascetic will disqualify a person from making an adoption,[f] but a mere change of status without any intention of giving up the secular life will not operate as such disqualification.[g]

93. Adoption by Lunatic.—Since adoption has important and far reaching consequences, an adoption by a lunatic or an idiot who cannot understand the nature and the effect of his act cannot be considered valid unless it is shown, the onus of which is on the person setting up the adoption, that it was made during a lucid interval.[h] An adoption made by a lunatic during a lucid interval does not become invalid simply because he had been adjudged a lunatic and a person has been appointed for the management of his estate and the custody of his person.[i] But the lunacy of the husband does not operate as his death for purposes of making an adoption, and his wife cannot adopt during his lifetime, since she

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(c) *Ramachari* v. *Saraswati*, 12 L.W. 544 60 I.C. 246=1920 M.W.N. 721; *Sattiraju* v. *Venkataswami*, 40 M. 925=32 M.L.J. 119= 40 I.C. 518=5 L.W. 603; *Patel* v. *Manilal*, 15 B. 565, *Jamoona* v. *Bamusoondari*, 3 I.A. 72 1 C. 289 (P.C); See also S. 105.

(d) *Nagappa* v. *Subba Sastri*, 2 M H.C.R. 367, *Sattiraju* v. *Venkataswami* 40 M. 925 =32 M L J. 119=40 I.C. 518=5 L.W. 603; *Gopal* v. *Narayan*, 12 B. 329; *Chandrasekharudu* v. *Brahmanna*, 4 M.H.C.R. 270; *Gunnappa* v. *Sankappa*, Bom. Sel. Rep. 202; *Sountharapandian* v. *Periaveeru*, 28 L.W. 45=1933 M.W.N. 1061=65 M.L.J. 58= 56 M. 759=1933 M. 550 (F.B.); *Annapurni Nachiar* v. *Collector of Tinnevelly*, 18 M. 277=5 M.L.J. 121; *Tulshi Ram* v. *Behari Lal*. 12 A. 328.

(e) *Chandrasekharudu* v. *Brahmanna*, 4 M H.C.R. 270, *Sountharapandian* v. *Periaveeru*, 56 M. 759=38 L.W. 45=1933 M. 550= 1933 M.W.N. 1061=65 M L.J. 58 (F.B), *Tulshi* v. *Behari*, 12 A. 328.

(f) *Tekn* v. *Busti*, (1874) P.R. 15; *Mhalsabai* v. *Vithoba*, 7 B.H.C.R. (App.) 2631.

(g) *Balagir* v. *Dhonegir*, 5 Bom. L.R. 114.

(h) *Amanchi* v. *Amanchi*, 40 M. 660=3 L.W. 290=33 I.C. 578; *Tayammal* v. *Seshachalla*, 10 M I A. 429.

(i) *Amanchi* v. *Amanchi*, 40 M. 660=3 L W. 290=33 I.C. 578.

will thereby be preventing the husband from making an adoption during a lucid interval that may subsequently supervene.(j)

94. Leprosy and other disqualifications.—Except where the leprosy is of a virulent type, a leper is not disqualified from adopting,(k) though in the case of Sudras, leprosy, however virulent, is no bar.(l) The decision of the Privy Council in *Bhagaban* v. *Ram Praparna*(m) that the leprosy of a virulent type disqualifies a person for making an adoption, leads to the inference that the other infirmities mentioned along with leprosy in the same text as disqualifying a person from inheriting, namely, congenital blindness, deafness, dumbness, impotency, lameness, etc., will equally disqualify a person from adopting. But the rule which concedes a right to adopt to one who is not without these disqualifications and deprives one who is suffering from any of these infirmities has no reason to support it. These unfortunate persons are still Hindus, and with the accumulated sins which weigh them down in the shape of these infirmities, they have a better right to a recognition of their power to adopt than others who are more fortunate without them, so that their souls may be conveyed by force of the spiritual benefit of the adopted son's offerings to regions where they may be freed from the torments in addition to those wherefrom they suffer here below. The reasons for holding such adoptions invalid must be either religious or secular. So far as the religious reason, namely, that a disqualified person cannot perform the religious ceremonies attendant on adoption, is concerned, there is no force in it because he can delegate another to do them. Besides, there is nothing in the texts to prevent an adoption being made to him after his death by his widow. If an adoption can be made to him after his death, why should he be denied the satisfaction of having had an adoption being made to him during his lifetime ? The secular reason can only be the property reason, namely, that if the disqualified person himself is not entitled to take an interest in the inheritance, why should he be allowed to give such interest to his son by adoption ? This also has no force in it because, if he gets an aurasa son, he cannot be prevented from taking his father's share. Besides, why should such an adoption be held invalid when no question of inheritance or joint family property is concerned, or when the question arises only in respect of the adopter's self-acquired property ? However that be, so far as the reason grounded on the inheritance disqualification is concerned, now that the Hindu Inheritance (Removal of Disabilities) Act of 1928, does away with the disquali-

(j) *Ramakrishna* v. *Lakshminarayan*, 22 Bom. L.R. 1181—59 I.C. 458.

(k) *Ramabai* v. *Harnabai*, 48 B. 363.

(l) *Praparna*, 22 C. 843—22 I.A. 94 (P.C.).

(m) *Sakumari* v. *Ananta*, 28 C. 168.

(n) 22 C. 843—22 I.A. 94 (P.C.) (a case of a Mahant adopting his successor).

fications other than congenital lunacy and idiocy, so far as regards the Mitakshara, it is submitted that there is no longer any reason why these defects should operate as disqualifications for making an adoption.

95. Statutory disqualification.—A minor under the Court of Wards requires the previous written consent of the Court of Wards before either making a valid adoption or authorising his wife to adopt.[n] But the consent of the Court of Wards is not necessary if the ward is above 18 years of age. S. 25 of the Court of Wards Regulation, Act V of 1804, made it incompetent for disqualified co-parceners to adopt without the consent of the Court of Wards previously had in writing. Under that Regulation, 18 years was the age of majority. The Majority Act IX of 1875 which increased the majority age of a ward of Court to 21 years did not touch the ward's capacity to adopt as it existed prior thereto. Hence the consent of the Court of Wards for an adoption will be necessary only if the adopter is below 18 years of age.[o]

96. Pollution of the Adopter if a disqualification.—Pollution is only a bar to a religious act and renders the religious ceremonies inefficacious. But the gift and acceptance of the boy can be completed even during the period of pollution, the necessary religious ceremonies being done after that period or vicariously by somebody else.[p] But in cases where the Datta Homam is not necessary as in the case of the Sudras[q] and in the case where the adopter and the adoptee are of the same gotra,[r] the adoption can be completed even during the period of pollution.[s] There is no authoritative Smriti text on this 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.

97. Degradation of the adopter.—Degradation of a person is not an absolute bar for his making an adoption, and an adoption after expiatory ceremonies made by a person who had served out

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(n) *Mata Baksh* v. *Ajodhia*, 1936 Oudh 310; *Jamoona* v. *Bamasoondari*, 3 I A. 72. 1 C. 289.

(o) *Arulananda* v. *Ponnuswami*, 15 L W. 237=1922 M. 1=42 M.L.J. 129=1922 M W.N. 93.

(p) *Santappaiyya* v. *Rangappaya*, 18 M. 207=5 M.L.J. 66; *Vedavalli* v. *Mangamma*, 27 M. 538=14 M.L.J. 340; *Lakshmibai* v. *Ramchandra*, 22 B. 590; *Vijiarangam Lakshman*, 8 Bom. H.C.R. 244; *Jamnabai* v. *Raychand*, 7 B. 225; *Ravji* v. *Lakshmibai*, 11 B. 381; *Asita Mohan* v. *Nirode*. 47 I A 140=24 C.W.N. 791. See also S. 145.

(q) *Thangathanni* v. *Ramu Mudali*, 5 *M*. 358; *Sourindra* v. *Siromani*, 28 C. 171=5 C.W.N. 307.

(r) *Bal Gangadhar Tilak* v. *Shrinivasa Pandit*, 39 B. 441 2 L.W. 611=1915 P.C. 7=29 M.L.J. 34=19 C.W.N. 729=42 I.A. 135=13 A.L.J. 570—17 Bom. L.R. 527= 1915 M.W.N. 454.

(s) *Sreematy* v. *Udit Pratap*, 3 Pat. L.J. 499=49 I.C. 215.

a sentence of transportation for the offence of murder is not invalid, though the conviction entailed degradation.(t)

98. Wife's consent not necessary for adoption. —A husband is entitled to adopt a son, not only without consulting his wife, but even in spite of her opposition,(u) the reason being that the adoption is made only to the husband and for his benefit, even though she takes the position of the adoptee's mother after the adoption.(v)

99. Simultaneous adoptions.—A man cannot have two adopted sons at the same time, though he is at perfect liberty to adopt as many times as he likes provided that at each time he adopts, he is without a son, grandson or great grandson, natural or adopted.(w) An adoption made during the existence of a son, aurasa or adopted, is an absolute nullity, and the death of the latter will not validate a transaction which is *ab initio* void.(x) For the same reason, simultaneous adoptions of two or more sons, each son being adopted in respect of each of several wives of the adopter, are also invalid as to all, and the argument that, as the adoption is the imitation of nature, two or more wives cannot be the mothers of the same boy and that, therefore, it would be more in conformity with nature to have as many adopted sons as there are wives, is unavailable to validate the adoptions since the argument overlooks the absence of any legal requirement that the adopter should be a married man, or that he should have his wife's consent for the adoption.(y) No doubt it would be difficult to determine whether the adoptions impeached on the ground of simultaneity were in fact simultaneous or successive. If the adoptions are not simultaneous, then the prior one alone will be valid and the subsequent one invalid. But this question whether the adoptions are simultaneous or not is to be decided by applying the touchstone of commonsense to the acts and intentions of the parties, and even though the beginnings and the endings of the ceremonies with reference to the adoptions of the two boys were not, as they could not have been, absolutely synchronous, yet if the said ceremonies were performed, practically speaking, simultaneously, both the

(t) *Vaman* v. *Krishnaji*, 21 Bom. L.R. 427=51 I.C. 363.

(u) *Narain* v. *Gopal*, 33 I.C. 361; *Sounthrapandian* v. *Periaveeru*, 56 M. 759 —1933 M. 550—38 L.W. 45 - 65 M.L.J. 58= 1933 M.W.N. 1061 (F.B.); *Rungama* v. *Atchama*, 4 M. I A. 1.

(v) *Sundaramma* v. *Venkatasubba Ayar*, 49 M. 941—51 M.L.J. 545—1926 M. 1203=1926 M.W.N. 778; *Rungama* v. *Atchama*, 4 M.I.A. 1; *Sounthrapandian* v. *Periaveeru*, 38 L.W. 45—56 M 759=1933 M. 550=65 M.L.J. 58=1933 M.W.N. 1061 (F.B.).

(w) *Runguma* v. *Atchama*, 4 M.I.A. 1; *Mohesh Narain* v. *Taruck Nath*, 20 I A. 30—20 C. 487 (P C).

(x) *Basoo* v. *Basoo*, M Dec. of 1856, 20.

(y) *Akhoy Chunder* v. *Kalupahar Haji*, 12 I.A. 198 .12 C 406 (P.C.); *Surendro Keshub* v. *Doorgasoondari*, 19 I.A. 108= 19 C. 513 (P.C.) *affirming Doorga* v. *Surendra*, 12 C. 686; *Sounthrapandian* v. *Periaveeru*, 56 M. 759=38 L.W. 45=1933 M. 550=65 M.L.J. 58=1933 M.W.N. 1061 (F.B.).

adoptions should be declared void. Where a Hindu gave each of his two widows authority to adopt three sons successively, it was held by the Privy Council that the authority should not be construed as empowering the widows to make simultaneous adoptions which are not allowed by Hindu Law.[z]

100. Participation by one of the wives in adoption.—Where only one of the wives of the adopter joins him in the adoption, she becomes the mother of the adopted boy and is entitled to inherit to him as his mother to the exclusion of the other wife or wives who in law would occupy the position of step-mother or step-mothers to the adopted son.[a]

101. Adoption by woman.—A husband can either himself make an adoption or authorise his wife to make an adoption to him.[b] But a woman cannot adopt to herself[c] except where the kritrima form is allowed. For the validity of the authority, it is not necessary that the husband should have attained majority, provided he has attained years of discretion.[d] Vasishta's text that no woman should accept a son unless with the assent of her lord has been variously interpreted in the various provinces though accepted by all the schools. The Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption and that therefore a widow cannot at all make an adoption. The Bengal School interprets the text as requiring an express permission given by the husband during his lifetime, but capable of taking effect after his death; whilst the Mayukha and Kaustubha treatises which govern the Mahratta School, explain the text away by saying that it applies only to an adoption made in the husband's lifetime and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul.[e] In South India, a fourth view has been taken that the want of the husband's assent may be supplied by that of his sapindas after his death.[e] The result of these various views may be summarised like this: In Mithila a widow cannot adopt even with her husband's consent. In Bengal and Benares, she can adopt only if her husband had assented, and such assent cannot be inferred from the mere absence of prohibition.[f] In Western India a widow can adopt even without the husband's

(z) *Akhoy Chunder* v. *Kalapahar Haji*, 12 C 406=12 I A. 198 (P.C.).

(a) *Annapurni* v. *Forbes*, 26 I.A. 246=23 M. 1=3 C.W.N. 730=9 M.L.J. 209=1 Bom. L.R. 611 (P.C.); *Navaneethakrishna* v. *Collector of Tinnevelly*, 1935 M.W.N. 1001=69 M.L.J. 632=42 L.W. 875=1935 M. 1017.

(b) *Narayan* v. *Nana*, 7 Bom. H.C.R. 153.

(c) *Narendra* v. *Dina*, 36 C. 824=3 I.C. 996; *Chaudry Pudum Singh* v. *Koer Oodey* 12 M.I.A. 350.

(d) *Jumoona* v. *Bamasoondari*, 1 C. 289. 3 I A. 72 (P.C.); See also. S. 89.

(e) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397.

(f) *Seetaramamma* v. *Suryanarayana*, 49 M. 969 at 976=25 L.W. 183=1926 M. 1184—51 M.L.J. 466.

consent provided he has not prohibited it. In Southern India a widow can make an adoption either with her husband's consent(f) or with the assent of his sapindas. Besides, a w low can adopt without her husband's authority under a custom sanctioning it (g) But in all cases where a woman can validly adopt to her husband her authority to adopt, though co-extensive with that of the husband, is confined to circumstances which would warrant an adoption by her own husband and does not confer on her powers greater than those exercisable by him.

102. Prohibition by husband.—A widow cannot make an adoption when the husband has prohibited it either expressly or by implication.(h) Such a prohibition by the husband will be implied where a son adopted by her husband is alive, even though the validity of the adoption is doubtful.(i) But the existence of an invalidly adopted son is no legal impediment to a subsequent adoption of another son by the widow if the invalidity is clear(j) and not merely a matter of controversy. A mere refusal by a husband to adopt just before his death does not necessarily amount to an implied prohibition against his widow making an adoption. It would be dangerous to say that, in every case where a deceased has refused to adopt, he must be thereby taken to have prohibited his widow from adopting. If a person refused to make an adoption at a time when he was practically in a dying state, one can realise that a man in that position might not want to have the bother of an adoption, without, thereby meaning that his widow should not adopt after his death.(k) But this does not mean that a prohibition against an adoption cannot be inferred from the husband's refusal to adopt, if the refusal taken along with the known views and conduct of the husband and the other circumstances of any particular case irresistibly force that conclusion.

103. Form and Nature of the husband's authority.—The authority empowering the wife to make an adoption need not be given in any particular form and may be contained in words written or oral(l) or in a will. If the authority is given by a non-testamentary instrument executed by an adult or minor,(l) or by

(f) See p. 96 foot note (f).

(g) *Bishwanath* v. *Jugal Kishore*, 50 I.A. 179=18 L.W. 88 · 1923 P.C. 90 · 45 M. L.J. 215=1923 M.W.N. 620=28 C.W.N. 790.

(h) *Collector of Madura* v. *Mootloo Ramalinga*, 12 M.I.A. 397. See this case for the position that a prohibition cannot be inferred merely from the wife living away from the husband.

(i) *Bhan* v. *Narasagouda*, 46 B. 400= 1922 B. 300· 23 Bom. L.R. 1272.

(j) *Radha* v. *Dinkarrao*, 39 Bom. L.R. 147=1937 B. 209.

(k) *Vithagouda* v. *Secretary of State*, 1932 B. 442 34 Bom L.R. 818, *Sitabai* v. *Govindrao*, 51 B 217· 1927 B. 151 29 Bom. L.R. 236 explaining *Bayabai* v. *Bala*, 7 Bom H.C R. (appx i.).

(l) *Mutasaddi Lal* v. *Kundan Lal*, 33 I. A. 55·28 A 377 ·3 A L.J. 246–8 Bom. L R. 371=16 M L.J. 174 (P.C.) See also *Mata Baksh* v. *Ajodhia*, 1936 Oudh 340 as to the need for the of discretion

a testamentary instrument executed by a minor,[m] the writing requires to be registered. But, if the authority is given under a will executed by a person competent to leave a will, the will must be a valid one. The authority may be either absolute or conditional, provided that, in the latter case, the condition is a legal one. A husband can authorise his wife to make any number of successive adoptions in case all the sons previously adopted should have died,[n] and even where the authority is couched in general terms and requires the widow to adopt so as to continue the line and provide for the spiritual benefit of the donor without indicating any particular person for adoption, the power does not become exhausted by one adoption, and on the death of the son first adopted without leaving a son or his own widow, the authority survives to the widow to empower her to make a second adoption.[o] But an authority to the widow to make an adoption, though need not always be express, cannot be implied from circumstances merely showing that the husband would have given such authority if he had lived to consider the contingencies that have in fact arisen. To imply such authority wherever it is desirable, or to infer such authority always from the fact of a prior adoption, is not permissible. Hence it cannot be laid down as a rule of law that whenever a husband adopts a son and afterwards that boy dies, the adopter's widow has implied authority to adopt another boy.[p]

104. Construction of the Authority.—An authority given by a Hindu to his widow to adopt a son to him must be strictly followed[q] so that where two widows are authorised to make two simulataneous adoptions each adopting one boy, the authority would

(m) *Vijaratnam* v. *Sudarsana Rao*, 22 L.W. 435=1925 (P.C.) 196=48 M. 614=23 A.L.J. 799=49 M.L.J. 247=1925 M.W.N. 522 =27 Bom. L.R. 1082=30 C.W.N. 193=52 I.A. 305. (P.C.).

(n) *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey*, 43 C. 432=3 L.W. 252=14 A.L.J. 167=18 Bom. L.R. 347=20 C. W. N. 169=30 M.L.J. 110=43 I.A.12=(1916) 1 M.W.N. 73=1915 P.C. 101; *Boobun Mojee* v. *Ram Kishore*, 10 M.I.A. 279 (P.C.); *Vellanki* v. *Venkata*, 4 I.A. 1=1 M. 174 (P.C.); *Jumoona* v. *Bamasoondari*, 1 C 289=3 I.A. 72 (P.C.).

(o) *Suryanarayana* v. *Venkataramana*, 33 I.A. 145=29 M. 382=3 A.L.J. 702=8 Bom. L.R. 700=10 C.W.N. 921=16 M.L.J. 276 (P.C.); *Amarendra* v. *Sanatan*, 60 I.A. 242=12 Pat. 642=1933 P.C. 155=38 L.W. 1 =35 Bom. L.R. 859=37 C.W.N. 938=65 M. L.J. 203=1933 A.L.J. 710=1933 M.W.N. 769=14 P.L.T. 399.

(p) *Navaneetha Krishna* v. *Collector of Tinnevelly*, 69 M.L.J. 632=1935 M. 1017=42 L.W. 875=1935 M.W.N. 1001 affirmed in *Balasubramania* v. *Subbayya*, 1938 P.C. 34 =47 L.W. 110 1938 A.L.J. 215=42 C.W.N. 419=(1938) 1 M.L.J. 426=19 P.L.T. 169 =65 I.A. 93.

(q) *Rajendra Prasad* v. *Gopal*, 34 C.W. N 1161=1930 A.L.J. 1184=11 P.L.T. 587= 10 Pat 187=32 Bom. L.R. 1588=59 M.L.J. 615=1931 M.W.N. 189=57 I.A. 296=32 L.W. 324=1930 P.C. 242; *Sitabai* v. *Babu*, 47 C. 1012=12 L.W. 386 22 Bom. L.R. 1359=25 C.W.N. 97=39 M.L.J. 106=47 I.A. 202= 1920 M.W.N. 556 25 C.W.N. 97=1921 P.C. 88; *Chowdry Pudum Singh* v. *Koer Oodey Sing*, 12 M.I.A. 350; *Surendra Keshub Roy* v. *Doorgasoondery*, 19 I.A. 108=19 C. 513 (P.C.); *Mulasaddi Lal* v. *Kundan Lal*, 28 A. 377=33 I.A. 55=3 A.L.J. 246=8 Bom. L.R. 371=16 M.L.J. 174 (P.C.); *Kalavati Devi* v. *Dharam Prakash*, 37 L.W. 534=55 A. 78=1933 P.C. 71=60 I.A. 90=37 C.W.N. 485=35 Bom. L.R. 487=1933 M.W.N. 276= 1933 A.L.J. 260=64 M.L.J. 427.

be ineffective since it could not be exercised in strict compliance with its terms which would result in simultaneous adoptions being made in contravention of the Hindu Law.(r) The right of the widow, as the donee of her husband's power, to make the adoption, is strictly confined to the terms of her authority, and her act of adoption should neither vary nor add to those terms. Hence where the direction as to adoption in a will was that the widow should, as far as possible, adopt the second son of the testator's brother, and that, if he could not be obtained, she was at liberty to adopt any other, and owing to ill-feeling that arose between the testator's widow and his brother, the widow, without applying for the brother's son, adopted some other boy, it was held that the adoption was invalid on the ground that she never tried to secure the testator's brother's boy as per the mandatory direction in her husband's will.(s) If the authority is coupled with a condition that it should be exercised within a particular period(t) or on the non-happening of a particular event,(u) the condition cannot be departed from. Again when a husband executed an *Anumaniga Patra* authorising his wife to adopt a son to him with the permission of his father, and the father died before the authority was acted upon, it was held that the permission of the husband's father was a condition precedent to the exercise of the power of adoption and that the power, which should be strictly construed, came to an end with the death of the father.(v) So also an authority to adopt given in a will to the executors and the wife was held to be a single and indivisible authority and incapable of execution on the ground that the power was bad in respect of the executors.(w) But an authority coupled with a direction that the widow should adopt with the good advice and opinion of the manager can be acted upon even without consulting the manager, since the direction is only advisory and not mandatory.(x) Where it is proved that the deceased husband had in fact expressed, as a direction to be followed by his wife, his wish that no boy except the one named by him should at any time be adopted to him, it must be held that the direction prohibited the widow from adopting any other boy than the one named. But such a direction to operate as a prohi-

(r) *Surendra Keshub Roy* v. *Doorgasoondery*, 19 C 513—19 I.A. 108 (P.C.).

(s) *Sitabai* v. *Babu*, 12 L.W. 386—47 C. 1012—1921 P.C. 88 -22 Bom. L.R 1359—25 C.W.N. 97 39 M.L.J. 106 - 47 I A. 202—1920 M.W.N. 556—25 C.W.N. 97.

(t) *Mutusaddi Lal* v. *Kundan Lal*, 28 A. 377—33 I A. 55 -3 A.L.J. 246—8 Bom. L.R. 371 16 M.L.J. 174 (P.C.).

(u) *Bhagwat Koer* v. *Dhanukdhari*, 47 C. 466—12 L.W. 105—1919 P.C. 75—24 C. W.N. 274—22 Bom. L.R 477—37 M.L.J. 513 -46 I.A. 259 -17 A.L.J. 1036—1919 M.W.N. 860 -1 P.L.T 1

(v) *Rajendra Prasad* v. *Gopal*, 57 I.A. 296 34 C.W.N. 1161 1930 A.L.J. 1184—11 P.L.T. 587 10 Pat. 187—32 Bom. L.R. 1588 —59 M.L.J. 615 -1931 M.W.N. 189 -32 L.W. 324 -1930 P.C. 212; *Radha Madhab* v. *Rajendra*, 12 P. 727—1933 P. 250—14 P.L.T. 258.

(w) *Amrita Lal Dutt* v. *Surnomoye*, 27 I.A. 128—27 C. 996—4 C.W.N. 549—2 Bom. L. R 446 (P.C.).

(x) *Surrendra Nandan* v. *Sailaja Kant*, 18 C. 385.

bition against adopting any other boy must be explicitly made and clearly intended by the husband to limit the discretion of the widow for all time, and on every occasion on which otherwise after his death his widow might validly make an adoption.(y) But if the direction of the husband is that the adoption should be made within a fixed period, it must take place within that period and not afterwards.(z) An authority to adopt must be construed, if possible, so as to advance the purpose the husband had in view in giving the authority; where a widow has been given the authority to adopt without any limitation being placed upon its exercise her authority is not exhausted by a first adoption and on the death of the boy adopted, she is entitled to adopt again as by his authority her husband made it clear that he desired adoption to secure spiritual benefit.(a) Hence where the authority directed the widow to adopt a son of one N. and the widow actually adopted a son of N, but on his death, adopted some other boy, it was held that the second adoption was valid and did not contravene the terms of the power.(y) So also where the authority was that the widow should adopt a particular son of one Iyah Pillai and the widow, without waiting indefinitely till he got such a son, adopted a stranger, the adoption would be valid on the ground that the authority by specifying a particular boy merely indicated a preference and did not amount to a prohibition against the adoption of any other boy.(b) Where a will containing the authority to the widow to adopt ran "If my younger brother should beget sons, you should take in adoption any of these children or the children of any other persons if and when you desire to do so," it was held that an adoption made by the widow, of a person other than the son of the testator's younger brother was quite valid as the testator by his words left it to the discretion of the widow to adopt the brother's son or any other.(c) Again where a particular person was mentioned in the authority to the widow as the person to be adopted with a rider that if there be any obstacle to take him, then any other may be adopted, and the widow *bona fide* believing on the advice of others that the adoption of the particular person would be invalid and prohibited by the Shastras adopted another

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(y) *Yadao* v. *Namdeo*, 49 C. 1—20 A.L.J. 481—24 Bom. L.R 609 · 26 C.W.N. 393—42 M.L.J. 219—48 I.A. 513—15 L.W. 565—1922 P.C 216; *Jagannath Rao* v. *Rambharosa*, 41 L.W. 120 1936 P.C. 201..1936 A.L.J. 874 · .38 Bom. L.R 776 · 40 C.W.N. 1125·.71 M. L.J 309 1936 M.W.N. 942.

(z) *Mutasaddi Lal* v. *Kundan Lal*, 33 I.A. 55—28 A. 377—3 A.L.J. 246—8 Bom. L.R 371 .16 M.L.J. 174 (P.C.).

(a) *Suryanarayana* v. *Venkataramana*, 33 I.A. 145 .29 M. 382—3 A.L.J. 702—8 Bom. L.R. 700—10 C.W.N. 921—16 M.L.J. 276 (P.C.); *Lakshmibai* v. *Rajaji*, 22 B. 996.

(b) *Veeraperumall* v. *Narain Pillai*, 1 N. C. 91.

(c) *Tiruvengalam* v. *Butchayya*, 52 M. 373—28 L.W. 727—1929 M. 11—1928 M.W.N. 53—55 M.L.J. 757. See however *Sitabai* v. *Bapu*, 12 L.W. 386—47 C. 1012—1921 P.C. 88—22 Bom. L.R. 1359—25 C.W.N. 97—39 M.L.J 106—47 I.C. 202—1920 M.W.N. 556—25 C.W.N. 97.

person, the adoption was held to be valid.[d] Again where a Hindu by his will has appointed five persons as trustees and authorised his widow to adopt with their consent, her adoption with the consent of only four of them who have undertaken the trust, the fifth having declined to do so, is a valid exercise of the power to adopt.[e] In the recent case of *Jagannath* v. *Rambarosa*[f] the relevant portion of a Hindu Will, ran as follows:

"A boy should be taken in adoption to perpetuate the name of ancestors and manage the estate. It is expected that any of my paternal uncle's sons may get a son. If he gives the boy, my wife should take him in adoption. Seven years' time is allowed for this. After seven years B should be taken in adoption. If this boy does not exist, any boy can be taken in adoption."

None of the paternal uncle's sons had a boy, and after the expiry of seven years from the date when the will was executed, but within seven years from the testator's death, the widow, after unsuccessfully trying to secure B in adoption and after and in consequence of B's mother's refusal to give B in adoption, adopted another boy R. The validity of this adoption was attacked on two grounds: (i) that the phrase in the will "Seven years' time is allowed for this" meant that the widow was to wait for seven years after the death of the testator and that the adoption of R having been made within that period, the adoption was invalid: (ii) that B had not died and unless he died any other adoption was prohibited. Their Lordships of the Privy Council rejected both these contentions and held the adoption valid. The dominating idea and object of the testator as expressed in the will was that there should, without fail, be an adoption and hence their Lordships laid down that that construction should be favoured which would best secure that object. The use of the present tense in the words "It is expected" coupled with the said object of the testator justified the computation of the period of seven years from the date of the will itself. As regards the second contention their Lordships observed: "It seems to be a forced and entirely inadmissible construction to extract from a parenthetic note providing for Bhagwati's possible death and permitting another adoption if that occurred, a prohibition of any other adoption if Bhagwati's adoption proved, as it did prove, to be impossible for a reason of which the testator had pro-

(d) *Rajendra Prasad* v. *Gopal*, 7 P. 245 =1929 P. 51=9 P.L.T. 123. [This decision was reversed by the Privy Council on another ground in 32 L.W. 324=57 I.A. 296=34 C.W.N. 1161=1930 A.I.J. 1184=11 P.L.T. 587=32 Bom. L.R. 1588=59 M.L.J. 615=1931 M.W.N. 189=1930 P.C. 242 (P.C.)]

(e) *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, 39 B. 441=2 L.W. 611=17 Bom. L.R. 527=19 C.W.N. 729=13 A.I.J. 570=29 M.L.J. 34=42 I.A. 135=1915 M.W.N. 454=1915 P.C. 7. See also *Rattan Lal* v. *Baij Nath*, 46 L.W. 394.

(f) 41 L.W. 120=1936 P.C. 201=1936 A.L.J. 874=38 Bom. L.R. 776=40 C.W.N. 1125=71 M.L.J. 309=1936 M.W.N. 942.

bably never thought at all. The language used by this Board in *Yadao* v. *Namdeo* (48 I.A. 513 : 49 C, 1. : 15 L.W. 565 : 1922 P.C. 216 : 20 A.L.J. 481 : 42 M.L.J. 219 : 25 C.W.N. 393 : 24 Bom. L.R. 609) is much in point. There was here no direction either explicitly made or clearly intended to limit the discretion of the widow in such a case as in fact occurred."

105. Minor widow when can adopt.—A minor widow who has been authorised by the husband can make a valid adoption provided she has attained sufficient maturity of understanding to comprehend the nature and the consequences of the act of adoption,[g] and, in the absence of convincing proof that she acted of her own free will and was fully aware of the sacrifice she was making in introducing a stranger into her family, her tender years would be her best protection and no Court would enforce the consequences of her inconsiderate act.[h] The fact that the widow has reached the years of discretion and attained sufficient maturity of understanding is not itself sufficient to validate an adoption by a minor widow of 15 years.[i] As it is not uncommon even for grown up women to adopt in haste only to lament at leisure, it is all the more necessary that in the case of minors they must be in a position to bring to bear a mature reflexion on the consequences of their acts and this necessity is not diminished by the circumstance that they were fortified by the well-meant advice of responsible adult relations.[j] An adoption vitiated by the immature age and the want of understanding on the part of the adopter is *ab initio* void and cannot be subsequently ratified.[k] But the tender years of the widow or the immaturity of her understanding would not prevent her validly making an adoption of a boy when the husband had mentioned that boy for adoption and had left nothing for the discretion of his widow,[l] to be moulded by the machinations of mischief-mongers.

106. Successive adoptions.—In order to ensure the performance of those religious rites on which depends his salvation in after-life, a Hindu can not only make, but can also authorise his wife to make, any number of successive adoptions, provided that at each time an

(g) *Basappa* v. *Sitramappa*, 43 B. 481 21 Bom L.R. 217 50 I.C. 736; *Parvatava* v. *Fakirnaik*, 46 B. 307—1922 B. 105=23 Bom. L.R 1075; *Sattiraju* v. *Venkataswami*, 40 M 925=40 I.C. 518 5 L.W. 603 32 M.L.J 119; *Ranganayakamma* v. *Alwar Setti*, 13 M. 214; *Somasekhara* v. *Subhadra*, 6 B. 524.

(h) *Ramachari* v. *Saraswati*, 1920 M W.N. 721=60 I.C. 246=12 L.W. 544; *Parvatava* v. *Fakirnaik*, 46 B. 307—1922 B 105=23 Bom L.R. 1075; *Bhimrao* v. *Gangabai*, 1931 N. 74.

(i) *Mallangouda* v. *Dundapagouda*, 1932 B 529=34 Bom. L.R 1009.

(j) *Sattiraju* v. *Venkataswami*, 40 M. 925=40 I.C. 518 5 L.W. 603=32 M.L.J. 119. But see *Ranganayakamma* v *Alwar Setti*, 13 M. 214.

(k) *Sattiraju* v. *Venkataswami*, 40 M. 925 40 I.C. 518. 5 L.W. 603= 32 M L.J. 119; *Murugeppa* v. *Kalava*, 44 B. 327=55 I.C. 361—22 Bom. L.R. 91. But see *Venkatanarasimha* v. *Rangayya*, 29 M. 437—16 M L.J. 178.

(l) *Mondakini* v. *Adinath*, 18 C. 69.

adoption is made there is no son, grandson, or great-grandson, aurasa or adopted, living,[m] who is qualified to render the spiritual services to the deceased ancestors.

107. Discretion of widow to adopt.—A widow authorised by her husband to adopt, has an unfettered discretion in the matter of making or not making the adoption, and cannot be compelled to act upon the authority until she chooses to do so.[n] Hence an express authority or even direction to the wife to adopt has no legal existence till it is acted upon by the widow of her own free will and choice,[o] and her refusal to adopt, even though she has been directed by the husband to make an adoption, is no ground for the executors under the husband's will declining to deliver to her the possession of the husband's estate;[p] and if she is made to act upon it under the influence of coercion, moral or physical,[q] or acts upon it in ignorance of the legal effect of her act,[r] the adoption is not valid, and cannot be rendered valid by subsequent ratification.[s] Though she has an absolute discretion in the matter of acting upon the authority, the authority itself is personal to her and cannot be delegated or transferred to another.[t]

108. No time limit for exercising the power.—There is no power under the Hindu Law to compel a widow to adopt, and, in the absence of a time limit imposed on the authority which empowered her to adopt or of a direction that she should adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted.[u] Though there is no obligation on the part

(m) *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey*, 43 C 432=3 L.W. 252=43 I.A. 12=(1916) 1 M.W.N. 73=14 A.L.J. 167 18 Bom. L.R. 347=20 C.W.N. 169 30 M.L.J. 110=1915 P.C. 101; *Boobun Moyee* v. *Ram Kishore*, 10 M. I.A. 279; *Rungama* v. *Atchama*, 4 M. I.A. 1, *Mahesh Narain* v. *Taruck Nath*, 20 C. 487 20 I.A. 30 (P.C.); *Yadao* v. *Namdeo*, 49 C 1 15 L.W. 565=20 A.L.J. 481 21 Bom L.R. 609=26 C.W.N. 393=42 M.L.J. 219=48 I.A. 513. 1922 P.C. 216; *Suryanarayana* v *Venkataramana*, 29 M. 382=33 I.A. 145 3 A.L.J. 702=8 Bom. L.R. 700=10 C.W. N. 921 16 M.L.J. 276 (P.C); *Madan Mohana* v. *Purushothama*, 41 M. 855=8 L.W. 167=16 A.L.J. 725=20 Bom. L.R. 1041=23 C.W.N. 117=35 M.L.J. 138=1918 M.W.N. 621=45 I.A. 156=1918 P.C. 74.

(n) *Mutasaddi Lal* v. *Kundan Lal*, 28 A. 377=33 I.A. 55=3 A.L.J. 246=8 Bom. L.R. 371=16 M.L.J. 174 (P.C.); *Bamundoss* v. *Mt. Tarinee*, 7 M. I.A. 169.

(o) *Ibid. Uma Sunduri* v. *Sourobinee*, 7 C. 288; *Bhimrao* v. *Gangabai*, 1931 N. 74.

(p) *Varadanarayana* v. *Vengu*, 47 L.W. 217; *Uma Sunduri* v *Sourobinee*, 7 C 288, *Bamundoss* v. *Mt. Tarinee*, . M I.A. 169.

(q) *Ranganayakamma* v. *Alwar Setti*, 13 M. 214

(r) *Bayabai* v. *Bala*, 7 Bom. H.C.R. Appx 1; *Sattiraju* v. *Venkataswami*, 40 M. 925=40 I.C. 518. 5 L.W. 603 32 M.L. J. 119

(s) *Sattiraju* v. *Venkataswami*, 40 M. 925 32 M.L.J 119=40 I.C 518 5 L.W. 603; *Murgeppa* v. *Kalawa*, 44 B 327 22 Bom. L.R 91 55 I.C. 361. But see *Venkatanarasimha* v *Rangayya*, 29 M 437=16 M.L.J. 278.

(t) *Bamundoss* v. *Mt. Tarinee*, 7 M. I.A. 169.

(u) *Pratapsingh* v. *Ajarsingji*, 10 L.W. 339=43 B. 778=17 A.L.J. 522 21 Bom. L.R. 496=46 I.A. 97 1919 M.W.N. 313=24 C.W. N. 57 36 M.L.J. 511 1918 P.C. 192; *Mutasaddi Lal* v *Kundan Lal*, 28 A. 377=33 I.A. 55=3 A.L.J 246=8 Bom. L.R. 371 =16 M. L.J. 174 (P.C.); *Madana Mohana* v. *Purushothama*, 41 M. 855=8 L. W. 167=16 A.L.J. 725=1918 N.W.N. 621=45 I.A. 156=20 Bom. L.R. 1041=23 C.W.N. 177=35 M.L.J. 138=1918 P.C. 74.

of the widow to make the adoption without the least delay,[v] undue delay in making the adoption may lead to a presumption that the authority itself was not given.[w]

109. Authority in the case of co-widows.—Where a man has two or more wives, he can authorise any one of them or all of them to adopt to him.[x] But only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.[y] When the power is given only to one of the wives, then she can adopt without consulting the others and none of the others can adopt.[z] If the power is given to the widows severally, then the senior widow, *i.e.*, the woman whose marriage was earlier, gets a preferential right to adopt,[a] and the junior widow cannot make an adoption unless the senior widow dies or refuses to adopt,[b] or leads a life wholly incapacitating her from making an adoption,[c] or consents to the junior widow making the adoption,[d] or relinquishes her right to make the adoption in favour of the junior widow.[e] If the senior widow has validly made an adoption, the junior widow's power to make the adoption comes to an end.[f] The adoption in Southern India by a junior widow without the consent of the senior widow does not become valid even if the sapindas have assented to the adoption,[g] and from the mere fact that the senior widow was living apart from her husband for 25 years, she cannot be deemed to be a "*dushta* or *nishidda*" and so disqualified to exercise her preferential right to

(v) *Sheo Bahadur Singh* v *Beni Bahadur Singh* 1926 P.C. 97.

(w) *Rajah Hanmun Chull Sing* v. *Koomar Gunsheam Sing*, 5 W.R. 69=2 Knapp. 203.

(x) *Tiruvengalam* v *Butchayya*, 52 M. 373=1929 M. 11=28 L.W. 727=1928 M.W.N. 53=55 M.L.J. 757.

(y) *Narasimha* v. *Parthasarathy*, 37 M. 199=41 I.A. 51=23 I.C. 166=12 A.L.J. 315=16 Bom L.R. 328 18 C.W.N. 554=26 M. L.J. 411 1914 M.W.N. 299 (P.C.).

(z) *Mayne* 9th Edn. p. 156.

(a) *Muthusami* v. *Pulavaratal*, 45 M. 266=42 M.L.J. 101=1922 M. 106=15 L.W. 40 =1922 M.W.N. 53; *Rajah Venkatappa* v. *Renga Rao*, 39 M. 772=29 M.L.J. 18=1916 M. 919: 1915 M.W.N. 424; *Rakhmabai* v. *Radhabai*, 5 Bom. H.C.R. (A.C.) 181; *Pudayirav* v. *Ramrav*, 13 B. 160; *Dnyanu* v. *Tanu*, 44 B. 508=22 Bom. L.R. 390=1920 B 27; *Ranjit Lal* v. *Bijoy Krishna*, 39 C 582=16 C.W.N. 440=14 I.C. 17.

(b) *Ranjit Lal* v. *Bijoy Krishna*, 39 C. 582 16 C.W. N. 440=14 I.C. 17; *Mondakini* v. *Adinath*, 18 C. 69.

(c) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C R (App.) 181.

(d) *Basappa* v. *Sidramappa*, 21 Bom. L.R 217=50 I.C. 736=43 B. 481; *Muthusami* v. *Pulavaratal*, 15 L.W. 40 =42 M L.J. 101 1922 M 106 (1)=45 M. 266.

(e) *Sadashiv* v. *Reshma*, 39 Bom. L.R. 1115 1938 B 1.

(f) *Shivappa* v. *Rudrava*, 57 B. 1=34 Bom. L.R. 539=1932 B. 410.

(g) *Rajah Venkatappa* v. *Renga Rao*, 1916 M. 919 1915 M.W.N. 424=39 M. 772= 29 M.L.J. 18=30 I.C. 106; *Muthusami* v. *Pulavaratal*, 15 L.W. 40=45 M. 266=1922 M. 106(1)=42 M.L.J. 101.

adopt.[h] The preferential right of the senior widow prevails only so long as the inheritance vests in her along with his junior widow.[i] If by the death of a Hindu leaving behind him two widows and a son by a junior widow, the property subsequently vests in the junior widow on the death of her son, the senior widow cannot make an adoption even with the consent of the junior widow.[j] When a joint power is given to two widows, both of them should act conjointly in the matter of adoption, though the senior widow will receive the boy during the ceremonial,[k] and when one of the widows dies before the authority is acted upon, the other widow cannot make a valid adoption.[l] But in such a case if the boy had been selected by the husband himself and the widow who died before the adoption consented to the boy being adopted by the surviving widow, the adoption is valid.[m] In *Narasimha* v. *Parthasarathy*,[l] their Lordships of the Judicial Committee observe as follows on the question whether a joint power to adopt given to two co-widows can be acted upon by one of them after the death of the other:—

"So construing it they are of opinion that it gives to the widows jointly the power to adopt a son should an occasion arise which in their opinion makes it desirable so to do. The power is a joint power and the occasion on which it is to be exercised depends on their joint opinion. In other words, the exercise of the power is vested in the discretion of the joint donees. Now it is clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English law or of any series of English decisions. It flows from the nature of a joint power. If power is given to A and B *personae designatae* to do an act if and when they think it desirable the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague nor can he then do the act, seeing that the authority to do it is only given to the two acting jointly. The case is different when the power is vested not in *personae designatae* but in the occupants for the time being of a specified office such as executors or trustees, but that is not the case which we have to consider here.

The point may perhaps be put in a simpler form not involving any appeal to legal doctrines as to joint donees of a power. Their Lordships are of opi-

(h) *Muthusami* v. *Pulavarattal*, 15 L. W. 40—45 M. 266—1922 M. 106(1)=42 M.L.J. 101.

(i) *Muthusami* v. *Pulavarattal*, 45 M. 266—15 L.W. 40—1922 M. 106=1922 M.W.N. 53; *Rajah Venkatappa* v. *Renga Rao*, 39 M. 772 29 M.L.J. 18—30 I.C. 106—1916 M. 919—1915 M.W.N. 424; *Rakhmabai* v. *Radhabai*, 5 Bom. H.C.R. (A.C.J.) 181; *Padajirao* v. *Ramarao*, 13 Bom. 160; *Dnyanu* v. *Tanu*, 44 Bom. 508=22 Bom. L. R. 390—57 I.C. 113; *Ranjit Lal* v. *Bijoy Krishna*, 39 C. 582=16 C.W.N. 440=14 I.C. 17.

(j) *Anandibai* v. *Kashibai*, 28 B. 461= 6 Bom. L.R. 464; *Lakshmibai* v. *Sarasvatibai*, 23 B. 789—1 Bom. L.R. 420.

(k) *Tiruvengalam* v. *Butchayya*, 52 M. 273—1929 M. 11—28 L.W. 727—1929 M.W.N. 53—55 M.L.J. 757.

(l) *Narasimha* v. *Parthasarathy* 37 M. 199 41 I A 51 1914 M.W.N. 299=12 A.L.J. 315—16 Bom. L.R. 328—18 C.W.N.554=26 M.L.J. 411—23 I.C. 166 (P.C.); *Lachmi Prasad* v *Parbati*, 42 A. 266; *Sarada* v. *Rama*, 17 C.W.N. 219.

(m) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1=1925 M. 497.

nion that the words of the will when properly construed relate to choice and adoption by the two widows acting jointly. Hence those words refer only to the period of time when both widows are living. The will is silent as to the period after the death of one of the widows and if their Lordships were to hold that Papamma could adopt a son after Chinnamma's death they would be providing for a period of time which the testator left unprovided for, and unnoticed in his will, i.e., they would be making an addition to his testamentary dispositions which is a thing that no Court is entitled to do."

110. Adoption by widow in the Bombay Presidency.—Under the Bombay School of Hindu Law, a widow has power to adopt to her husband subject only to such restrictions if any as may have been imposed upon her by her husband[n] and when she exercises this power of adoption, she really exercises the authority conferred on her by implication by her husband.[o] Thus she may, though not expressly authorised by her husband, and whether he was at the time of his death joint or separate, adopt a son to him without the consent of his kinsmen or surviving coparceners.[p] But if there is a prohibition by the husband express or implied,[q] or if a son adopted by her husband is alive even though the validity of that adoption is questionable,[r] an adoption by the widow is invalid. But such a prohibition cannot be implied merely from the husband's refusal to make an adoption during his lifetime[s] or from the absence of intention to adopt or authorise adoption.[t]

It has been held that an adoption made by a widow in Western India who succeeds to the last male owner's estate not as his widow, but as the widow of his Gotraja Sapinda, as for instance when a widow succeeds to her step-son as his nearest heir, is invalid.[u] But the real test of the validity or otherwise of such an adoption is that enunciated in *Amarendra* v. *Sanatan*,[v] namely, whether

(n) *Jagannath Rao* v. *Rambharosa*, 37 C W N. 321 -35 Bom. L.R. 230 64 M L J 142 -1933 M.W N 117= 1933 A L J. 486 60 I.A. 49 37 L W 319 1933 P C 33.

(o) *Sadashiv* v. *Reshma*, 39 Bom. L.R. 1115, *Venkappa* v *Jivaji Krishna*, 25 B. 306 2 Bom. L.R. 1101; but see *Lakshmibai* v. *Saraswatibai*, 23 B. 789 -1 Bom. L.R. 420; *Vendravan* v. *Manilal*, 15 B. 565 (Husband dying as a minor); *Lakshmibai* v. *Saraswatibai*, 23 B. 789 (Husband having lived away from his wife).

(p) *Bhimabai* v. *Gurunathgouda*, 35 Bom. L.R. 200 -37 C W.N. 210- 60 I A. 25 -64 M.L.J. 34 - 1933 A.L.J. 366- 1933 M W. N. 1 -57 B. 157 -37 L.W. 81 -1933 P.C. 1; *Umrao Singh* v. *Chaman*, 6 B. 498 (F.B.); *Vijayasingji* v. *Shivsangi*, 59 B. 360 - 62 I.A. 161 =37 Bom L.R. 562.=39 C.W.N. 682 =68 M. L.J. 701 -42 M.L.W. 1=1935 P.C. 95=1935 A.L.J. 690=1935 M.W.N. 534.

(q) *Malyada* v *Babaji*, 37 B. 107=14 Bom. L.R. 1121 17 I C. 746; *Collector of Madura* v *Mottoo Ramalinga*, 12 M I.A. 397, *Gopal* v *Vishnu*, 23 B. 250.

(r) *Bhau* v. *Narsingouda*, 46 B. 400=23 Bom. L.R. 1272.=1922 B. 300, *Chimabai* v. *Mallappa*, 46 B. 946 -1922 B 397 -24 Bom L.R. 489.

(s) *Sita bai* v. *Govindrao*, 51 B. 217 -1927 B. 151; *Ishwar Dadu* v. *Gajabai*, 50 B 468 -1926 B 435.

(t) *Vithangowda* v. *Secretary of State* 1932 B. 442 -30 Bom. L.R 818.

(u) *Basangouda* v. *Rudrappa*, 52 B. 393- 1928 B. 291-30 Bom. L.R. 591; *Yekanath* v. *Laxmibai*, 1922 B. 347 -47 B. 37 . 24 Bom. L.R. 836; *Datto Govind* v. *Pandurang*, 32 B. 499 10 Bom. L.R. 602.

(v) *Amarendra* v. *Sanatan*, 12 Pat. 642 .60 I A. 242 -35 Bom. L.R. 859 -37 C.W. N. 938.-65 M.L.J. 203 -1933 A L J. 710 -38 L.W. 1=1933 P.C. 155- 1933 M.W.N. 769= 14 P.L.T. 399.

or not the power of the widow to make the adoption has come to an end prior to the adoption by reason of a son of her husband having died subsequent to the husband's death, having his own (son's) widow or his son to continue the line, and if her power has not so come to an end, her power of adoption cannot be questioned, even though at the time she exercises that power the estate vested in her has come to her by inheritance as the widow of a *gotraja sapindas* of the last male-holder.[w]

111. Adoption with the consent of sapindas.—The whole basis of the rule that in Southern India the want of consent of the husband for his widow making an adoption can be supplied by the consent of the sapindas was a single sentence in Colebrooke's note on the Mitakshara to the effect that in some of the schools a valid adoption can be made by the widow with the assent of his kindred. This statement which was repeated by Sir Thomas Strange in his Hindu Law was approved as correct by the Privy Council in the *Ramnad* case[x] as the statement of the established law in Southern India. The decision of the Madras High Court, which the Privy Council confirmed in that case, upheld an adoption by a widow with the consent of the majority of her sapindas on the ground that the law of adoption was a development from the old practice of raising up issue to a deceased husband by his brother or sapinda having carnal intercourse with the widow.[y] This analogy between the form of the Dattaka adoption and the old practice relied upon by the High Court was not accepted by the Privy Council whose decision in favour of the rule proceeds on the ground of the presumed incapacity of women for independence. Elaborating on this ground their Lordships proceed to lay down the following propositions: (1) that if the husband was a joint member of the family which remains joint on the date of the sanction, then the widow is allowed the alternative of seeking and obtaining the consent of only the husband's father who, as the head of the family and the natural guardian of the widow, is competent by his sole assent to authorise an adoption by her; (2) if there be no father in the husband's undivided family, the assent 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; (3) where, however, the widow has taken by inheritance the separate estate of her husband, the consent of the father-in-law if he is alive, would be sufficient; (4) if there be no father-in-law, there

(w) *Ramachandra* v. *Mt. Yamuni*, 1936 N. 65 (P.B.).
(x) *Collector of Madura* v. *Moottoo Ramalinga*, 12 M.I.A. 397.
(y) *Collector of Madura* v. *Moottoo Ramalinga*, 2 M.H.C.R. 206.

should be such evidence of the assent of the kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive; (5) but the consent of kinsmen however remote is not essential since their assent seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption; (6) inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen 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 and the widow cannot adopt with the assent of the kinsmen 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 the 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 rites. 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.

112. Sapindas' consent in undivided family.—Where the husband had died a member of an undivided family and the family still remains joint at the time the widow seeks the sapindas' consent to make the adoption, the permission must be sought within the family and not outside it.[z] If the husband's father is alive then his consent alone will be sufficient to authorise the widow to make the adoption, [a] and in the absence of such father, either the manager or all the undivided members of the family can empower her to adopt,[b] but not the divided members without the concurrence of the undivided members.[b] Though religious duty is the foundation of the law of adoption, and the devolution of property a mere legal consequence, yet having regard to the grave social objections to making the succession of property depend upon the caprice of a woman, the power enunciated in the *Ramnad* case[a] should be kept strictly within the limits assigned to it.[z] An adoption made with the consent of the deceased son of the adopting widow is a valid adoption where there is no change in the cir-

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(z) *Raghunada* v. *Brozo*, 1 M. 69–3 I.A. 154 (P.C.); *Narayanesami* v. *Mangammal*; 28 M. 415–15 M.L.J. 143.

(a) *Collector of Madura* v. *Mootoo-Ramalinga*, 12 M.I.A. 397.

(b) *Raghunada* v. *Brozo*, 1 M. 69 (81) –3 I.A. 154 (P.C.).

cumstances and there are no other grounds for the next presumptive reversioners to object to the adoption when actually made.[c] But where the only surviving coparcener is a minor and hence incapable of according a valid assent to the deceased coparcener's widow, the widow can make a valid adoption with the consent of the minor's guardian.

113. Sapindas' consent in a divided family.—Where the husband died a divided member, then the widow can adopt with the assent of her father-in-law, if he be alive[d] or with the assent of a substantial majority of the nearest heirs of her husband.[e] 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 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.[f] In giving or withholding their consent to a proposed adoption, it is the duty of the sapindas, who are to be regarded as a family council, the natural guardians of the widow and the protectors of her interest, to form an honest and intelligent judgment on the advisability or otherwise of the proposed adoption in and with reference to the widow's branch of the family. Where one of two sapindas whose consent is sought refuses it, being actuated by personal motives, his dissent may be disregarded, and the adoption made with the consent of the only other sapinda, *bonc fide* given, will be perfectly valid.[g] But it is the duty of the widow to ask for the consent of every one of the nearest sapindas and she cannot excuse herself by saying that she did not ask his consent because she knew it would be refused.[h] The consent may be asked either in person or even by a letter and the fact that the widow merely wrote for the sapinda's consent for adopting a particular boy instead of going to the sapinda and having a discussion with him regarding the propriety or otherwise of the proposed adoption does not invalidate the widow's approach so as to justify the sapinda in refusing to give his consent.[g] In the absence of the father, the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be disregarded. But the absence of their consent or, in case there

(c) *Annapurnamma* v. *Appayya*, 56 M. L.J. 760=52 M 620 1929 M. 577=29 L.W. 858 (F.B.).

(d) *Collector of Madura* v. *Moottoo Ramalinga*, 12 M.I.A. 397.

(e) *Kristnayya* v. *Lakshmipathi*, 43 M 630=18 A.L.J. 601=24 C.W.N. 905=39 M. L J. 70=47 I.A. 99=1920 M.W.N. 385=12 L.W. 625=1920 P.C. 4.

(f) *Vellanki* v. *Venkata*, 1 M 174=4 I.A. 1. (P.C.); *Kristnayya* v. *Lakshmipathi*, 43 M. 630=18 A.L.J. 601=24 C W N. 905=39 M L J 70=12 L.W. 625=1920 P.C. 4=47 I.A. 99=1920 M.W N. 385.

(g) *Krishnayya Rao* v. *Surya Rao*, 1935 P.C. 190=69 M.L.J. 388=40 C.W.N. 1=37 Bom. L.R 852=42 L.W. 267=1935 M.W.N. 1216.

(h) See p. 110 foot note (h).

is only one, of his consent, cannot be made good by authorisation of distant relatives remotely connected[h] whose interest in the well being of the widow or the spiritual welfare of the deceased or in the protection of the estate is of a minute character and whose assent is more likely to be influenced by improper motives. This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary; nor does it exclude the view that where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded. Nor does it contemplate cases where the nearest sapinda happens to be in a distant country, and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. The consent required is that of a substantial majority of those agnates nearest in relationship who, as already observed, are capable of forming an intelligent and honest judgment on the matter.[i] When it is said that the assent of sapindas is necessary, sapindas include *bhinnagotra* sapindas[j] as well as *sagotra* sapindas, and when there is no agnatic relation, the consent of the cognate relation who under the law would be the presumptive reversioner is sufficient. The test of propinquity from the point of view of property is an unfailing test and a sure guide in this matter.[k] In the absence of any other sapindas the consent of the husband's mother would validate an adoption.[l] When there are no sapindas, the widow has in herself no residuary power to adopt[m] but in the presence of sapindas, near or remote, a daughter's consent to

(h) *Veera Basavaraju* v. *Balasurya Prasada Rao*, 41 M. 998 9 L W 243 .1918 P.C. 97=45 I.A. 265= 17 A L J 34 21 Bom I.R. 238 23 C W.N. 251 .36 M L J 40 *Subramanyam* v. *Venkammu*, 26 M 627.. 13 M L J 239; *Kristnayya* v *Lakshmipathi* 43 M. 650 18 A.L.J. 601 24 C.W N. 905 39 M.L.J. 70 47 I.A. 99 1920 M W N. 385 12 L.W. 625 1920 P.C. 4; *Venkamma* v. *Subramaniam*. 30 M. 50 17 M.L.J. 114=34 I A. 23 4 A.L.J. 150 .11 C W N. 345.

(i) *Kristnayya* v. *Lakshmipathi*, 43 M. 650 (P C) . 18 A L J. 601=24 C.W.N. 905= 39 M.L.J. 70 47 I A. 99 1920 M.W N. 385 12 L.W. 625=1920 P.C. 4, *Veera Basavaraju* v *Balasurya Prasada Rao*, 41 M. 998. 9 L.W. 243 1918 P.C. 97 =45 I A 265 17 A.L.J. 34 =21 Bom. L.R. 238 23 C.W.N. 251=36 M.L.J. 40; *Solaimalai* v. *Sokkammal*, 67 M L.J. 618=1934 M. 567=40 L.W. 559.

(j) *Balasubramanya* v. *Subbayya*, 47 L. W 110=1938 P.C. 34=1938 A.L.J. 215 42 C.W.N. 449=(1938) 1 M.L.J. 426=19 P.L.T. 169 .65 I.A. 93.

(k) *Balasubramania* v. *Subbayya*, 1938 P.C. 34=17 L.W. 110. *Kesar Singh* v. *Secretary of State*, 49 M. 652=51 M. L.J. 16 1926 M W.N. 540=1926 M 881 .24 L.W 878: See contra in *Viswasundara* v. *Somasundara*, 43 M. 876 59 I.C. 609 and *Murahari* v. *Sumitramma*, 57 M. 411 .66 M.L.J. 577= 1934 M.W N. 127 .1934 M. 191=L.W. 133. After the Hindu Law of Inheritance Amendment Act (II of 1929) a question may arise whether in the presence of agnatic relations whose right to succession is postponed under this Act, the consent of the preferential heirs under the Act would be necessary or sufficient for a valid adoption. But when one considers the limited scope and the obvious object of the Act, the answer to this question would appear to be in the negative.

(l) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1=1925 M. 497.

(m) *Balasubramania* v. *Subbayya*, 1938 P.C. 34=47 L.W. 110; See contra in *Appalaswamy* v. *Moosalaya*, 12 R. 22=1933 R. 334.

the adoption is unnecessary.[n] In the *Ramnad* case, their Lordships of the Privy Council have the following observations to make on the question as to whose consent would be a sufficient substitute in the absence of the husband's authority:—

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased Husband, is the first to suggest itself. Where the Husband's family is in the normal condition of a Hindoo family—*i.e.*, undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her Husband's share of the joint estate, except a right to maintenance. And though 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, yet, if there be no Father, 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 co-parcener against their will. Where, however as in the present case, the Widow has taken by inheritance the separate estate of her Husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the Husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the Father-in-law, to whom the law points as the natural Guardian and "venerable protector" of the Widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no Father-in-law is in existence. Every such case must depend upon the circumstances of the family."

114. Validity of sapindas' consent.—Where the assent of the kinsmen to an adoption is procured by a widow under circumstances negativing the exercise of any conscious discretion in the matter on the part of the kinsmen, the consent is invalid and insufficient to validate an adoption. Thus where the widow falsely represents to the sapindas that she has her husband's consent and thereby secures their assent to the adoption, the adoption will be invalid.[o] For the same reason the consent by a minor is ineffective to validate an adoption, [p] or even a mere presence, at the adoption, of one whose consent can validate it.[q] So also a con-

(n) *Murahari* v. *Sumitramma*, 39 L.W. 133=57 M. 411=66 M.L.J 577=1934 M. 191 =1934 M.W.N. 127.

(o) *Venkanna* v. *Venkanna*, 1927 M. 706; *Venkatalakshmamma* v. *Narasayya*, 8 M. 545; *Venkamma* v. *Subramaniam*, 30 M. 50=17 M.L.J. 114=3 I A. 22=4 A.L.J. 150=9 Bom. L.R. 89=11 C.W.N. 345 (P.C.); *Ganesa* v. *Gopela*, 2 M. 270 7 I A. 173 (P.C.); *Raghunada* v. *Brozo*, 1 M. 69=3 I.A. 154 (P C.). *Ramanuja* v. *Narasamma*, 1933 M.W N. 1118.

(p) *Vasudeo* v. *Ramchandra*, 22 B. 551

(q) *Ibid* -*Ramanni* v *Kulandai*, 14 M I A. 346.

sent obtained by bribery or corruption is invalid.[r] But where a sapinda gives his consent to an adoption with the view of getting his daughter's daughter married to the adoptee, the validity of the consent cannot be attacked on the ground that it is given with a fraudulent or corrupt motive, because the mere hope or bare expectation of the consenting sapinda cannot be treated as amounting to an inducing motive in giving the consent.[s] So also there is nothing wrong in a coparcener of the husband consenting to an adoption after stipulating for his own protection that his own share should remain undisturbed by the adoption.[t] Nor does the fact that the boy to be adopted happens to be the son of a sapinda disqualify that sapinda from validly assenting to the adoption.[u] A consent to the widow adopting "any boy from the *sagotrajas*" is not invalid as being too general or as excluding a conscious exercise of discretion in the matter by the sapindas.[v] The mere circumstance that the consent of a substantial majority of the sapindas has been obtained will not validate an adoption and the widow's omission to consult any one of the nearest sapindas is enough to render the adoption invalid,[w] even if he was inimically disposed towards her and would have refused his assent[x] if asked for. This point received the following consideration of the Privy Council in the case of *Venkamma* v. *Subramaniam*[x] where a widow obtained the consent of one of the two sapindas by representing that she had already obtained her husband's authority and omitted to ask for the consent of the other sapinda on the ground that he was inimically disposed towards her:—

"One of the most important facts in the case is that the first appellant, the widow, at the time of the adoption and in her defence to this action, asserted that her husband had before his death given her, orally, permission to take a boy in adoption. Both Courts have held that this has not been established in evidence. It is only as a second and corroborative authority, that the first appellant obtained the deed of consent which has been mentioned. This failure of the appellants to prove the husband's authority enters deeply into the question about the kinsmen's consent, for it cannot be disputed that the first appellant, in obtaining such consents as she did, represented herself to have received her husband's authority. Accordingly the respondents rely not merely on the absence of the consent of one of the two nearest kinsmen, but on the consents actually obtained having been given, not in the exercise of an independent judgment on the expediency

(r) *Danakoti* v. *Balasundara*, 36 M. 19 : 18 I C 989 ; *Rami* v. *Rangamma*, 11 M L. J. 20. *Ganesa* v. *Gopala*, 2 M. 270—7 I A. 173 (P.C.).

(s) *Sivasuryanarayana* v. *Andinarayana*, 44 M.L.W. 876—1936 M.W.N. 1333—1937 M. 110.

(t) *Srinivasa* v. *Rangasami*, 30 M. 450 —17 M L.J. 322.

(u) *Krishnayya Rao* v. *Rajah of Pittapur*, 42 L.W. 267=37 Bom. L.R. 852=40 C.W.N. 1—69 M L.J. 388—1935 P.C. 190=1935 M.W N. 1216.

(v) *Brahmanastri* v. *Sumitramma*, 57 M 411—66 M L.J. 577—1934 M. 191—1934 M W.N. 127 39 L.W. 133.

(w) *Subbamma* v *Adimoorthappa*, 21 L.W 85 .1925 M 635 1925 M.W.N. 107.

(x) *Venkamma* v. *Subramaniam*, 30 M. 50 17 M L.J. 114=34 I.A. 22.=4 A.L.J. 150 .9 Bom. L.R. 89—11 C.W.N. 345 (P.C.).

of the proposed adoption, but rather as the ratification of what must now be taken to be the non-existent authority of the deceased husband. This is the view taken in the judgment appealed against, and in their Lordships' opinion it is sound.

It is unnecessary to re-state the law as to the persons whose authority is required for adoption, for the appellants' case fails in the quality of the consents actually obtained. But, in their Lordships' judgment, the appellants have failed to justify the widow in omitting to ask for the authority of a person holding so important a position in the family as did the first respondent. She defends herself by saying that she knew he would refuse; but she is not entitled to say so, and to consult him was essential to her obtaining the mind of the kinsmen on this family question."

115. Difference between the husband's authority and sapindas' consent.—There is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband and there is no obligation upon the widow to make the adoption at once or within a reasonable time(a). The latter is intended to be used within a reasonable time after the consent is given. When the interval is short, the death of the sapinda may not matter, but a sapinda's consent is not to be pocketted by a widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply. Again, the boy to be adopted ought also to be referred to the consideration of the sapinda, since his consent to the adoption of any boy at any time will be invalid.(b) Another distinction that may be urged between an adoption with the husband's authority and an adoption with the sapindas' consent is that in the former case the motives of the widow are immaterial,(c) while in the latter case the motives of the widow, if corrupt or capricious, may be said to invalidate the adoption.

116 Time limit for acting on sapindas' consent.—The consent of sapindas empowering the widow to make an adoption is ordinarily the consent of those sapindas nearest in relationship and living at the time the adoption is made. Hence a sapinda's consent cannot be acted upon after his death when those who are the nearest reversioners at the time the adoption is made are against the adoption.(b) The proper rule seems to be that laid down by the Madras High Court in *Brahmayya* v. *Ratayya*,(c) that a consent of a sapinda

(a) *Rawat Sheo* v. *Beni Bahadur*, 1926 P C 97; *Mutasaddi Lal* v. *Kundan Lal*, 28 A. 377=33 I A. 55=16 M L J 174=3 A.L.J. 246=8 Bom. L.R. 371 (P.C.); *Raja Vyankatrao* v. *Jayarantrao*, 4 Bom. H.C. R 191.

(b) *Brahmayya* v. *Ratayya*, 20 L.W. 503 1925 M. 67=1924 M W.N. 844; But see *Brahmasastri* v. *Sumitramma*, 57 M. 411=66 M.L.J. 577=1934 M. 191=1934 M.W.N. 127 39 L.W. 133.

(c) See the reasoning in *Banarsi* v. *Sumal*, 1936 A 641=1936 A L.J. 1237. See also S 119.

(b) *Mani* v. *Subbarayar*, 36 M. 145=24 M L.J. 484 19 I C. 663; *Lakshmibai* v. *Vishnu*, 29 B. 410=7 Bom. L.R. 436.

(c) 1924 M.W.N. 844=20 L.W. 503=1925 M. 67.

does not become inoperative automatically on the sapinda's death and the only condition that should be imposed as regards the time within which it should be acted upon is that it should not be used after an unreasonably long time when entirely different considerations as to the expediency of making the adoption might arise.[d]

117. Sapinda's consent whether revocable.—A sapinda cannot arbitrarily or capriciously withdraw or revoke his consent. If a sapinda cannot, as is now well established, arbitrarily withhold his consent or refuse it (See S. 118), it stands to reason that an arbitrary revocation of the consent should stand equally condemned. The correct view has been trenchantly expressed by Venkatasubba Rao J. in *Sivasuryanarayana* v. *Audinarayana*[e] as follows: "As Seshagiri Ayyar, J. points out in *Suryanarayana* v. *Ramadas*[f] the assent of a sapinda is presumptive evidence of the *bona fides* of the widow's act. That being the essence of the doctrine of consent, it is impossible to uphold the contention that a sapinda may at his pleasure withdraw his consent. It has been faintly argued that the discretion in the exercise of which a sapinda gives his consent, necessarily carries with it a power to revoke it. This is contrary to the spirit of the Hindu Law, which treats a sapinda's consent as amounting to an expression of his opinion that the adoption conduces to the spiritual benefit of the deceased person. We, without hesitation, concur in the view of Seshagiri Ayyar J. that when a sapinda, upon a dispassionate consideration of the question, once gives his consent, he cannot arbitrarily or capriciously withdraw it." Whether he can do so for justifiable reasons, is a matter left open by this ruling, but there can be little doubt that he can, for it is easy to visualise cases of post-consent awakening of the sapindas to the sordid or nefarious schemes in furtherance of which the adoption was thought of to cover up debauchery and sin by a religious exterior.

118. Improper refusal of consent by the sapindas.—Where a sapinda refuses to give his consent to the widow's adoption, actuated by corrupt or malicious motives, his dissent may be disregarded,[g] and an adoption made with the consent of the agnates next in order is valid.[h] The behest of the law is that the sapinda

(d) *Ammanna* v. *Satyanarayana*, 49 M. 636=51 M.L.J. 426=24 L.W. 150=1926 M. 916; *Suryanarayana* v. *Ramadoss*, 41 M. 601=7 L.W. 72=1918 M.W.N. 208=43 I.C. 526 : 34 M L J. 87 ; *Annapurnamma* v. *Appayya Sastri*, 52 M 620=29 L.W 858=1929 M 577=56 M L J. 760 (F.B.)

(e) 44 M.L.W. 876=1937 M. 110=1936 M.W.N. 1333.

(f) 41 M. 604 34 M.L.J. 87=7 L.W. 72 =1918 M.W.N. 208.

(g) *Krishnayya* v. *Lakshmipathi*, 43 M. 650=12 L.W. 625=1920 P.C. 4=39 M.L.J. 70=47 I.A. 99=18 A.L.J. 601=24 C.W.N. 905=1920 M.W.N. 385.

(h) *Ramanuja* v. *Narasamma*, 1933 M. W.N 1118; *Venkatarama Raju* v. *Papamma*, 39 M. 77=1914 M.W.N. 911=26 I.C. 888=27 M.L.J. 638; *Hari Ramayya* v. *Venkatachalapathi*, 43 M.L.W. 668=1936 M. 460= 70 M.L.J. 619=1936 M.W.N. 261.

must subordinate his self-interest to his duty and offer disinterested advice to the widow.[i] But the expectant heir is not always prepared to forswear his heritage for the beatitude of one who has passed to the world of the invisible. Hence it is that questions arise under what circumstances can a widow adopt in spite of the refusal of consent by the sapindas. A refusal of consent by a sapinda on the ground that his reversionary right would be prejudiced by the adoption,[j] or on the ground that no other boy except his own son should be adopted,[k] or on the ground that the person to be adopted is the son of his enemy and is refusing to recognise his legitimacy,[l] is an improper refusal and an adoption made in spite of it is valid. But any refusal unaccompanied by reasons is not necessarily improper. But the refusal will become an improper one if the widow asks the sapindas for their reasons for refusing and they decline to state them.[m] It cannot be said that a sapinda's judgment is vitiated from the outset on account of his personal interest as a presumptive reversioner. So long as he has exercised a reasonable judgment and is not actuated by motives of self-interest, fraud or corruption,[n] his decision given *bona fide* on a fair exercise of discretion in the interest of the estate must be respected and he is entitled to show that the adoption is undertaken by the widow not with any religious or spiritual purpose but with a view to put him to loss and to secure a personal gain for herself.[o]

119. Widow's motive in making the adoption.—When a widow applies to the sapindas for their consent for her making an adoption, what they have to decide is the propriety of her act and not the propriety of her reasons, and if their consent has been *bona fide* without being affected by any fraud or corruption, it is conclusive as to the propriety of her adoption, even if the adoption is made to defeat an alienation or disappoint an expectant heir. It would be very dangerous to introduce into the considerations of the cases of adoption nice questions as to the particular motives operating on

(i) *Krishnayya Rao* v. *Rajah of Pittapur*, 42 L.W. 287=40 C.W.N. 1=37 Bom. L.R. 852=69 M.L.J. 388=1935 P.C. 190=1935 M.W.N. 1216.

(j) *Venkatarama Raju* v. *Papamma*, 39 M. 77=1914 M.W.N. 911=26 I.C. 888=27 M.L.J. 638; *Kamayya* v. *Sooranna*, 1933 M.W.N. 149 (2)=39 L.W. 68=66 M.L.J. 37 =1934 M. 48.

(k) *Parasara* v. *Rangaraja*, 2 M. 202.

(l) *Krishnayya Rao* v. *Rajah of Pittapur*, 42 L.W. 287=37 Bom. L.R. 852=40 C. W.N. 1=69 M.L.J. 388=1935 P.C. 190=1935 M.W.N. 1216.

(m) *Brahmayya* v. *Ralayya*, 20 L.W. 303=1925 M. 67 1924 M.W.N. 844; *Venkatakrishnamma*, v *Annapurnamma*, 23 M. 486=10 M.L.J. 73.

(n) *Venkamma* v. *Subramanian*, 34 I. A. 22=4 A.L.J. 150=9 Bom. L.R. 89=11 C.W.N. 345=30 M. 50=17 M.L.J. 114 (P.C.); *Krishnayya Rao* v *Rajah of Pittapur*, 42 L.W. 287=37 Bom. L.R. 852=40 C.W.N. 1 =69 M.L.J. 388=1935 P.C. 190=1935 M. W.N. 1216.

(o) *Krishnayya Rao* v. *Raja of Pittapur*, 51 M. 893=28 L.W. 422=55 M.L.J. 894=1928 M. 994 (F.B.); *Ganesa* v *Gopala*, 2 M. 270=7 I.A. 173 (P.C.); *Parasara* v. *Rangaraja*, 2 M. 202..

the mind of the widow[p] and hence the question of her motive is altogether irrelevant in adjudicating on the validity of her adoption.[q] Even if her motives are puerile or malicious, the adoption by the widow will be upheld if duly assented to by the proper persons[r] because she after all does a thing which she is entitled to do. For the same reason an adoption by a widow of an only son which is sinful and irreligious is valid since such an adoption is not illegal and the sapindas' consent invests her with a power co-extensive with that of her husband.[s] The observation of the Privy Council in the *Ramnad* case[t] that in order to be valid an adoption by the widow must be made in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive may lead to an inference that an adoption by a widow may be impugned on the ground that it was made with a corrupt motive especially as the observation was quoted with approval by the Privy Council in a later case.[u] But the effect of this dictum was explained away in another decision[v] by the observation that it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow and that all which this Committee in the former case[w] meant to lay down was that 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 interests 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. Even this explanation, it is submitted, does not settle the position and requires further explanations which, it is hoped, the Privy Council will vouchsafe to the legal public in future cases. But if the consent of a substantial majority of the agnates nearest in relationship has been obtained, the Court need not trouble itself about the widow's motives.[x] In a recent case it was held by the Madras High Court that if the consent of the nearest sapinda was obtained under circumstances which show that he gave the consent with a view to benefit himself, or if the facts show that the widow was making the adoption with a view to

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(p) *Vellanki* v *Venkata*, 1 M. 174=4 I.A 1 (P.C.).

(q) *Ramchandra* v. *Mulji*, 22 B. 558 (F.B.); *Banarsi Das* v. *Sumat*, 1936 A.L.J. 1237—1936 A. 641.

(r) *Vithoba* v. *Bapu*, 15 B. 110.

(s) *Sri Balusu* v. *Sri Balusu*, 22 M. 398—26 I.A. 113—21 A. 460—3 C.W.N. 427—9 M.L.J. 67 1 Bom. L.R. 226 (P.C.).

(t) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397.

(u) *Yadao* v. *Namdeo*, 49 C. 1—20 A.L. J. 481 24 Bom. L.R. 609—26 C.W.N. 393=42 M.L.J. 219—48 I.A. 513=15 L.W. 565=1922 P.C. 216.

(v) *Vellanki* v. *Venkata*, 1 M. 174=4 I.A. 1 (P.C.).

(w) *Collector of Madura* v. *Mootloo Ramalinga*, 12 M.I.A. 397.

(x) *Krishnayya Rao* v. *Raja of Pittapur*, 51 M. 893=28 L.W. 422=1928 M. 994—55 M.L.J. 894 (F.B.).

defeat the interests of this or that sapinda (in this case her own daughter) and not to promote the spiritual welfare of her husband, the motives of the sapinda and the widow were corrupt and capricious and the adoption was invalid.(y) But there is nothing corrupt or immoral in a widow stipulating before the adoption that the adopted son should pay her debts or make some provision for their discharge, though the debts may not be binding upon the estate in his hands, and hence an adoption made on the understanding that the widow should have half the estate for herself for the discharge of her debts cannot on that ground be held invalid. Whether the doctrine of Hindu Law that in the case of a man unpaid debts are a burden in the after-life applies to a woman or not, there is nothing corrupt or immoral in a pious Hindu widow thinking that the doctrine would apply even to her and attempting to provide for the discharge of her debts at the time of adoption.(z) The question whether when an adoption is made by a widow both in fulfilment of her religious duties and also for the purpose of getting a gain for herself, the adoption should be upheld, holding only the arrangement invalid, or both the adoption and the arrangement should be held void was left open by the Privy Council.(a) See S. 169.

120. Consent of the substantial majority of the sapindas.—It is not always possible to get the consent of all the sapindas to an adoption, in which case it is sufficient if the widow has secured the consent of a substantial majority of the sapindas. But she is bound to consult all of them if available even though some of them according to her belief would certainly refuse their consent.(b) But in a case where there are only two nearest sapindas, one assenting and one dissenting, no question of majority comes in,(c) and the adoption will be upheld only if the dissent of the dissenting sapinda is shown to be unreasonable. In the same way where the question of majority and minority comes in, if the refusal to consent of the dissenting minority is shown to be based upon proper and valid grounds, the mere circumstance of the majority being in favour of the adoption will not prevail.(c) As regards capacity to consent to an adoption, an adopted son and a subse-

(y) *Kandaswami* v. *Chinnammal*, 37 L. W. 729=1933 M. 540 (2)=1933 M.W.N. 335.

(z) *Krishnayya Rao* v. *Rajah of Pittapur*, 42 L.W. 267=37 Bom. L.R. 852=40 C.W.N. 1 :69 M.L.J. 388=1935 P.C. 190=1935 M.W.N. 1216.

(a) *Subramanyam* v. *Venkamma*, 26 M 627=13 M.L.J. 239 affirmed in 30 M. 50=17 M.L.J. 114=34 I.A. 22=4 A.L.J. 150=9 Bom. L.R. 89=11 C.W.N. 345 (P.C.); *Kristnayya* v. *Lakshmipathi*, 43 M. 650=12 L.W. 625=18 A.L.J. 601=24 C.W.N. 905 39 M.L.J. 70=47 I.A. 99=1920 M.W.N. 385=1920 P.C. 4; *Veera Basavaraju* v. *Balasuryu Prasada Rao*, 41 M. 998 9 L.W. 213 1918 P.C 97=17 A.L.J. 34=21 Bom. L.R. 238 23 C.W.N. 251=36 M.L.J. 40=45 I.A. 265.

(b) *Brahmayya* v. *Ralayya*, 20 L.W. 503 =1925 M. 67=1924 M.W.N. 844.

(c) See p. 118 foot note (c)

quent natural born son of a deceased relation stand on an equal footing.[e]

Adoption in the absence of sapindas. Where there are no sapindas an adoption made by a widow who has not her husband's authority to make the adoption, is invalid.[d]

121. Consideration for the adoption.—Though an agreement for payment of money to the adopter or to the adoptee's father as consideration for the adoption may be unlawful, the adoption itself will be unaffected as regards its validity, the parties being quite competent of their own choice to receive or give away the boy in adoption.[e]

122. Ratification of adoption.—An adoption made neither with the authority of the husband nor with the consent of the sapindas is void *ab initio* and cannot be rendered valid by being ratified by consent given by the sapindas subsequent to the adoption; nor can an adoption made by a widow under coercion or when she was too young to have exercised a mature reflection on the consequences of her act be ratified by her subsequently. The dictum in *Venkatanarasimha* v. *Rangayya*,[f] that an adoption under coercion can be ratified just as a contract under coercion can be ratified is not sustainable as the act of adoption is not one in the nature of a contract, and the validity of an act changing the status of a person cannot be made to remain in suspense at the option of one of the actors in the transaction.[g] In this connection the distinction between ratification and estoppel must not be lost sight of. Though an adoption *ab initio* void cannot be made valid by subsequent ratification, yet under the plea of estoppel certain persons or their representatives may be precluded from questioning the validity of the adoption by reason of their representations or conduct towards persons who on the faith of such representations or conduct had acted in a particular way.

123. Co-widows and sapindas' consent.—Where a Hindu dies sonless leaving two widows, the preferential right to adopt with the consent of the sapindas vests with the senior widow, that is to say, the one whose marriage was earlier, and an adoption made by the

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(c) *Krishnayya Rao* v. *Raja of Pittapur*, 51 *M* 893 28 L.W. 422. 1928 M. 994=55 M.L.J. 894 (F.B.); See also S. 169.

(d) *Balasubramonia* v. *Subbayya*, 1938 P.C. 34 47 L.W. 110; See contra in *Appalaswamy* v. *Mooselaya*, 12 R. 23=1933 R 334.

(e) *Murugappa* v. *Nagappa*, 29 M. 161 = 16 M.L.J. 22; *Viswasundara* v. *Somasundara*, 43 M. 876=59 I.C. 609; *Narayan* v. *Gopal*, 46 B. 908 1922 B. 382—24 Bom. L.R. 414.

(f) *Venkatanarasimha* v. *Rangayya*, 29 M. 437. 16 M.L.J. 178.

(g) *Doraisami* v. *Chinnia Goundan*, 7 L.W. 335=43 I.C. 560 =34 M.L.J. 258 = 1918 M.W.N. 89; *Vasudeo* v. *Ramchandra*, 22 B. 551; *Sattiraju* v. *Venkataswami*, 40 M. 925 5 L.W. 603=40 I.C. 518=32 M.L.J. 119.

junior widow with the sapindas' consent, but without the consent of the senior widow is invalid.[h] The mere fact that the senior widow was living apart from her husband for about 28 years prior to his death does not warrant an inference of the husband's prohibition against her making the adoption or that she is a *dushta* or *nishidda*" and so disqualified to exercise her preferential right to adopt.[i] But it was held in a Bombay case[j] that the doctrine of the preferential right of the senior widow to adopt applies only where the husband died a separated member of the family and the widows inherited his property and does not apply to a case where the husband dies in union with his father in which case the junior widow can adopt with the consent of her father-in-law. This decision cannot be held to be correct after the decision of the Privy Council in *Bhimabai's case*[k] which does away with the distinction between a widow's power to adopt in a divided and that in an undivided family See also S. 109 and S. 80.

124. Abuse of husband's authority. The widow who has been given the authority to adopt holds the authority only for the benefit of her husband and has no power to turn it to her own personal advantage by entering into an agreement not to adopt in consideration of her obtaining some properties. Such an agreement will be void as opposed to public policy.[l] But she will be perfectly within her rights in acting upon the authority and making an adoption with the worst and the most pernicious of motives (See S. 119).

125. Revocation of husband's authority.—He who is competent to authorise another to do a thing must be equally competent to revoke the authority to do the thing provided the revocation takes place before the thing is accomplished. On this principle the man who gives the authority to adopt can revoke the authority before it is acted upon.[m] Such power of revocation was assumed in *Venkatanarayana's* case.[n] In a case where the authority is contained in a will it can be revoked only in the manner provided for revocation of the will: See S. 70 of the Indian Succession Act. 1925.

(h) *Venkatappa* v. *Renga Rao*, 39 M. 772 :29 M.L.J. 18 : 30 I.C. 106—1915 M.W.N 424; *Muthusami* v. *Pulavaratal*, 45 M. 266—1922 M. 106 (1) :15 L.W. 40—1922 M.W.N. 53.

(i) *Muthusami* v. *Pulavaratal*, 45 M. 266 : 15 L.W. 40 1922 M.W.N. 53 : 1922 M. 106.

(j) *Dnyanu* v. *Tanu*, 44 B. 508—57 I.C. 113—22 Bom. L.R. 390.

(k) *Bhimabai* v. *Gurunathgouda*, 57 B. 157—37 L.W. 81—1933 P.C. 1—35 Bom. L. R 200 1933 A.L.J 363 :1933 M.W.N. 1—61 M.L.J. 34 37 C.W.N 210—60 I.A. 25.

(l) *Jagannatha* v *Kunju Behari*, 49 I.C. 929 1919 M.W.N 52 :9 L.W. 385. See also Ss 80 and 109.

(m) *Basvant* v *Mallappa*, 45 B. 459 at 463 1921 B. 301 22 Bom. L.R. 1400.

(n) *Venkatanarayana* v. *Subbamnal*, 39 M. 107 13 I.A. 20—3 L.W. 177—1915 P.C. 37 14 A.L.J 178 :18 Bom. L.R. 372—26 C.W.N 234—29 M.L.J. 851=(1916) 1 M.W.N. 97.

126. Widow's disqualification to make the adoption.—Re-marriage[o] and even unchastity[p] operate to disqualify a widow from making an adoption to her deceased husband, even though she has been authorised by him to make an adoption. But while remarriage destroys altogether her capacity to make an adoption, unchastity only suspends her power which can be exercised after performing the expiatory penances, provided her unchastity has not then resulted in her pregnancy. The reason of the rule is that in the case of remarriage she becomes identified with her new husband ceasing thereby to represent her deceased husband as his surviving half while in the case of her dissolute life her ceremonial competency is only suspended and could be restored to her by proper penances. But this principle of ceremonial competency has no application in the case of Sudras, and an adoption made by a Sudra widow is not invalid either on the ground that she is under pollution[q] or on the ground that she is leading a life of immorality and shame.[r] But a Vaisya widow, not being a Sudra, cannot adopt while in a state of pollution.[s]

127. Determination of the widow's authority to adopt.—A widow's power to adopt comes to an end where her husband dies leaving also a son and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of an adoption.[t] The basis of this limiting rule cannot be traced in any of the ancient texts, but is to be found in those considerations of expediency against frequent disturbances of vested titles. Thus when a person dies leaving a son and a widow with authority to adopt in the event of the son's death, an adoption made by the widow on her son's death leaving his own widow [u] is invalid as her power of adoption comes to an end and is incapable of execution on the vesting of the estate in the widow of the son.[v] The succession of an adopted son and his dying after attaining full

(o) *Fakirappa* v. *Savitreva*, 23 Bom. L. R. 482 62 I.C. 318 1921 B 1 (F B); *Panchappa* v. *Sangambasawa*, 24 B. 89-1 Bom L.R. 543.

(p) *Sayamalal* v. *Saudamini*, 5 Beng. L.R 362

(q) *Thangathanni* v. *Ramu* 5 M 358; See also *Ranganayakamma* v. *Alwar Setti*, 13 M 214.

(r) *Basant* v. *Mallappa*, 45 B. 459—1921 B 301 22 Bom. L.R. 1400.

(s) *Ranganayakamma* v. *Alwar Setti*, 13 M 214.

(t) *Ramkrishna* v. *Shamrao*, 26 B. 526 4 Bom L.R 315 (F.B.); *Amarendra* v. *Sendan*, 60 I.A. 212 35 Bom. L.R. 852—37 C.W.N. 938—65 M.L.J. 203 - 1933 A.L.J. 710—1933 M.W.N. 769—14 P.L.T. 599—38 L.W. 1—12 P. 642—1933 P.C. 155; See also *Pangam* v *Rama Lakshmamma*, 35 L.W. 182 55 M 581—1932 M. 227—1932 M.W.N. 22—62 M.L.J. 187; *Bhoobun Moyee* v. *Ram Kishore*, 10 M.I.A. 279, *Pandurang* v. *Yesubai*, 35 Bom L.R. 775 1933 B. 355; *Sangangauda* v. *Hanmant*, 55 B. 699 -33 Bom L.R. 1225—1932 B. 8; *Vijaysingji* v. *Shivsangji*, 59 B. 360 62 I.A. 161—37 Bom. L.R 562 39 C.W.N. 682 68 M.L.J. 701—1935 P.C. 95 42 L.W 1—1935 A.L.J. 690—1935 M.W.N. 534; *Subramanian Chettiar* v. *Somasundaram*, 59 M. 1064 14 L.W. 185 1936 M.W.N. 774—1936 M. 642 (upholding a custom to the contrary).

(u) *Bhoobun Moyee* v *Ram Kishore*, 10 M I A 279; *Tarachurn* v. *Suresh Chunder*, 17 C. 122—16 I.A. 166 (P.C.).

(v) *Padmakumari* v. *Court of Wards*, 8 I.A. 229—8 C. 302 (P.C.).

legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son by his own widow, would in themselves be sufficient to bring the limiting principle into operation so as to determine the authority of his mother to adopt again.(w) The same principle will apply to invalidate an adoption made in Southern India by a widow with sapindas' consent after her son's death leaving his own widow.(x) But if the son dies leaving no heir other than his widowed mother, then an adoption by her will be quite valid.(y) This principle applies to validate an adoption made by a widow who inherits immediately to her grandson who had succeeded directly to his grandfather.(z) But if a Hindu died leaving a widow and a son and that son himself died leaving a widow who could have adopted, his mother has no power to adopt to her husband on her succession to the son's estate either on the death of the son's widow(a) or on the remarriage of the son's widow.(b) The question whether the adoption by the son's widowed mother to her husband will be valid when the son dies leaving a daughter in whom the property has become vested by inheritance to him has been answered in the affirmative by a Bench of the Bombay High Court in *Chanbasappa* v. *Madiwalappa*,(c) and it is submitted that this decision cannot but be sound in view of the dictum of the Privy Council which lays down the limit to be the death of the son leaving a son or his own widow to continue the line by adoption. The son's daughter cannot continue his line by adoption to him and hence her existence is no ground for depriving the son's mother of the power of adopting to her husband. The mere attainment of majority by the son does not terminate his widowed mother's authority to adopt to his father, for unless he gets married and leaves a son or his own widow to continue the line, his mother's

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(w) *Madana Mohana* v. *Purushothama*, 11 M 855 8 L.W. 167 1918 P.C. 74=16 A. L.J 725 20 Bom. L.R. 1041 23 C.W.N. 177 35 M.L.J. 138 1918 M.W.N. 621=45 I.A. 156; *Tarachun* v. *Suresh Chunder*, 17 C. 122 16 I.A. 166 (P.C.) explained in *Amarendra* v. *Sanatan*, 60 I.A. 212=35 Bom. L.R. 859 37 C.W.N. 938 65 M.L.J. 203=1933 A.L.J. 710 1933 M.W.N. 769=14 P. L.T. 399 38 L.W. 1 12 P. 642=1933 P.C. 155; *Ramkrishna* v. *Shamrao*, 26 B. 526= 4 Bom. L.R. 315 (F.B.) approved in 41 M. 855 8 L.W. 167=1918 P.C. 74=16 A.L.J. 725 20 Bom. L.R. 1041=23 C.W.N. 177= 35 M.L.J. 138=1918 M.W.N. 621=45 I.A. 156.

(x) *Thayammal* v. *Venkatarama*, 14 I.A. 67=10 M. 208 (P.C.).

(y) *Vellanki* v. *Venkata*, 4 I.A. 1=1 M. 174 (P.C.); *Gavdappa* v. *Girimallappa*, 19 B. 331; *Verabhai* v. *Bai Hiraba*, 27 B. 492 30 I.A. 234 (P.C.) 7 C.W.N. 716 =1924 B. 437=26 Bom. L.R. 528, *Shivappa* v. *Rudrava*, 57 B. 1=34 Bom. L.R. 539=1932 B. 410

(z) *Narher* v. *Balwant*, 48 B. 559 =1924 B. 437=26 Bom. L.R. 528, *Shivappa* v. *Rudrava*, 57 B. 1=34 Bom. L.R. 539=1932 B. 410

(a) *Manikyamala* v. *Nandakumara*, 33 C. 1306 4 C.L.J. 408; *Krishnarav*. v. *Shankarrav*. 17 B. 161; *Adivi* v. *Nidamarty*, 33 M. 228 4 I.C. 386 1910 M.W.N. 251; *Shivappa* v. *Rudrava*, 57 B. 1=34 Bom. L.R. 539 1932 B. 410.

(b) *Ganpati* v. *Sant*, 89 I.C. 345; *Vithoba* v. *Amruta*, 1931 N. 183; *Ramchandra* v. *Murlidhar*, 39 Bom. L.R. 599=1938 B. 20.

(c) 39 Bom. L.R. 591=1937 B. 337.

power to adopt does not become extinguished.[d] Besides, merely because the son gets married, the widow's power to adopt after his death does not become extinguished, if he dies without leaving any male issue or widow, they having predeceased him.[e] In the recent Full Bench case before the Bombay High Court, *Balu Sakharam* v. *Lahoo Sambhaji*,[f] S who was the last surviving coparcener died leaving a widow G, and a sister A. G succeeded to the estate, but on her subsequent remarriage, A took the estate as the next heir. When the estate thus stood vested in A, the widow of a brother of the last surviving coparcener adopted a son to her husband. It was held by the majority of the Judges (per Beaumont C.J. and N. J. Wadia J.—Rangnekar J. dissenting) that the adoption was valid, and this ruling is perfectly correct[g] as it satisfies the test enunciated by the Privy Council in *Amarendra's* case.[h] Applying the same test, it would appear that if a Hindu dies leaving his widow and a widow of his predeceased son, the son's widow will be entitled to make an adoption whether or not her mother-in-law has already made an adoption, though the mother-in-law will not be entitled to adopt after the daughter-in-law has adopted a son to her husband.

128. Limits of the rule of extinction of the widow's authority.—The widow's power to make an adoption cannot be said to have become extinguished merely because the adoption would divest the estate vested in another.[i] For instance, an adoption by the senior of two co-widows in pursuance of her husband's authority to adopt, cannot be impugned on the ground that it is unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish.[j] Nor is the adoption invalid where the estate has devolved upon another by survivorship.[j] Thus where the husband to whom the adoption is made was a

(d) *Amarendra* v. *Sanatan*, 60 I A. 242 = 35 Bom. L.R 859 37 C.W.N. 938 -65 M. L J. 203 1933 A.L.J. 710 -1933 M.W.N. 769 = 14 P.L.T 399-38 L.W. 1—12 P. 642=1933 P.C. 155; *Tripuramba* v. *Venkataratnam*, 46 M 423—1923 M 517.=44 M.L.J. 349.

(e) *Maharajah of Kolhapur* v. *Sundaram, Ayyar*, 48 M. 1—1926 M. 497; *Venkappa Bapu* v. *Jivaji Krishna*, 25 B. 306; *Bhoobun Mojee* v. *Ramkishore*, 10 M I A 279.

(f) 59 Bom. L.R. 382.

(g) *Umabai* v. *Nani*, 60 Bom. 102=38 Bom. L R. 100—1936 B. 135; *Dundoobai* v. *Vithalrao*, 60 B. 498—38 Bom L R. 193=1936 B. 182; *Dhondi* v. *Rama*, 60 Bom. 83 =38 Bom. L.R. 94 -1936 B. 132.

(h) *Amarendra* v. *Sanatan*, 60 I.A. 242 =35 Bom. L.R. 859—37 C.W.N. 938-.65 M. L.J. 203—1933 A.L.J. 710—1933 M.W.N. 769 14 P.L.T. 399-38 L.W. 1-12 P. 642 = 1933 P.C. 155; *Pratapsing* v. *Agarsingji*, 43 B. 778- 17 A.L J. 522-.21 Bom L.R. 496 46 I.A. 97 24 C W.N. 57 -1919 M.W.N. 313 36 M L J. 511 10 L.W. 339 -1918 P.C. 192; *Vijaysingji* v. *Shivsingji*, 59 B. 360= 62 I.A. 161 39 C.W.N. 682-.37 Bom. L.R. 562-68 M.L.J. 701—1935 P.C. 95=1935 A. L J 690 -1935 M.W.N. 534.

(i) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C R. 192; *Narayanasami* v. *Mangammal*, 28 M. 315 -15 M.L J. 143.

(j) *Madana Mohana* v. *Purushothama*, 38 M. 1105- 27 M.L.J. 306-24 I C. 999=16 A.L.J. 725- 20 Bom. L.R. 1041—23 C.W. N. 117—35 M.L J. 138.-1918 M.W.N. 621—45 I A. 156; *Chandra* v. *Gojarabai* 14 B. 483; *Bachoo* v. *Mankorebai*, 31 B. 373—17 M.L. J. 343 (P.C.)=2 Bom. L.R. 846=11 C.W.N. 769 -34 I.A. 107.

member of an undivided family and on his death without a son the other members of his family got his share by survivorship, the widow's authority to make an adoption would continue to be alive at least until the last surviving member dies and the whole estate is inherited by another heir.[k] Thus the vesting of the estate by survivorship in the undivided brother or brother's son of the deceased husband does not operate to extinguish his widow's power to make an adoption to him.[l] In an interesting case from Bombay, the facts were these : two undivided brothers died leaving their wives surviving. The wife of one of the brothers who was pregnant at the time of his death subsequently gave birth to a son, and, subsequent to this, the wife of the other brother adopted a son to her husband in pursuance of his authority. The Privy Council held, reversing the decision of the lower Court, that the adoption was valid on the ground that the existence of a son in the womb kept the coparcenary alive and that the adoption was not made at a time when the coparcenary ceased to exist.[m] The correct principle is that the question of vesting or divesting of the estate has nothing to do with the validity or otherwise of a widow's adoption. The test of validity of an adoption made by a widow is to be found enunciated in *Amarendra* v. *Sanatan*[n] and reiterated in *Vijaysingji* v. *Shivsangji*,[o] namely, that her power to adopt is not extinguished in any case where her husband had not been survived by her son who had died leaving his own widow or son to continue the line. Applying this test, the mere extinction of the coparcenary by the death of the last surviving member and the vesting of its property in some heir, near or remote, of that member, do not operate to terminate the power to adopt of the widow of any of the predeceased coparceners, if that power has not become otherwise extinguished under the said test.[p] So also where a daughter-in-law of a Hindu whose son had predeceased him comes to hold the estate under a devise from her father-in-law she is entitled to divest her own estate by making an adoption to her husband.[q] If the power of the widow to make the adoption has been extinguished, the fact that the adoption is made with the consent of the person in whom the property has become vested does not validate

(k) *Shivbasappa* v. *Nilava* ; 47 B. 110=1923 B. 17 . 24 Bom. L.R. 1162; *Shivappa* v. *Rudrava*, 1932 B. 410=34 Bom. L.R. 539 = 57 B. 1.

(l) *Bachoo* v. *Mankorebai*, 31 B. 373=17 M.L.J. 343 (P.C.)=9 Bom. L.R. 646=11 C.W.N. 769 34 I.A. 107.

(m) *Nagindas* v. *Bachoo*, 40 B. 270=14 A.L.J. 185—18 Bom. L.R. 172—20 C.W.N. 702=30 M.L.J. 193=43 I.A. 56=1916 (1) M.W.N. 258. 3 L.W. 259 =1915 P.C. 41.

(n) 12 Pat. 642 60 I.A. 242 1933 A.L.J. 710=35 Bom. L.R. 859 37 C.W.N 938. 65 M.L.J. 203 38 L.W. 1—1933 P.C. 155 1933 M.W.N 769 14 P.L.T. 399.

(o) 59 B. 360. 62 I.A. 161=37 Bom. L.R. 562—39 C.W.N. 682—68 M.L.J. 701—1935 P.C. 95=1935 M.W.N. 534—1935 A.L.J. 690.

(p) *Balu Sakharam* v. *Lahoo Sambhaji*, 39 Bom. L.R. 382.

(q) *Amanna* v. *Satyanarayana*, 49 M 636 1926 M. 916=24 L.W. 150=51 M.L.J.

the adoption. Thus if a Hindu dies leaving a widow and a son, and the son dies leaving a widow, the power of the father's widow to adopt is extinguished and cannot be validly exercised even with the consent of the son's widow.[r] See S. 129.

129. Consideration of the Rule.—The whole question as regards the extinction of the widow's authority to make the adoption has been elaborately discussed with reference to the case-law in a case[s] involving the following facts:—One B, a Hindu, died leaving him surviving his widow and his only daughter. After the death of the widow, B's properties devolved on his daughter. Soon after her marriage her husband died undivided from the other members of his family who subsequently effected a partition amongst themselves. The daughter thereafter adopted after obtaining the consent of all her husband's sapindas. The reversioners to the estate of B then brought a suit for a declaration that their reversionary right was not affected by the adoption and contended that the daughter's power to make the adoption came to an end with the extinction of her husband's joint family by the partition and that the said power could not be revived subsequently by the consent of her sapindas. Justice Venkatasubba Rao delivering the judgment of the Bench consisting of himself and Justice Pakenham Walsh, on a learned review of the case-law on the question, rejected the above contention and held that the true test of the principle defining the limit on the widow's power to adopt is to be sought not in the rule of divesting or otherwise of an estate but in the rule that requires the continuance of a person to perform all the requisite religious services. According to the learned Judges, the limit is reached only on the happening of the event mentioned in the judgment of Chandavarkar J., in *Ramkrishna* v. *Shamrao*,[t] namely, the death of a Hindu leaving the adopting widow and a son and in turn the death of that son leaving a natural born or adopted son or his own widow to continue the line by means of adoption. Where this limit is not reached and the religious purposes of a son have not been satisfied, there is nothing to extinguish the widow's authority to make the adoption. To the same effect is the recent decision of the Privy Council in *Amarendra* v. *Sanatan*[u] wherein two propositions in regard to the extinction of the widow's power to adopt have been clearly laid down: (i) the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of

(r) *Sangangauda* v. *Hanmant Gauda*, 55 B. 699=33 Bom. L.R. 1225=1932 B. 8.

(s) *Paryam* v. *Rama Lakshmamma*, 55 M. 581=35 L.W. 182=1932 M. 227=62 M. L.J. 187=1932 M.W.N. 23.

(t) 26 B. 526=4 Bom. L.R. 315 (F.B.).

(u) 60 I.A. 242=35 Bom. L.R. 859=37 C.W.N. 938=66 M.L.J. 203=1933 A.L.J. 710 =1933 M.W.N. 769=14 P.L.T. 399=38 L.W. 1—12 P. 642=1933 P.C. 155.

the joint family, or an outsider claiming by reverter or by inheritance, cannot be in itself the test of the continuance or extinction of the widow's power of adoption: (ii) a mother's authority to adopt is not extinguished by the mere fact that her son has attained ceremonial competence, and therefore if an only son dies without leaving a son or widow, though after attaining the age of discretion, the mother's power is not at an end. The reason given by their Lordships of the Privy Council is that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son dies himself sonless and unmarried, the duty will still be upon the mother and the power in her which was necessarily suspended during the son's lifetime will revive.

In considering this question of the rule of extinction of the widow's power to make an adoption two recent decisions of the Privy Council which throw considerable light on the same may be usefully canvassed. One is the decision in *Amarendra* v. *Sanatan*[u] above referred to, and the other is the decision in *Bhimabai* v *Gurunathgowda*.[v] In the latter case, the facts were these: Two brothers N and J constituted a joint Hindu family in the Mahratta country of the Bombay Presidency. J died in 1913 leaving a widow B. N, to whom J's undivided interest passed by survivorship adopted a son D, in 1919, and died in the same year. D also died in the same year leaving a minor son, and a month thereafter, J's widow B, adopted the appellant as a son to her deceased husband. This adoption was not made under any express authority from her husband, nor could it have been made with the consent of the sole surviving coparcener, namely D's son, who was then a minor. The validity of the adoption was challenged on two grounds: (i) B's husband having been undivided at the time of his death, the appellant's adoption by B having been made without her husband's permission or the consent of his sapindas was invalid under the rulings of *Ranji* v. *Ghaman*[w] *and Ishwar Dadu* v. *Gajabai*:[x] (ii) that the adoption was made after the extinction of the coparcenary and hence was invalid under the ruling in *Chandra* v. *Gojarabai*.[y]

Both the above contentions were rejected by their Lordships of the Privy Council who held as follows:—

(u) See p 124 foot note (u).

(v) 60 I.A. 25 =35 Bom. L.R. 200=37 C. W.N. 210 64 M.L.J 34=1933 A.L.J. 363=1933 M.W.N. 1=57 B. 157=37 L.W. 81=1933 P.C. 1.

(w) 6 B. 493 (F.B.).

(x) 50 B. 468=28 Bom. L.R. 782=1926 P 435 (F.B.).

(y) 14 B. 463.

(i) According to the law prevalent in the Mahratta country of the Bombay Presidency, a Hindu widow whose husband was undivided at the time of his death, and who has not the express permission of her husband, may adopt a son to him without the consent of the surviving coparceners. The ruling to the contrary in *Ramji* v. *Ghaman*[z] was overruled by the Board in *Yadao* v. *Namdeo*[a] and the view in *Ishwar Dadu* v. *Gajabai*[b] following *Ramji* v. *Ghaman*[z] was wrong, the correct view being that expressed in *Rakhmabai* v. *Radhabai*.[c]

(ii) The adoption of the appellant by B was quite valid, and neither the circumstance that B had not the authority of her husband or the consent of D's son, nor the fact that the adoption was made after the death of N rendered the adoption invalid. N was not the sole surviving coparcener at the date of his death and the estate did not pass to D by inheritance as his heir. The coparcenary at the death of N having consisted of himself and D and the estate having passed to D by survivorship the adoption of the appellant was not made after the extinction of the coparcenary, but during its subsistence, and hence the principle of *Chandra* v. *Gojarabai*[d] did not apply. The fact that N's widow's power to adopt to her husband came to an end the moment D died leaving a son was no ground for holding that even B's power to adopt was not subsisting at the time she adopted the appellant.

This decision establishes the principle that the mere extinction of the paternal grandmother's power to adopt does not necessarily carry with it the extinction also of the grandaunt's adopting power. But this ruling, though it discusses the question of the power of a coparcener's widow to make an adoption on the assumption that that power is alive so long as the coparcenary continues by the existence of at least one of its members, should not be regarded as having decided against the continuance of that power after the extinction of the coparcenary by the death of the last surviving coparcener and the vesting of the property in some heir other than the adopting widow, and the fact that *Chandra* v. *Gojarabai*[d] is mentioned in the course of the discussion on an assumption of its soundness cannot be construed as a decision by the Privy Council that the principle enunciated in *Chandra's* case against the continuance of the adopting power of a widow after the termination of her husband's coparcenary is sound.[e]

(z) 6 B. 498 (F.B.).
(a) 49 C. 1=20 A.L.J. 481=24 Bom. L. R. 609=26 C.W.N. 393=42 M.L.J. 219=48 I.A. 513=15 L.W. 365=1922 P.C. 216.
(b) 50 B. 468=1926 B. 435=28 Bom. L. R. 782 (F.B.).
(c) 5 Bom. H.C.A.C. 181.
(d) 14 B. 463.
(e) *Balu Sakharam* v. *Lahoo Sambhaji*, 39 Bom. L.R. 382.

In the other, more recent, case of *Amarendra* v. *Sanatan.*(1) the facts were as follows : One Raja Brajendra, the holder of Dompara Raj, an impartible estate descendible by custom only to males, died leaving a son, Raja Bibhudendra, and a widow Rani Indumati with power to adopt in case of the son's death without male issue. After Raja Bibhudendra succeeded to the estate on his father's death, the estate came under the superintendence of the Court of Wards and so remained till his death on 10th December 1922, unmarried and a minor at the age of 20 years and 6 months. On the 18th December, his mother, Rani Indumati, adopted Amarendra, a minor, and the Court of Wards continued in possession of the Estate apparently on his behalf.. One Banamali, a sapinda of Bibhudendra several degrees removed, disputed the validity of the adoption and claimed the estate on two grounds : (i) Treating Banamali as a separated sapinda claiming strictly by inheritance, once the estate had vested in an heir (Banamali) of the last male holder (Bibhudendra) other than the adopting widow eight days prior to the adoption, the power of adoption was at an end and the Rani, who was precluded by the custom from inheriting to her son Bibhudendra, could no longer adopt : (ii) Where the husband (Brajendra) from whom the power to adopt was derived left a son (Bibhudendra) to succeed him and that son attained full legal capacity to continue the line, the power of his mother was equally at an end and this would be the case whether the family was separate or joint. Both these contentions were upheld by the lower Courts and the suit by Banamali was decreed in his favour. Amarendra appealed to the Privy Council. Their Lordships rejected both these contentions and dismissed Banamali's suit on the grounds already mentioned. The following is the relevant portion of the judgment where they consider the contentions advanced on behalf of Banamali.

"Their Lordships think that in dealing with the arguments which have been addressed to them, it is important to bear in mind the essential features of the doctrine of adoption among orthodox Hindus, as they are conscious that these may have been to a certain extent blurred by the mass of case-law which has been accumulated in the last three-quarters of a century.

The origin of the custom of adoption is lost in antiquity, and may well have been no more than the natural desire for a son as an object of affection, a protector in old age, and at the last an heir. However this may be, it is certain that through all the centuries which have seen the spread of Brahminical influence, and among all classes which have come under its sway, a peculiar religious significance has attached to the son. He is so essential to the spiritual welfare of the souls of his immediate ancestors that an extensive class of subsidiary sons was admitted to the family, all of whom could perform the necessary ceremonies, though only some of

(1) 38 L.W. 1=12 P 612=1933 P.C. 155 538=65 M.L.J. 203=1933 A.L.J. 710=1933 =60 I.A. 242=35 Bom L.R. 859=37 C.W.N. M.W.N. 769=14 P.L.T. 399.

them were allowed full rights of inheritance. Of these among the orthodox classes, only the adopted son is now recognized, but he, in the absence of an *aurasa*, or natural born son, is clothed with all the attributes of a son, and is from the date of his adoption regarded as having been born in his adoptive family.

The 9th Chapter of Manu's Code, which has always been regarded as of paramount authority, is instinct with this doctrine. The father by the birth of a son discharges his debt to is progenitors (v. 106); through him he attains immortality (v. 107); by a son a man obtains victory over all people; by a son's son he enjoys immortality; and afterwards by the son of that grandson he reaches the solar abode (v. 137); a son is called *putra* because he delivers his father from *Put* (v. 138) In the Dharma Sutra of Baudhayana, which is probably older than the Christian era, the formula prescribed for adoption is "I take thee for the fulfilment of my religious duties: I take thee to continue the line of my ancestors": Bau vii. 11, Sacred Bks. of the East, Vol. xiv. 335.

In their Lordships' opinion, it is clear that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites. And it may well be that if this duty has been passed on to a new generation, capable itself of the continuance, the father's duty has been performed and the means provided by him for its fulfilment spent: the "debt" he owed is discharged and it is upon the new generation that the duty is now cast and the burden of the "debt" is now laid

It can, they think, hardly be doubted that in this doctrine, the devolution of property, though recognised as the inherent right of this son, is altogether a secondary consideration. So Sir James Colvile, in delivering the judgment of the Board in *Shri Raghunadh* v *Shri Brozo Kishoro*(*g*) (a case to which further reference will be made later) observes at page 192 (*of 3 I A.*) that:

"A distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Holloway, J., has himself strenuously insisted upon elsewhere, viz., that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it."

Having regard to this well established doctrine as to the religious efficacy of sonship, their Lordships feel that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man; see in this connection *K. Suryanarayana* v. *P. Venkata Ramana*.(*h*) The Hindu law itself sets no limit to the exercise of the power during the lifetime of the donee, and the validity of successive adoptions in continuance of the line is now well recognized. Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property. But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognized both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has mainly turned.

(*g*) 3 I A 154=1 M. 69 (P.C.). 702=8 Bom. L.R 700=10 C.W.N. 921=16
(*h*) 33 I.A. 145=29 M. 382=3 A.L.J. M.L.J. 276 (P.C.).

In support of his first line of reasoning, based upon the vesting of property in an heir other than the adopting widow, counsel for respondent 1, relied upon the often quoted judgment delivered by Lord Kingsdown in *Bhoobun Moyee* v. *Ramkishore*.(i) There one Gour Kishore died leaving a son Bhowanee, and a widow Chundrabullee Debia to whom he gave authority to adopt in the event of Bhowanee's death. Bhowanee died at the age of 24 without issue, but leaving a widow Bhoobun Moyee, who succeeded by inheritance to his property. Chundrabullee then adopted Ram Kishore who sued Bhoobun Moyee for the recovery of the estate. It was held by the Board that his claim failed. The parties being governed by the Dayabhaga law, Bhoobun Moyee would have succeeded to Bhowanee's property in preference to Ram Kishore, even if he had been a natural born son of Gour Kishori, and the Board held that it was contrary to all reason and to all the principles of Hindu law" that he should displace the rightful heir. It is not so much the actual decision in this case that is relied on as certain dicta in the judgment and the implications which have been held to arise from it. "The question is" said Lord Kingsdown (page 311) "whether the estate of his son being unlimited and that son having married and left a widow as his heir, *and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate*...." From this it is argued that it was upon the vesting of the property that the determination of the power of adoption depended, and that this view is confirmed by subsequent decisions of the Board to which reference must be made.

After the death of Bhoobun Moyee, Ram Kishore got possession of the property and if his adoption was good he was undoubtedly the next heir. His title however was disputed by a distant collateral and the validity of his adoption was the subject of another suit. The Bengal High Court upheld the title of Ram Kishore, considering that the Board in the previous case had only affirmed the prior right of inheritance of Bhoobun Moyee, and had not held the adoption to be invalid. This case again came before the Board, *Pudma Coomari Debi* v. *Court of Wards*,(j) and the decision of the High Court was reversed, the opinion of their Lordships being that upon the vesting of the estate in the widow of Bhowanee the power of adoption was at an end and incapable of execution, and that this was what the Board had held in the previous case.

These authorities were again considered in a case from Madras, *Thayammal* v. *Venkatarama*,(k) the decision in which is also relied on by the respondents. The question there was as to the right of succession to the estate of one Kuttisami who had died without issue leaving his widow *Thangammal* as his heir. After his death, his mother, Thayammal, with the permission of the sapindas, adopted a son to the father of Kuttisami. The validity of the adoption was disputed on the ground that "the survival of the son's widow and the vesting of the estate in her put an end to the right of Thayammal, his mother, to adopt a son to his father." Their Lordships were of opinion that this objection was fatal to the adoption, and that the learned Judges of the High Court who had so decided, were correct in considering that the case was governed by the authorities above referred to.

Thayammal's case(l) was followed in *Tarachurn Chatterji* v. *Suresh*

(i) 10 M.I.A. 279.
(j) 8 I.A. 229=8 C. 302 (P.C.).
(k) 14 I.A. 67=10 M. 255 (P.C.).
(l) 14 I.A. 67=10 M. 255 (P.C.).

Chunder Mookerji[m] where Sir Richard Couch observes (page 170 of 16 I.A.):

"On the son's death after coming of age leaving Matangini his widow, Madhub Chunder's wife would not have power to adopt a son, *the estate of Kali Churn having become vested in his widow.*"

So far then, their Lordships think, it was well established that a power of adoption in a mother was extinguished when her son had died leaving a widow to whom the son's estate passed by inheritance. But though undoubtedly certain passages in the judgments relied on seemed to suggest that it was the succession to the estate by the son's widow that was the determining factor, and, as was stated by a learned Hindu Judge in 1900, "the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others;" per Ranade, J., in *Venkappa* v. *Jiwaji Krishna*;[n] yet it was never so laid down by the Board in precise terms. The dominant consideration may have been the right of property, and equitable claims may not have been without their influence, but the religious and ceremonial side was not altogether ignored. In *Bhoobun Moyee's case*,[o] Lord Kingsdown evidently relied upon the fact that Bhowanee had died at an age which enabled him to perform—and it was to be presumed that he had performed—all the religious services which a son could perform for a father, and he refers to the doctrine of Hindu law that the husband and wife are one, and that in the widow a half of the husband survives. It is at least material that in each of the other cases it was the existence of the son's widow that stood in the way of the adoption, and that in none of them was there any suggestion that the same rule would apply if the heir in whom the property had vested were some one other than her. Moreover, in dealing with the succession in a joint family it is clear under the decisions of this Board that the vesting in another coparcener does not put an end to the power of adoption: see *Sri Raghunadha* v. *Sri Brozo Kishoro*,[p] *Bachoo Hurkissondas* v. *Mankorebai*,[q] *Yadao* v. *Namdeo*.[r] That this is so has not been questioned in the present case. Indeed, as their Lordships understood the argument of counsel for respondent 1, the joint family cases were rather relied on as emphasising the importance of "vesting" in the case of separate property.

It must also, their Lordships think, be taken as settled law that where the son dies in infancy, or before attaining what is often referred to as "ceremonial competence" leaving his mother as his heir, her power of adoption is still exerciseable: *Vellanki Venkata* v. *Venkata Rama Lakshmi*,[s] *Verabhai Ajubhai* v. *Bai Hirabai*,[t] *Mallappa* v. *Hanmappa*.[u] This again has not been disputed, and it is plain that if it were not so, successive adoptions would be impossible. It will however be necessary to consider the limits of this particular doctrine later on.

Tarachurn Chatterji's case[m] was decided in 1889, and during the next 30 years little further light is thrown upon the question now under consideration by decisions of this Board. In the Indian Courts however the effect of the earlier authorities was constantly under discussion, and various attempts were

(m) 16 I.A. 166=17 C. 122 (P.C.).
(n) 25 B. 306.
(o) 10 M.I.A. 279.
(p) 3 I.A. 154=1 M. 69 (P.C.).
(q) 34 I.A. 107=31 B. 373=17 M.L.J. 343=9 Bom. L.R. 646=11 C.W.N. 769 (P.C.)
(r) 48 I.A. 513=49 C. 1=15 L.W. 565=20 A.L.J. 481=24 Bom. L.R. 609=26 C.W.N. 393=42 M.L.J. 219 (P.C.).
(s) 4 I.A. 1=1 M. 174 (P.C.).
(t) 30 I.A. 234=27 B. 492=5 Bom. L.R. 534=7 C.W.N. 716 (P.C.).
(u) 44 B. 297=22 Bom. L.R. 263=55 I.C.

made to arrive at the true principle, the opinions of Judges deeply versed in the Hindu law inclining now to what may be for convenience called the secular theory and now to the religious.

Nothing would be gained, in their Lordships' opinion, by attempting a critical examination of these cases in view of two recent pronouncements of this Board to which reference must now be made. It will however be necessary first to recite a decision in 1902 of the Full Court in Bombay *Ramkrishna* v. *Shamrao*.(v) The question in this case was as to the validity of an adoption by the grandmother of the last male holder who had died unmarried and without issue. It was not disputed that the grandmother was his heir, and it was contended that inasmuch as by the adoption she divested no estate but her own, the adoption was valid. The Court held that it was invalid, on the ground that the penultimate owner, the son, had himself left a son, by reason of which fact the grandmother's power of adoption had come to an end. The judgment of the Full Court which was delivered by Chandavarkar, J., involved a careful analysis of the older decisions of the Board and the conclusion come to was that

"Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

Sixteen years later, in April 1918, the case of *Madana Mohana Deo* v. *Purushothama Deo*(w) came before a Board consisting of Lord Haldane, Dunedin and Sumner with Sir John Edge and Mr Ameer Ali. It was by a somewhat strange coincidence a sequel to *Raghunatha* v. *Brozo Kishore*(x) to which reference has already been made. In the earlier case Brojo, who had been adopted by the widow of Adikonda, was held entitled to succeed to the impartible zamindari of Chinnakimedi, notwithstanding the fact that on Adikonda's death it had passed to his undivided brother Raghunadha. Brojo held the estate from 1870 till his death in 1906. He left no issue but a widow, Ratnamala, who was alive at the date of the later litigation but was not joined as a party. On Brojo's death, possession of the zamindari was taken by Raghunatha's son Vaishnava, who died in the same year and was succeeded by his son Purushothama. In 1907 the widow of Adikonda purported to adopt Madana, who sued Purushothama for the estate. The principal question before the Board was again whether this second adoption was valid. The Full Court case from Bombay was referred to, was approved, and was held to be decisive against the adoption.

Their Lordships will pass away from this case for the moment to refer to the second case which came before the Board a few months later, and which has perhaps a more direct bearing upon the particular line of argument which they are now considering. They only pause to point out that now the case-law has arrived at a point where it would be impossible to say that the sole test of the validity of an adoption is the vesting or divesting of property.

In *Pratapsing Shivsing* v. *Agarsingji*(y) the litigation related to a village which had formed part of an impartible estate in the Bombay Presidency, and

(v) 26 B. 526=4 Bom. L.R. 315.

(w) 45 I.A. 156=41 M. 855=8 L.W. 167 =16 A.L.J. 725=20 Bom L.R. 1041=23 C.W.N. 177=35 M.L.J. 138=1918 M.W.N. 621 (P.C.).

(x) 3 I.A. 154=1 M. 69 (P.C.).

(y) 46 I.A. 97=43 B. 778=10 L.W. 339= 17 A.L.J. 522=21 Bom. L.R. 496=24 C.W. N. 57=36 M.L.J. 511=1918 P.C. 192=1919 M.W.N. 313.

had been the subject of a maintenance grant to a junior branch of the family. By the custom of the family such grants reverted to the estate upon failure of male descendants of the grantee. The last holder Kaliansing, died in October 1903, childless, but leaving a widow who some five months later adopted the appellant. The respondent, the owner of the principal estate, sued for recovery of the maintenance lands on the allegation that they vested in him on Kaliansing's death, and that consequently the adoption was invalid. The Subordinate Judge dismissed the suit, but his decision was reversed by the High Court on the ground that the land having once vested in the respondent, the subsequent adoption could not divest it. If this view had been accepted by the Board, it might well have been decisive in favour of the present respondent on their first line of argument. But it was not accepted and their Lordships think that it must be regarded as decisive the other way. Notwithstanding that the property had vested in the respondent the adoption was held to be good, and the suit was dismissed. It was laid down in clear terms that "the right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate;" and this dictum is supported by reference to the two cases already cited from Vols. 3 and 34 of the Indian Appeals, both of them cases of joint property which had passed by survivorship. It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption. If in *Pratapsingh's* case[z] the actual reverter of the property to the head of the family did not bring the power to an end, it would be impossible to hold in the present case that the passing by inheritance to a distant relation could have that effect any more than the passing by survivorship would in a joint family.

For these reasons, their Lordships are of opinion that the first line of reasoning upon which the respondents seek to uphold the decision below must fail, and they think that the true principle must be found upon the religious side of the Hindu doctrine to which they have already adverted.

Much reliance was placed by counsel for respondent 1 on another Bombay case, *Bhimabai* v. *Tayappa*.[a] in which an apparently contrary result had been arrived at in 1913 by Batchelor and Shah, JJ. The property in question in this case was a *watan* estate which, under the provisions of the Bombay Hereditary Offices Acts of 1874 and 1886, did not pass by inheritance to the adopting widow on the death of her unmarried son, but vested in another member of the family, and for this reason the adoption was held to be bad. Unless there is something in the nature of *watan* property which makes the decision in *Pratapsingh's* case[z] inapplicable, their Lordships think that this case can no longer be regarded as authoritative.

It being clear upon the decisions above referred to that the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end, but that the mere birth of a son does not do so, and that this is not based upon a question of vesting or divesting of property, their Lordships think that the true reason must be that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and

(z) 46 I.A. 97=43 B. 778=10 L.W. 339= 17 A.L.J. 522=21 Bom. L.R. 496=24 C.W. N. 57 36 M.L.J. 511=1918 P.C. 192=1919 M.W.N. 313.

(a) 33 B. 598.

was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son die himself sonless and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive.

There is, in their Lordships' opinion, nothing in the Hindu law which is contrary to this, and nothing in previous decisions of this Board which would induce them to hold otherwise. It is, they think, in accord with the acceptance by Mr. Ameer Ali in *Pratapsingh's* case(z) of the view that among Hindus the male line is not regarded as extinct, as a man to have died without issue until the continuation of the line by adoption is impossible. It is also in their opinion supported by Lord Haldane's judgment in *Madana Mohana's* case,(b) which has been much discussed, and to which they must now return.

After referring to the conclusion come to by the Bombay Full Court in *Ramkrishna* v. *Shamrao*,(c) the judgment proceeds:

"Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge and they are of opinion that, on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adikonda's widow to an end when Bhau the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural-born son or by adoption to him of a son by his own widow."

Whether in order to bring this principle into play it is essential that the son's widow should herself be clothed with the power of adoption, is left open, and it is not necessary for their Lordships to consider this in the present case, as Bibhudendra died unmarried; the only question is as to the bearing of the passage cited on the facts now involved.

For the respondents it is contended that the Board must be taken to have held that the mother's power came to an end upon the attainment by the son of what is called ceremonial competence; that it did not depend upon his having in fact left a son or a widow, but merely upon his competence so to do. Bibhudendra, it is said, having died at the age of 20½ years, must be regarded as a fully "competent" Hindu for all ceremonial purposes. He had not, it is true, attained legal majority, nor could he adopt or give authority to his wife to adopt without the consent of Government but that, it is said, is immaterial; "ceremonial competence" is all that is necessary, and that should be ascribed to every Hindu of the age of 16.

But in the first place, their Lordships have had some difficulty in understanding exactly what this expression means. They have not been referred to any passage in the evidence bearing upon the matter, nor has any real light been thrown upon it in the argument. The respondent would apparently suggest that ceremonial competence means no more than the age of discretion, and reliance is placed upon the judgment of this Board in *Jumoona Dassya* v. *Bamasoondari Dassya*,(d) where it was held that an authority to adopt given by a husband who died at the age of 15 or 16 was

(z) See p. 132, foot note (z).
(b) 45 I.A. 156=41 M. 855=8 L.W. 167=16 A.L.J. 725=20 Bom. L.R. 1041=23 C.W.N. 177=35 M.L.J. 138=1918 M.W.N. 621 (P.C.)
(c) 26 B. 526=4 Bom L.R. 315.
(d) 1 C. 289 3 I.A. 72.

valid, he having attained "an age which according to the law prevalent in Bengal is to be regarded as the age of discretion." In *Verabhai Ajubhai* v. *Bai Hiraba*[e] it was contended that an adoption by a widow after the death of her son at the age of 15 or 16 was invalid on the ground that he had "attained a ceremonial competence." Lord Lindley, in delivering the judgment of the Board, says:

"A great number of authorities bearing more or less on this subject were cited but so far as they went they appear to their Lordships to be rather in favour of, than against the validity of the adoption. Certainly no authority was cited which shows it to be invalid. Assuming that it would be invalid if it were shown that Lalubha had attained ceremonial competence, their Lordships are not in a position to decide whether he had or had not attained it. There does not appear to be any fixed age at which a Hindu child attains such competence. Nor is there any proof that Lalubha had attained such competence in fact, or that he ever acted or was treated as having attained it."

"The Subordinate Judge, himself a learned Hindu, considered it to be clear that Lalubha had not attained such competence, as he died a minor and unmarried, and the High Court came to the same conclusion. Their Lordships are not prepared to say that he had attained such competence in the absence of evidence or authority to that effect"

It is, at least, noticeable that no suggestion seems to have been made in that case that the age of ceremonial competence meant no more than the age of discretion, and that among the "great number of authorities cited" the case from *Juttoona Dassya* v. *Bamasoondari Dassya*[d] did not find a place. The contention has been raised in several other cases in Bengal, but their Lordships have been referred to none in which it has prevailed.

An interesting note by Mr. Colebrooke is appended to the translation of the "Dattaka-Mimamsa," S. 4. v. 23, a well-recognized treatise on the law of adoption. In it he enumerates the ceremonies which are requisite in the case of the twice-born classes. Of these the best known are that of the *tonsure*, which is performed in infancy, and the upanayana, or investiture with the sacred thread. The latter, which marks the second birth, can apparently be performed at any age between the 5th and the 16th years, and can therefore hardly be regarded as the test of ceremonial competence as a synonym of "full legal capacity." To these, Mr. Colebrooke says, must be added "the ceremony which precedes conception and marriage which is the last of these sacraments" He then refers to certain other post-marital ceremonies, but says that "these are not essential": Stoke's Hindu Law Books, p. 576 (note).

If their Lordships can regard this as authoritative, they would be made inclined to the view that full ceremonial competence could hardly be attained without marriage, but it is not necessary for them so to decide in the present case. If the question ever becomes of importance hereafter, Hindu lawyers may quite possibly be able to throw further light on the matter. It is sufficient for their Lordships to say in the present case that neither the age of discretion nor such ceremonial competence as a Hindu boy may have acquired at 16 is an adequate interpretation of "full legal capacity to continue the line," as used in the judgment of the Board. There is certainly nothing in the case

(e) 30 I.A. 234 : 27 B. 492=5 Bom. L.R. 534—7 C.W.N. 716 (P.C.).

(d) See p. 133, foot note (d)

to suggest that any question as to ceremonial competence was raised before the Board, nor, apparently, had it been considered in the High Court; see the case reported in *Madana Mohana Deo* v. *Purushothama Deo*.(*f*)

But in the second place, their Lordships think that the words "full legal capacity" cannot be dissociated from the rest of the passage cited, and that they cannot be taken as indicating a particular moment in the son's life when the mother's power is extinguished. The qualification that follows them shows that the continuance referred to is a continuance in one of two defined ways, "*either* by the birth of a natural son, or by the adoption to him of a son by his own widow;" and the test is to be whether these conditions exist at the time of the son's death. The passage under consideration is, in their Lordships' opinion, clearly intended to be a restatement in a more critical form of the conclusion to which the Bombay Court had come, and which was affirmed in the same sentence only a few lines before, viz, that the power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow. There was no reason, and their Lordships think, no intention, to go beyond this. There is nothing in the judgment to suggest that the Board had in mind the case of a man who had died without leaving either a son or a widow, or that Lord Haldane was devising a formula which would cover such a case. It would be obvious that other considerations might come in and other authorities have to be considered.

The question had in fact arisen in Bombay very shortly before the Full Court case, and one of the Judges who sat on the Full Court had been a party to the decision. There the son had died without issue at the age of 30, his wife having predeceased him, and it was held that on his death the mother could adopt. The argument now advanced as to the attainment of full age and ceremonial competency was urged against the adoption, but was held to be of no weight: *Venkappa Bapu* v. *Jivaji Krishna*.(*g*) It was cited along with other cases in the argument before the Full Court, but no reference was made to it in the judgment, nor is there any word to suggest that its authority was questioned. Their Lordships are certainly not prepared to hold that this and other decisions of a like nature, none of which were referred to even indirectly in Lord Haldane's judgment, were intended to be overruled by him. Moreover, in *Bhoobun Moyee's* case,(*h*) which was the foundation of the decision in the Bombay Full Court, Lord Kingsdown made it clear that if Bhowance Kishori, who died at the age of 24, and was evidently regarded as having attained full ceremonial competence, had not left a widow, the adoption by Chundrabullee would have been good. This *dictum* has stood unquestioned for well over half a century and it is too late now to suggest that it was merely *obiter*, and can be disregarded.

One more case must, their Lordships think, be referred to: *Tripuraniba* v. *Venkataratnam*.(*i*) There one Venkata Somayajulu died leaving a widow and a son Subanna, who apparently succeeded to his father's estate. Subanna having died unmarried at the age of 25, his mother, with the consent of *sapindas*, adopted. The validity of the adoption was challenged by the nearest reversioner of Subanna. The trial Judge held it to be valid. His decision was reversed by the District Judge on the ground that Subanna had attained full legal capacity to continue the line within

(*f*) 45 I.A. 156=41 M. 855=8 L.W. 167 16 A.L.J. 725=20 Bom. L.R. 1041=23 C.W.N. 177=35 M.L.J. 138=1918 M.W.N. 621 (P.C.).

(*g*) 25 B 306 at 312.

(*h*) 10 M I A. 279.

(*i*) 46 M. 423=44 M.L.J. 349=1923 M. 517.

the meaning of Lord Haldane's judgment . On second appeal to the High Court, Sir W. Schwabe, C.J., was of opinion that the passage relied on by the District Judge was merely *obiter dictum*, and he held that the only test was whether the property was vested in the adopting widow. It is unfortunate, their Lordship's think, that *Pratapsingh's* case(*j*) was not referred to in this connection. Wallace J., thought that there could be no attainment of full legal capacity without marriage, and that the mother's power would only be brought to an end if the son left a son or a widow. "The purpose of adoption," he said, "is to perpetuate the line, and if the only son dies without leaving any one to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can by adopting a son to her own husband." With this last citation their Lordships find themselves in complete agreement. They think that there is no foundation for the contention that a mother's authority to adopt is extinguished by the mere fact that her son has attained ceremonial competence, and they are satisfied that Lord Haldane had no question of this in mind. They are therefore of opinion that the second line of reasoning upon which the judgment of the High Court in the present case has been supported fails equally with the first. In their opinion, the Rani's power of adoption under her husband's authority was not exhausted at the death of Bibhudendra, and the adoption of Amarendra was valid.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court, dated the 29th January, 1930, and the decree of the Subordinate Judge, dated the 30th November, 1925, should be set aside, and the suit instituted by Banamali Singh dismissed. The appellants will be entitled to their costs throughout.

130. Power to give in adoption.—Under the Hindu Law it is essential for the validity of an adoption that the child should be given to the adopter by the father, or if he be dead, by the mother. No other person has that right nor can the same be delegated to any body else.(*k*) As between the parents, the father has an absolute discretion in the matter and can give away the boy even against his wife's will,(*l*) for in the eye of the Hindu Law, when a man gives his son in adoption, he exercises a power more like the power of an absolute proprietor than that of a guardian.(*m*) Neither the adoptive parents nor a step-mother,(*n*) nor the paternal grandfather,(*o*) nor a brother(*p*) can give away the child in adoption. The reason for vesting this power only in the parents

(*j*) 46 I.A. 97=43 B. 778=10 L.W. 339=24 C.W.N. 57=1918 P.C. 192=17 A.L.J. 122=21 Bom. L.R. 496=36 M.L.J. 511=1919 M.W.N. 313.

(*k*) *Dhanraj Joharmal* v. *Soni Bai*, 52 C. 482=23 A.L.J. 273=27 Bom. L.R. 837=52 I.A. 231=1925 M.W.N. 692=30 C.W.N. 601=49 M.L.J. 173=1925 P.C. 118; *Basheti-appa* v. *Shivlingappa*, 10 Bom. H.C.R. 268; *Jogesh Chandra* v. *Nrityakali*, 30 C. 965=7 C.W.N. 871; *Pullabai* v. *Mahadu*, 33 B. 107=1 I.C. 659=10 Bom. L.R. 1134; *Bhagwandas* v. *Rajmal*, 10 Bom. H.C.R. 241.

(*l*) *Chitko* v. *Janaki*, 11 Bom. H.C.R. 199; *Narayanasami* v. *Kuppusami*, 11 M. 43.

(*m*) *Chitko* v. *Janaki*, 11 Bom. H.C.R. 199; *Alank Manjari* v. *Fakirchand*, 5 S.D. 356.

(*n*) *Papamma* v. *Appa Rao*, 16 M. 384=3 M.L.J. 80.

(*o*) *Mt. Tara Munee* v. *Deb Narayan*, 3 S.D. 387; *Moottoosamy* v. *Lutchmee*, M. Dec. 1852 p. 97.

(*p*) *Moottoosamy* v. *Lutchmee*, M. Dec. 1852 p. 97; *Collector of Surat* v. *Dhirsingji*, 10 Bom. H.C.R. 225.

is that the giving of the boy in adoption which is an act of serious consequence on the prospects of often a child of tender years must be decided upon and effected only by those who by their natural ties of blood and affection would be in a position to weigh the *pros* and *cons* calmly and *only* in the interests of the child. Even the mother of the child is relegated to an inferior position as against the father and cannot give away the boy without his consent,(q) unless he is dead,(r) or is permanently absent, or has entered a religious order, or has lost his reason in which case she can validly give away the boy in adoption provided her husband had not prohibited it.(s) It will be noticed here that though Vasishtha's text enjoins on the widow not to accept or give a son without the assent of her Lord, no consent of the husband is really necessary when the widow wants to give away her son in adoption. This is one of the anomalies of judicial interpretation of the ancient texts, justifiable only on the ground that giving away the boy is often in the boy's interest and hence the husband's consent can always be presumed. But a mother's power to give her boy in adoption terminates on her remarriage(t) except when authorised by her first husband.(u)

131. Disqualification for giving in adoption.—Nobody can give a child in adoption unless he or she happens to be the child's parent(v) who has attained the age of discretion and is not mentally incapable.(w) So long as the father is alive and is capable of giving the boy himself, his wife has no place in the matter, and if he deputes his wife to give away the son, any condition that he has imposed must be strictly adhered to by the wife even though the condition might have been imposed under a mistake or misapprehension.(x) But the conversion of the father does not deprive him of his power to give away his Hindu boy in adoption, except that the performance of ceremonies accompanying the

(q) *Narayan* v. *Nana*, 7 Bom. H.C.R. 153; *Rangubai* v. *Bhagirathi Bai*, 2 B. 377; *Santappayya* v. *Rangappayya*, 18 M. 397-5 M.L.J. 66; *Jogesh Chandra* v. *Nrityakali*, 30 C. 965-7 C.W.N. 871; *Lallubhai* v. *Mankuvarbhai*, 2 B. 388.

(r) *Tarinee* v. *Sheroda*, 11 W.R. 469; *Jogesh Chandra* v. *Nrityakali*, 30 C. 965 at 971-7 C.W.N. 871.

(s) *Jogesh Chandra* v. *Nrityakali*, 30 C. 965-7 C.W.N. 871; *Arunachallam* v. *Ayyaswami*, 1 M. De 154; *Raja Makund* v. *Jagannath*, 2 P. 469-1923 P. 423, *Rangubai* v. *Bhagirath. Bai*, 2 B. 377.

(t) *Narayanasawmi* v. *Kuppusami*, 11 M. 43; *Gurulingaswami* v. *Ramalakshmanma*, 18 M. 53-4 M.L.J. 237; *Raja Makund* v. *Jagannath*, 2 P. 469-1923 P. 423; *Rangubai* v. *Bhagirathi Bai*-2 B.377.

(u) *Fakirappa* v. *Sanitrewa*, 23 Bom. L.R. 482-1921 B. 1 (F.B.), *Panchappa* v. *Sangavbasava*, 21 B. 89-1 Bom L.R. 543. But see *Pattabai* v. *Mahadu*, 33 B. 107-1 I.C. 659-10 Bom. L.R. 1134.

(v) *Pattabai* v. *Mahadu*, 33 B. 107-1 I.C. 659, 10 Bom. L.R. 1134.

(w) *Dhanraj Johurmal* v. *Soni Bai*, 52 C. 482-19 M. L.J. 173-1925 P.C. 118-23 A.L.J. 273-27 Bom. L.R. 837 (P.C.)-52 I.A. 231-1925 M.W.N. 692-30 C.W.N. 691; *Papamma* v. *Venkatadri*, 16 M. 381-2 M. L.J. 80, *Vaithilingam* v. *Murugaian*, 37 M. 529.

(x) *Bireswar* v. *Shib Chander*, 19 I.A. 101-19 C. 152 at 461 (P.C.).

(y) *Rangubai* v. *Bhagirathi Bai*, 2 B. 377.

physical act of giving the boy has to be done vicariously by some Hindu delegate.(c) Even the mother's conversion does not deprive her of her power, in the absence of the father, to give the boy in adoption (Act XXI of 1850) but her re-marriage deprives her of this power(a) and she cannot give her boy by the first husband in adoption to her second husband because her connection with the family of her husband, which is necessary for her act of giving in adoption, ceases on remarriage.(b) But if the widow has been authorised by her husband to give their son in adoption, her remarriage does not disqualify her from giving the boy in adoption.(c) As regards other disqualifications that may be urged as debarring a person from giving away his son in adoption, namely, congenital leprosy, impotency, etc., it is submitted that the father will not be disqualified on account of these disabilities from making a gift of his son in adoption which is considered to be a meritorious act by the ancient writers. As regards the widow's power to give away her son in adoption, the fact that he happens to be her only son, is no bar.(d)

132. Delegation of the power to give in adoption.—A person cannot delegate his or her right to give the boy in adoption to another.(e) But if the decision to give and the essential contract of gift and acceptance followed by the delivery of the boy which can be made only by the parents have already taken place, the mere physical act of giving accompanying the Datta Homam may be left to be done by another.(f) This position was succinctly put as follows in the case of *Venkata* v. *Subhadra*(g) :—

"The substantial question is whether a gift made by the natural father and accepted by the adoptive father in view to adoption being made at a future time can validate the adoption, if it is made after the death of the natural father and if the elder brother acts in the place of the father at the time of the adoption and during the performance of the datta homam.

Viewing adoption barely as a civil transaction, gift and acceptance from and by persons competent to give and take would make it complete, if the adopted boy were transferred from one family to the other. In the view that

(c) *Sham Singh* v. *Santa Bai*, 25 B. 551 = 3 Bom. L.R. 89; *Kusum* v. *Satya*, 30 C. 999=7 C.W.N. 784.

(a) *Shankbai* v. *Ganpat*, 1925 N. 1 (F.B.); *Fakirappa* v. *Savitreva*, 23 Bom. L.R. 482=1921 B. 1 (F.B.); *Panchappa* v. *Sanganbasava*, 24 B. 89=1 Bom. L.R. 513; contra in *Putlabai* v. *Mahadu*, 33 B. 107=1 I.C. 659=10 Bom. L.R. 1134.

(b) *Fakirappa* v. *Savitreva*, 23 Bom. L.R. 482=1921 B. 1. (F.B.).

(c) *Putlabai* v. *Mahadu*, 33 B. 107=1 I. C. 659=10 Bom. L.R. 1134.

(d) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 =26 I A 118=21 A. 460=3 C.W.N. 427=9 M L.J. 67=1 Bom. L.R. 226 (P C.); *Krishna* v. *Parasuhri*, 25 B. 537 3 Bom. L R. 73.

(e) *Dhanuj Joharmal* v. *Soni Bai*, 52. C. 482 at 488=19 M L J. 173=23 A.L.J. 273=27 Bom. L.R. 857 P.C.=52 I.A. 231= 1925 M.W.N. 692=30 C.W.N. 601=1925 P. C. 118; *Basheltappa* v. *Shivlingappa*, 10 Bom H.C.R. 268; *Bhagwandas* v. *Rajmal*, 10 Bom. H.C.R. 241.

(f) *Venkata* v. *Subhadra*, 7 M. 548, *Sham Singh* v. *Santa Bai*, 25 B. 551=2 Bom L.R. 89; *Subbarayer* v. *Subbammal*, 21 M. 497; *Jamnabai* v. *Raychand*, 7 B. 225; *Vijiarangam* v. *Lakshman*, 8 Bom. H.C.R. 244.

(g) *Venkata* v. *Subhadra*, 7 M. 548

datta homam is essential among Brahmans, the civil transaction is not perfect unless it is invested with the character of a religious rite. But from the very nature of the thing, the agreement to give and to take must precede the religious rite, and the interval of time between the two is immaterial. We do not see, therefore, why a prior gift and acceptance should not be perfected by a valid religious rite performed on a subsequent occasion. It may be that the gift might be validly revoked during the interval, but when it remains unrevoked, the subsequent rite, when performed, relates back to the prior agreement. In this case, the respondent was actually delivered by his father to the appellant, and the nature of the transaction was one of actual gift and acceptance subject to a condition subsequent. Under the presence of the natural father during datta homam is indispensable. His previous authorization to give is inoperative, there is no reason to suppose that the datta homam is inefficacious. The gift by the brother in this case during the datta homam was not an act of his own mere motion as a brother, but it was an act ancillary to perfect, by a religious rite, what the father had done."

133. Who can be adopted.—An adoption can be made only of a boy and not a girl,(h) and the boy should not be of a different caste(i) though he may be of a different sub-caste.(j)

134. Other Rules of Eligibility within the caste.—As regards the eligibility of the boy within the caste of the adopter, there is a rule of Sutherland that the boy to be adopted should not be the son of a woman whom the adopter could not have married in her maiden state. This rule though formulated by Mr. Sutherland as the rule of Nandapandita, is really different from Nandapandita's rule which is that the boy to be adopted must be the son of a woman on whom the adopter could have begotten him in the Ksheeraja form. Nandapandita's rule is based really on Saunaka's metaphor that the adopted son is the reflection of a son and hence disqualifies the daughter's son, the sister's son, the brother, the paternal and maternal uncles etc., from being adopted. Owing to this difference, persons who could be adopted according to Sutherland's rule may not be available for adoption according to the rule of Nandapandita. For instance, a paternal uncle's son who cannot be adopted according to Nandapandita's rule on the ground that he does not bear the resemblance of a son having really the resemblance of a brother can be adopted without objection under Sutherland's rule because his mother could have been validly married to the adopter in her maiden state. In addition to these rules, there is a text by Sakala enjoining the adoption of a son of a sapinda if available, failing which, the adoption of a person of the same gotra, failing that also.

(h) *Ganga Bai* v. *Anant*, 13 B. 699; *Biraswar* v. *Shib Chander*, 19 I.A. 101—19 C. 452 (P.C.). See also S. 180.

(i) *Kusum* v. *Satia*, 7 C.W.N. 781-30 C. 999; *Narain* v. *Shiam* 25 I.C. 45; *Shib Deo Misra* v. *Ram Prasad*, 46 A. 637=1923 A 79; Mitakshara, 1-11-9; Mayukha, v-5-4; Dattaka Chandrika, 1-12 to 16; Dattaka Mimamsa, ii-22 to 25.

(j) *Shib Deo Misra* v *Ram Prasad*, 46 A 637—1923 A 79—22 A.L.J. 690; *Girish* v. *Mahomed*, 23 C.W.N. 634.

a person born in another family except the daughter's son, the sister's son and the son of a mother's sister (cited in Dattaka Chandrika Ch. 1—Sec. 17). Nandapandita has propounded a rule that a sister cannot adopt a brother's son and this he deduces from a text of Vriddha Gautama that "In the three regenerate castes, a sister's son, is nowhere a son" by construing the sister's son to include a brother's son with reference to the adopter being a woman. As regards the applicability of these rules, Sutherland's rule has been adopted to test the eligibility of the boy in Madras and Calcutta,[k] and the rule has been held not to exclude the adoption of the mother's brother's son or the father's brother's son.[l] But Sutherland's rule has been held by the Bombay High Court to be purely directory except in the case of prohibition against the adoption of the son of a daughter, or of a sister or of the mother's sister,[m] the same having been prohibited even by the text of Sakala which has been held to be mandatory by the Privy Council so far as these three relations are concerned except in the case of the Sudras.[n] In this view the Bombay High Court has declared as valid, the adoption of a daughter's husband,[o] husband's brother,[p] father's sister's son[q] or even a half brother.[r] But the adoption of her brother's son by a widow, though prohibited by Nandapandita's extension on the text of Vriddha Gautama, is not invalid,[s] and custom can validate the adoption of a daughter's son,[t] of the sister's son,[u] and, it is submitted, even of the mother's sister's son. But in the absence of any such custom the adoption

(k) *Haridas* v. *Manmatha*. 41 C.W.N. 322—1936 C. 1.

(l) *Virayya* v. *Hanumanta*. 14 M 459; *Meenakshi* v *Ramanada*. 11 M 49 (F.B.). See also *Bhagwan* v *Bhagwan*. 17 A 291, *Harna Chunder* v *Harro Mohun*. 6 C 41; See also *Kahandas* v *Jivan*. 25 Bom. L.R. 510 regarding inapplicability of the Rule to Sudras.

(m) *Vyas* v *Vyas*. 24 B. 473—2 Bom L. R. 163; *Ramchandra* v *Gopal*. 32 B. 619—10 Bom. L.R 948; *Gajanan* v *Kashinath*. 39 B 410—17 Bom. L.R. 372. *Subrao* v. *Radha*. 52 B. 197 1928 B. 295.

(n) *Bhagwan Singh* v. *Bhagwan Singh*. 21 A 412—26 I A 153—3 C.W.N. 454—1 Bom L.R. 311 (P.C.).

(o) *Sitabai* v *Parvatibai*. 47 B. 35 —1922 B. 239 (2)—24 Bom. L.R. 748.

(p) *Shripad* v *Vithal*. 49 B. 615 1925 B. 399—27 Bom L.R. 674

(q) *Ramakrishna* v. *Chimanji*. 21 I.C. 31—15 Bom. L.R. 824.

(r) *Gajanan* v. *Kashinath*, 39 B. 410—28 I.C. 978—17 Bom. L.R. 372; See contra in *Sriramulu* v. *Ramayya*, 3 M. 15.

(s) *Putti Lal* v. *Paibati* 37 A. 359—2 L W 881—13 A L J 721 17 Bom L.R. 549 19 C W N 841 19 I A 155 29 M L J 63 1915 M W N 511 1915 P C. 15 approving *Jai Singh* v. *Bibi*. 27 A. 417—2 A L J. 26.

(t) *Sundrabai* v *Gurnath*, 56 B. 298—1932 B 398 34 Bom L.R. 802. *Visvasundara* v. *Somasundara*. 43 M. 876—59 I. C. 609 *Rup Narain* v. *Gopal*, 36 C. 780—6 A L J. 567—11 Bom L.R 833—13 C W N. 920. 35 I A. 107. 19 M L J. 548—3 I C 382 (P.C.); *Vayidinada* v. *Appu*. 9 M. 44 (F.B.); *Appayya* v. *Venga*. 15 M L J. 211; *Bai Nani* v *Chunilal*. 22 B. 973, *Vishnu* v *Krishnan*. 7 M. 3; *Sooratha* v. *Kanaka*, 43 M 867 59 I C. 585. 12 L.W. 245—1920 M W N. 528 (case of a brother's daughter's son).

(u) *Vayidinada* v. *Appu*. 9 M. 44 (F B); *Ganpatrao* v. *Vithoba*, 4 Bom. H. C.R (A.C.) 138; *Jogeshwar* v. *Pandurang*, (1924) N. 73—78 I.C. 840; *Chain Sukh* v. *Parbati*, 14 A. 53; *Manjunath* v. *Kaveribai*, 4 Bom. L.R. 140; *Bai Nani* v. *Chunilal*, 22 B. 973.

amongst the twice born classes of a daughter's son,(v) the sister's son,(w) or the mother's sister's son(x) is certainly not valid.(y)

135. Orphan.—From the discussion on the question as to who can give the boy in adoption it will be plain that an orphan cannot be adopted(a) except where it is sanctioned by custom.(b) In *Basheliappa* v. *Shirlingappa*,(c) Westropp, C.J. and Haridas J., held that the adoption of an orphan, even when given by an elder brother with the authority of the parents given before their death was invalid and added "to allow such an adoption would leave it in the power of an elder brother of any branch of his fellow parceners by bestowing his younger brothers in adoption in a manner highly detrimental to the interests of the latter."

136. Rules of preference not mandatory.—The texts of Hindu Law prescribing that a Hindu wishing to adopt a son shall adopt the son of his whole brother in preference to any other person or a nearer relation to a more distant one are merely binding upon the conscience of pious and orthodox Hindus as defining what they ought to do, and are not so imperative as to have the force of law the violation whereof should be held in a Court of Justice to invalidate an adoption otherwise regularly made. Hence an adoption of a boy of a different gotra(d) or of a very distant relation, not even within the class of the sapindas, made in violation of the preferential right accorded by the texts to a brother's son, is not invalid.(d)

(v) *Maharajah Pertab Narain Singh* v. *Maharanee Subha Koer*, 3 C 426 : 4 I.A. 228 (P.C.).

(w) *Mussumat Lal* v *Murli Dhar*, 28 A. 488—33 I.A. 97 : 8 Bom. L.R. 402 : 3 A.L.J. 415—10 C.W.N. 730 (P.C.), *Mussammat Sundar* v *Mussamat Parbati*, 12 A. 51 : 16 I.A. 186 (P.C.).

(x) *Bhawan Singh* v *Bhagwan Singh*, 21 A. 412 : 26 I.A. 153—3 C.W.N. 451 : 1 Bom. L.R. 311 (P.C.); *Walbai* v. *Heerbai* 34 B. 491—11 Bom. L.R. 1172.

(y) See S. 142.

(z) *Dhanraj* v. *Sori Bai*, 52 C. 182 : 23 A.L.J. 275 : 27 Bom. L.R. 837—52 I.A. 231 : 1925 M.W.N. 602 : 30 C.W.N. 601—49 M.L.J. 173 : 1925 (P.C.) 118; *Basant* v. *Brij Raj*, 57 A. 494 : 1935 P.C. 132—62 I.A. 180 —16 Pat. L.T. 669 : 37 Bom. L.R. 805—1935 M.W.N. 768 : 1935 A.L.J. 847 : 39 C.W.N. 1057—42 L.W. 221 : 69 M.L.J. 225; *Shrinivas* v. *Balvant*, 37 B. 513 : 15 Bom. L.R. 533 : 20 I.C. 162; *Mareyya* v. *Ramalakshmi*, 44 M. 260 : 39 M.L.J. 495—1920 M.W.N. 708 : 1921 M. 331 : 12 L.W. 613; *Sukhbir Singh* v. *Mangeisar*, 49 A. 302 : 1927 A. 252 : 25 A.L.J. 183; *Rajendbal* v. *Jhummun*, 1922 M.W.N. 181 : 1923 M. 11; *Ramkishore* v *Jainarayan* 49 C. 170 : 15 L.W. 144 : 1922 P.C. 2 : 26 C.W.N. 881 : 20 A.L.J. 857 : 1922 M.W.N. 125 : 42 M.L.J. 50 : 68 I.A. 407.

(a) *Sukhbir* v. *Mangeisar*, 49 A. 302 : 1927 A. 252 : 25 A.L.J. 183; *Purshottam* v. *Venchand*, 45 B. 751 : 1921 B. 147 : 23 Bom. L.R. 227; *Ramkishore* v. *Jainarayan*, 49 C. 170 : 26 C.W.N. 881 : 20 A.L.J. 857—1922 M.W.N. 125 : 42 M.L.J. 50—68 I.A. 105—15 L.W. 111 : 1922 P.C. 2; *Subramanian* v. *Someswaram*, 44 M.L.W. 185 : 1936 M.W.N. 771 : 1936 M. 642 : 29 M. 1064; *Basant* v. *Brij Raj*, 57 A. 494 : 62 I.A. 180 : 16 Pat. L.T. 669 : 37 Bom. L.R. 805 : 1935 M.W.N. 768 : 1935 A.L.J. 847 : 39 C.W.N. 1057—42 L.W. 221 : 69 M.L.J. 225 : 1935 P.C. 132.

(b) 19 Bom. H.C.R. 268.

(c) *Brij Raj* v *Basant Sing*, 118 I.C. 154 : 1929 A. 561.

(d) *Woomi Dasi* v. *Gokoolanund*, 3 C. 587 at 597 : 5 I.A. 40 (P.C.); *Dharma* v. *Ramkrishna*, 10 B. 80.

137. Adoption of an only son.—An adoption of an only son is not null and void under the Hindu Law and the text of Vasishta prohibiting it is only directory and not mandatory.(e) Such an adoption is not so improper as to preclude in the Madras Presidency a widow from effecting it with the assent of the sapindas, in the absence of express authority from her husband. The following are the observations of the Privy Council on the question of the validity of the adoption of an only son in the well-known case of *Sri Balusu* v. *Sri Balusu*.(e)

"On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy, especially in later times. Manu says that by the eldest son as soon as born a man discharges his debt to his progenitors: and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that Manu attributes additional value to the first-born's son and grand-son. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishta whose text is the fundamental one does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors, one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "*put*" here, or if Mr. Justice Knox is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards, if he was so minded, adopt another; and neither authority nor reason was adduced to show that he could not."

138. Adoption of the eldest son.—Since the adoption of an only son has been held valid, *a fortiori*, the adoption of the eldest son must also be valid;(f) for, it cannot be denied that the spiritual services due to the giver of the boy can be as effectually performed by his other sons.

139. Adoption of a son adopted by another.—A boy who has been adopted by one cannot again be adopted by another, nor can the same boy be adopted by two persons even though they happen to be co-widows(g) or brothers.(h) This does not mean that the same boy cannot be the son of two fathers, as for instance, when he is taken as *dvyamushyayana* by an express agreement that his

(e) *Sri Balusu* v. *Sri Balusu*: *Radha Mohun* v. *Hardai Bibi*, 22 M. 398=21 A. 460=26 I.A. 113=3 C.W.N. 427=9 M.L.J. 67=1 Bom. L.R. 226 (P.C.).

(f) *Jamnabai* v. *Raichand*, 7 B. 225; *Janokee* v. *Gopaul*, 2 C. 365; *Kashibai* v. *Tatia*, 7 B. 221.

(g) *Gopi* v. *Gopi*, 27 I.C. 707=13 A.L.J. 91; *Sarada* v. *Rama*, 17 C.W.N. 319.

(h) *Rajcoomar* v. *Bissessur*, 10 C. 688 at 696.

relationship to his natural family will not be affected by the adoption.(i) Nor does it preclude an invalidly adopted son from being again validly given in adoption.(j)

140. Personal disqualifications.—A boy suffering from any of those disabilities which disqualify him from inheriting, such as virulent leprosy, insanity, etc., will operate as his disqualification for being adopted, since he will thereby be incapable of performing those religious rites for which the adoption is made. But this question will hardly arise on account of the unlikelihood of such an adoption being made which would defeat the object for which an adoption is undertaken. But the excommunication of a father does not *ipso facto* involve the excommunication of his son so as to invalidate an adoption of that son by another.(k) But if the son himself is excommunicated there can be little doubt that the adoption of him will be invalid, and the Caste Disabilities Removal Act cannot be held to preserve his rights in the adoptive family.

141. Adoption of an illegitimate son.—Illegitimacy is also a disqualification for the performance of the funeral ceremonies and hence an adoption of an illegitimate son is invalid, though made by his own putative father.(l)

142. List of other eligible and ineligible relations.—The Nyog rule of Nandapandita based upon Saunaka's metaphor that the adopted son should bear the reflexion of a natural born son should be accepted with caution.(m) It is questionable whether the text of Saunaka lends any basis for Nandapandita's rule at all. From the context in the books, which relates to the ceremonial and not to the selection of a son, the metaphor appears only to describe the result of the boy having been adopted. Besides, Nandapandita's rule is not borne out by the fiction in adoption that the adopter begets the boy on his own wife. The Courts, however, have applied Nandapandita's rule as varied by Sutherland and held that while the brother or a step-brother(n) or a brother's daughter's son(o) or an uncle cannot be adopted, an adoption of any of the following persons was good:—Sister's son's son,(p) wife's brother,(q) wife's sister's son,(r) wife's brother's son,(s) son's son

(i) See S. 174.

(j) *Viswasundara* v. *Samasundara*, 43 M. 876=59 I.C. 609.

(k) *Neelavva* v. *Gurshiddappa*, 39 Bom. L.R. 211=1937 B. 169.

(l) *Kallyanti* v. *Shivappa*, 1924 B. 516

(m) *Puttu Lal* v. *Parbati*, 37 A. 359=2 L.W. 881=13 A.L.J. 721=17 Bom. L.R. 549=19 C.W.N. 841=42 I.A. 155=29 M. L.J. 63=1915 M.W.N. 514=1915 P.C. 15—See S. 134.

(n) *Sriramulu* v. *Ramayya*, 3 M. 15; *Rajendra* v. *Gopal*, 7 Pat. 245=1929 P. 51 =9 Pat. L.T. 123—See contra as regards half brother in *Gajanand* v. *Kashinath*, 39 B. 310=17 Bom. L.R. 373=28 I.C. 978 and *Shripad* v. *Vithal*, 49 B. 615=1925 B. 399 =27 Bom. L.R. 671.

(o) *Bandhu* v. *Manmatha*, 41 C.W.N. 322=1936 C. 1.

(p) *Shenayya* v. *Kanay Gir*, 56 I.C. 632.

(q) *Sriramulu* v. *Ramayya*, 3 M. 15.

(r) *Rajarendra* v. *Jayaram*, 20 M. 283 =7 M.L.J. 124.

(s) *Jai Singh* v. *Bijai*, 27 A. 417—2 A. L.J. 36; *Sriramulu* v. *Ramayya*, 3 M. 15.

of a brother,[t] son or grandson of a cousin,[u] the son of a paternal uncle,[v] the son's son of a maternal uncle,[w] and the maternal aunt's daughter's son or maternal aunt's son's daughter's son.[x] It will be seen that all the above decisions will be correct by applying Sutherland's rule of eligibility, but that some of them offend against the Nyog principle enunciated by Nandapandita. Besides the above, the adoption of a daughter's son,[y] the sister's son,[z] mother's sister's son or of a brother's daughter's son.[a] though offending against Sutherland's rule, is held valid in Southern India and the Punjab[b] on the ground of custom. In a recent case, the Bombay High Court held that the sastraic prohibition against the adoption of a sister's son is confined to the regenerate castes and does not apply in the case of Sudras.[c]

143. Age of the adopted boy.—A passage in Kalikapurana lays down that a boy ought not to be adopted who is more than 5 years old or for whom the ceremony of tonsure has been performed in his natural family. (Dattaka Mimamsa iv—22). But the authenticity of this text has been denied by Dattaka Chandrika (ii—25) which lays down the rule that so long as marriage has not been performed for the boy in the natural family amongst the Sudras and the Upanayanam has not been performed in that family amongst the three regenerate castes there is no age restriction as regards the boy to be adopted and he can be validly adopted at any time within that period (Dattaka Chandrika ii—20—33). This view was adopted by Justice Mahmood,[d] and accepted as correct in Bengal,[e] Madras,[f] and by the Patna High Court.[g] It can now be taken as settled that, except in the Bombay Presidency, the limit after which a boy cannot be adopted is his Upanayanam amongst the twice born castes and his marriage amongst the Sudras.[h] Even the performance of the Upanayanam will not operate as a bar to an adoption if both the adopter and the adoptee belong to

(t) *Viranna* v. *Ramananda*, 11 M 459; *Haran Chunder* v. *Hurro Mohun*, 6 C. 41.

(u) *Moruu* v. *Bapoj. Sath* Sp. No 122.

(v) *Bala Singh* v. *Dal Singh*, (1902) P.R 67. *Viranna* v. *Hanumanta*. 14 M 459

(w) *Veeraya* v. *Hanumanta*, 11 M. 459; *Haran Chunder* v. *Hurro Mohun*, 6 C. 41.

(x) *Venkata* v. *Subhadra*. 7 M 518.

(y) *Vayidinada* v. *Appu*, 9 M. 44 (F B); *Sundrabai* v. *Gurnath*, 56 B 298= 1932 B 398 34 Bom L.R. 802.

(z) *Vayidinada* v. *Appu*. 9 M 44 (F.B.)

(a) *Appayya* v. *Venya*, 15 M.L J 311.

(b) *Chuttan* v. *Ramchand*, (1904) P.R. 86

(c) *Kalappa* v *Shivappa*. 1938 B 132.= 39 Bom. L.R. 1282; *Lakshmappa* v. *Rama-*

na. 12 Pom. H.C R. 361.

(d) *Ganga Sahai* v *Lekhraj Singh*, 9 A 233

(e) *Dullabakaul* v. *Kesheppree*, 6 S D. 219. *Ram Kishore* v. *Bhoobun Mojee*, (1859) S D A R 29

(f) *Viraraahava* v. *Ramalinga*, 9 M. 148; *Pichavanna* v. *Subbayyan*, 13 M. 128

(g) *Chandreshwar* v. *Bisheshwar*, 5 P. 777 1927 P. 61 8 Pat L.T. 510.

(h) *Ganga Sahai* v. *Lekhraj Singh*, 2 A 253, *Jhunka* v. *Nathu*, 35 A. 263=11 A LJ. 293 .18 I.C. 960; *Viraraghava* v. *Ramalinga*. 9 M. 148; *Makund* v. *Jagannath*, 2 P. 469=1923 P. 423 =4 Pat. L.T. 427; *Chandreshwar* v. *Bisheshwar*, 5 P. 777= 1927 P. 61—8 P.L.T. 510; *Papamma* v. *Appa Rau*, 16 M. 384

the same gotra.[i] As regards the performance of marriage to the adoptee in the natural family, there is, with the exception of the Bombay High Court,[j] a consensus of judicial opinion that it will operate to disqualify a person from being adopted even though the parties are Sudras.[k] But the Bombay High Court takes the view that there can be a valid adoption in any community of a married man even with children,[l] and that the adoption of a married Brahmin, even when he belongs to a gotra different from that of the adopter, is perfectly valid.[m] When a person having wife and son is adopted, the adoptee alone passes to the adoptive family and loses his gotra in the natural family, while the son born before the adoption still remains a member of his natural family retaining his interest therein.[n] But both the wife of the adoptee,[o] and his son born after the adoption, though conceived before it, pass with the adoptee to the adoptive family.[o] That High Court further holds that the adoptee may even be older than the adopter.[p]

144. Formalities of adoption.—Vasishta's text enjoining the giving of notice to the King and the assembling of kinsmen for making the adoption does not lay down a legal requisite for the validity of the adoption, but only indicates the desirability of publicity as regards such an important act as that, so that there may be no doubt in future in respect thereof. But it is well settled that the physical act of giving and taking the boy is absolutely necessary to constitute an adoption, and the same being the operative and the most essential part of the ceremony transferring the boy from one family into another,[q] it cannot be delegated[r] or

(i) *Viraraghava* v. *Ramalinga*, 9 M 148; *Bal Gangadhar Tilak* v. *Shrimant Pandit*, 39 B. 441 13 A.L.J. 570–17 Bom. L.R. 527 19 C.W.N. 729–29 M.L.J. 34 –42 I.A. 135–1915 M.W.N. 454–2 L.W. 661 –1915 P.C. 7. *Kannayya* v. *Sooranna*, 1933 M.W.N. 149 66 M.L.J. 37 –1931 M. 48 –39 L.W. 68.

(j) *Manikbai* v. *Gokuldas*, 49 B. 520–: 27 Bom. L.R. 814–1925 B. 363; *Balabai* v. *Mahadu*, 48 B. 387 1924 B. 319–26 Bom. L.R. 222.

(k) *Somasekhara* v. *Mahadeva*, 53 M. 297 31 L.W. 476–59 M.L.J. 151=1930 M. 496 affd. in 43 L.W. 105–1936 P.C. 18 –40 C.W.N. 243 38 Bom. L.R. 317–70 M.L.J. 159 1936 A.L.J. 96–1936 M.W.N. 21; *Hira* v. *Hardat*, 68 I.C. 763=1923 L. 26; *Lingayya* v. *Chengalammal*, 48 M. 407–20 L.W. 959 47 M.L.J. 776–1925 M.W.N. 268–1925 M. 272; *Damodarji* v. *Collector of Banda*, 7 A.L.J. 927–7 I.C. 418; *Jhanka* v. *Nathu*, 38 A. 383–18 I.C. 960–11 A.L.J. 293.

(l) *Dharma* v. *Ramkrishna*, 10 B. 80; *Manikbai* v. *Gokuldas*, 49 B. 520=1925 B. 363–39 L.W. 68; *Balabai* v. *Mahadu*, 48 B 387 1924 B. 319–26 Bom. L.R. 222; *Mhalsabai* v. *Vithoba* 7 Bom. H.C.R. XXVI

(m) *Sadashiv* v. *Hari Moreshwar*, 11 Bom. H.C.R. 190; *Dharma* v. *Ramkrishna*, 10 B. 80

(n) *Kalgavda Tevanappa* v. *Somappa Tamavgavda* 33 B. 669–3 I.C. 809 11 Bom. L.R. 797.

(o) *Fakirappa* v. *Fakirappa*, 42 B. 347 – 16 I.C. 611–20 Bom. L.R. 703

(p) *Balabai* v. *Mahadu*, 48 B. 387–1924 B. 349 26 Bom. L.R. 222; *Gopal* v. *Vishnu*, 23 B. 250.

(q) *Shoshinath* v. *Krishna*, 6 C. 381 – 7 I.A. 250 (P.C.); *Rangaayakamma* v. *Alwar Setti*, 13 M. 214; *Govindayyar* v. *Doraswmi*, 11 M. 5 (F.B.) *Krishna* v. *Broja*, 25 C.W.N. 493 1921 C. 617; *Bireswar* v. *Ardha Chander*, 19 C 432–19 I.A. 101 (P.C.), *Balak Ram* v. *Nanun*, 11 Lah. 507 1930 L. 579; *Haridas* v. *Manmatha*, 1936 C. 1–41 C.W.N. 322.

(r) *Basheltappa* v. *Shivlingappa*, 10 Bom. H.C.R. 268.

dispensed with even in the case of Sudras.(s) Even the doctrine of *factum valet* is unavailable to cure its absence.(t) A mere declaration by the adoptive father is not sufficient to create a valid adoption,(u) nor even the mere execution of a formal registered deed of adoption.(v) But if the discretion to give the boy in adoption has been exercised by the proper persons and there has been an agreement to give the boy in adoption by his natural parents, there is nothing to prevent the physical giving of the boy being delegated to another.(w) But the act of giving and taking cannot be done by the same individual as when a re-married widow gives her boy by the first husband to her second husband.(x)

145. Datta Homam.—Even the Datta Homam which is the service of the burning of clarified butter offered as sacrifice by way of religious propitiation or oblation with the object of effecting a change in the gotra of the boy is held by some of the decisions to be a matter of unessential ceremonial, and the authorities, both ancient and modern, are not in accord on the point whether Datta Homam is a legal as well as a religious requisite.(y) In Bombay it is held to be absolutely necessary for the validity of an adoption,(z) while the view taken by the Lahore High Court and the earlier decisions of the Madras High Court is that the non-performance of the Datta Homam even amongst the Brahmins is not fatal to its validity.(a) But the later decisions of the Madras High Court treated the earlier cases as of little authority.(b) The Calcutta High Court holds the view that the Datta Homam is absolutely necessary in the three superior classes(c) while the Allahabad High Court inclines to the view that it is not neces-

(s) *Shoshinath* v. *Krishna*, 6 C. 381. 7 I.A. 250 (P.C.); *Kishori Lal* v. *Jowali*, 108 I.C. 62; *Indramoni* v. *Behari Lal*, 5 C. 770 .7 I.A. 24 (P.C.); *Kuppusami* v. *Venkatalakshmi*, 31 I.C. 855 =1915 M.W.N 959; *Bireswar* v. *Ardhu Chander*, 19 C. 452=19 I.A. 101. (P.C.)

(t) *Mareyya* v. *Ramalakshmi*, 41 M. 260 —39 M L J. 495—1920 M.W N. 708—12 L.W. 618=1921 M. 331; *Soni Bai* v. *Dhanraj*, 56 I C. 620.

(u) *Ishwari Prasad* v. *Rai Hari Prasad*, 6 P. 506—1927 P. 145=8 P.L.T. 34; *Basheti-appa* v. *Shivlingappa*, 10 Bom. H.C.R. 268.

(v) *Shidappa* v. *Santawa*, 77 I C. 477= 1923 B. 302; *Shoshinath Ghose* v. *Krishna Sunderi*, 6 C. 381—7 I.A. 250 (P.C.); *Viswanath* v. *Ralibai*, 55 B. 103—32 Bom. L.R. 1385—1931 B. 105; *Mt. Mandit* v. *Phool Chand*, 2 C.W.N. 154; *Dhapabai* v. *Champalal*, 1 Bom. L.R. 842.

(w) *Sham Singh* v. *Santabai*, 25 B. 551 =3 Bom. L.R. 89; *Mt. Chatibai* v. *Shrimati Kundibai*, 88 I.C. 573=1925 S. 223; *Lakshmibai* v. *Ramchandra*, 22 B. 590; *Mt. Channibai* v. *Girdhari*, 1931 N 1—16 N.L. J 319 See also S. 132.

(x) *Fakirappa* v. *Savitrewa*, 62 I.C 318

(y) *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, 39 B. 441 =2 L.W. 611—1915 P.C. 7. 13 A.L.J. 570 17 Bom. L.R. 527—19 C.W. N. 729 29 M.L.J. 34—42 I.A. 135 .1915 M. W.N. 454; See the conflict on this question between *Sootrogum* v. *Subitra*, 2 Knapp. 287—5 W.R. P.C. 109 saying that religious ceremonies are not necessary and *Shoshinath* v. *Krishna*, 6 C. 381=7 I.A. 250 saying that such ceremonies are essential.

(z) *Govind Prasad* v. *Rindabai*, 49 B. 515- 1925 B. 289—27 Bom. L.R. 365.

(a) *Dayaram* v. *Hansraj*, 1930 L. 115; *Singamma* v. *Venkatacharlu*, 4 M.H.C.R. 165; *Shankaran* v. *Kesavan*, 15 M. 5; *Chandra Mala* v. *Mukta Mala*, 6 M. 20.

(b) *Venkata* v. *Subhadra*, 7 M. 543; *Subbarayar* v. *Subbammal*, 21 M. 497.

(c) *Lachman* v. *Mohun*, 16 Suth. 179

sary.[d] But it is now settled that among Sudras no ceremonies are necessary to render an adoption valid in addition to giving and taking the child in adoption,[e] and that even among the twice born, the Datta Homam is unnecessary if both the adopter and the adoptee belong to the same gotra.[f] Even in a case where Datta Homam is necessary, if the secular act of giving and taking the boy has been completed, the Datta Homam may be performed later,[g] and even by deputing another to perform the same.[h] The ceremony of Putreshi fag or the sitting upon the *bedi* during the Datta Homam ceremony is not necessary for the validity of an adoption even among the regenerate classes.[i] But if the use of a particular ceremony is so general in the community in question, the absence of it may be a ground for suspicion in any particular doubtful case.[j]

146. Factum Valet.—The proper application of the doctrine of *factum valet* to cases of adoption must be limited to cases in which there is neither want of authority to give nor to accept nor imperative interdiction of adoption. In cases in which the Sastras are merely directory and not mandatory or only indicate particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the moral precept or recommended preference be disregarded.[k] Adoption under the Hindu Law being in the nature of gift, three main matters constitute its elements apart from questions of form. The capacity to give, the capacity to take and the capacity to be the subject of adoption, seem to be matters essential to the validity of the transaction, and, as such, beyond the province of the doctrine of *factum valet*.[l] But the mere fact that a transaction is condemned in books does not necessarily prove it to be void, and it

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(d) *Atma Ram* v. *Madhao Rao*, 6 A. 276

(e) *Indromoni* v *Behari Lal*, 5 C 770=7 I A. 24 (P C); *Shashinath* v. *Krishna Sunderi*, 6 C. 381 7 I A 230 (P.C.); *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, 39 B. 441 at 447—2 L.W. 611 1915 P.C 7 - 19 A L J. 570 17 Bom. L R 527—19 C.W N 720 29 M L.J. 34—42 I A 135 1915 M.W N 454 (P.C.).

(f) *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, 39 B 441 2 L.W. 611 -1915 P C. 7 .13 A L J. 570 . 17 Bom. L R 527—19 C. W.N 729 29 M L J. 34—42 I A. 135 1915 M W N. 454 (P.C); *Govindayyar* v. *Doraisami*, 11 M 5 (F.B.); *Vedavalli* v *Mangamma*, 27 M 538; *Retki* v. *Lakpati*, 20 C.W.N. 19—27 I C. 39.

(g) *Seetharamamma* v. *Suryanarayana*, 49 M 969 .51 M.L J. 466—25 L.W. 183.= 1926 M. 1184; *Indromoni* v. *Behari Lal*, 5 C 770=7 I A. 24 (P.C.); *Subbarayar* v. *Subbammal*, 21 M. 497 ; *Venkata* v. *Subhadra* 7 M 518. The fact that the homam is performed after the death of the natural or adoptive father does not invalidate the adoption.

(h) *Lakshmibai* v *Ramchandra*, 22 B. 596; *Santappayya* v *Ramayyayya*, 18 M. 397 5 M L J 66; *Subbarayar* v. *Subbammal*, 21 M. 497. See also Ss. 96, 132 and 144.

(i) *Mokund Deb* v. *Sri Jagannath*, 2 P 169 1923 P 123 .4 Pat. L.T. 427; *Sheokuarbai* v. *Jeoraj*, 25 C.W.N 273; *Govind Prasad* v. *Rindabai*, 49 B. 515; *Asita* v *Nirode*, 20 C W N. 901; *Sheolotan* v. *Bhirmun*, 1 Pat. L.J. 481.

(j) *Indromoni* v. *Behari Lal*, 5 C 770 (P.C.) approving *Sootrugan* v. *Subitha*, 2 Knapp 287.

(k) *Lakshmappa* v. *Ramava*, 12 Bom. H C.R. 364.

(l) *Ganga Sahai* v. *Lekhraj Singh*, 9 A. 253.

must be considered whether the condemnation is merely a moral one or a legal condemnation.[m] But if the precept is a legal and a mandatory precept, the application of the doctrine can have no place as in the case of an adoption of an orphan[n] or of a boy given or accepted by a woman having no authority,[o] though it is available on grounds of justice, equity and good conscience to cure violations of texts relating to the *modus operandi* of adoption and not affecting the essence of the ceremony, as, for instance, where a stranger has been adopted in preference to a nearer relation,[p] or where the boy adopted was more than 5 years of age,[q] or was the eldest son or an only son,[r] or the boy was adopted by an uncharte,[s] or an untonsured widow,[t] or by a widow after paying money to the boy's natural father.[u] In other words, as was observed by Mahmood, J., of the Allahabad High Court in *Ganga Sahai* v. *Lekhraj Singh*,[q] "In the case of adoption there are of course questions of formalities, ceremonies, preference in the matter of selection and other points which amount to moral and religious suggestions. Such matters, speaking generally, are dealt with in the texts in a directory manner, relating to what I may call the *modus operandi* of adoption. To such matters, which do not affect the essence of the adoption, the doctrine of *factum valet* would undoubtedly apply on general grounds of justice, equity, good conscience, and irrespective of the authority of any text in the Hindu Law itself."

147. Effect of adoption.—In contemplation of law an adopted child is begotten by the father who adopts him, or for or on behalf of whom he is adopted. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect of his paternal and maternal lines, and his complete substitution into the adopter's family as if he were born in it.[v] In other words, the effect of

(m) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113 : 3 C.W.N. 427 : 9 M.L.J. 67 : 1 Bom. L.R. 226 : 21 A. 460 : 22 M. 398 (P.C.).

(n) *Dhanraj* v. *Soni Bai*, 52 Cal. 482 = 27 A.L.J. 273 : 27 Bom. L.R. 837 : 52 I.A. 231 : 1925 M.W.N. 692 : 30 C.W.N. 601 : 49 M.L.J. 173 : 1925 P.C. 118. *Vaithilingam* v. *Natesa*, 37 M. 529 : 23 M.L.J. 189 : 15 I.C. 299 : 1912 M.W.N. 1127; *Mareyya* v *Ramalakshmi*, 44 M. 260 : 12 L.W. 613 : 1921 *M.* 531 : 39 M.L.J. 495 : 1920 M.W.N. 708; *Basketlappa* v. *Shivlingappa*, 10 Bom. H.C. R. 268.

(o) *Rangubai* v. *Bhagirathibai*, 2 B. 377; *Narayan Babaji* v. *Nana Manohar*, 7 Bom. H.C.R. (A.C.) 153.

(p) *Wooma Daee* v. *Gokoolanund*, 3 C. 587.

(q) *Ganga Sahai* v. *Lekhraj Singh*, 9 A. 253.

(r) *Sri Balusu* v. *Sri Balusu*, 26 I.A. 113 : 21 A. 460 : 22 M. 398 : 3 C.W.N. 427 : 9 M.L.J. 67 : 1 Bom. L.R. 226 (P.C.).

(s) *Basvant* v. *Mallappa*, 45 B. 459 : 22 Bom. L.R. 1460 : 1921 B. 301 (1); See contra in *Seyamalal* v. *Saudamini*, 5 Beng. L.R. 362 and *Dnyoba* v. *Rudhabai*, (1894) P.J. 22.

(t) *Ravji* v. *Lakshmibai*, 11 B. 381.

(u) *Murugappa* v. *Nagappa*, 29 M. 161 : 16 M.L.J. 22; *Sitaram* v. *Harihar*, 35 B. 169 : 8 I.C. 625 : 12 Bom. L.R. 910.

(v) *Nagindas* v. *Bachoo*, 40 B. 270 : 14 A.L.J. 185 : 18 Bom. L.R. 172 : 20 C.W.N. 702 : 30 M.L.J. 193 : 43 I.A. 56 : (1916) 1 M.W.N. 258 : 3 L.W. 259 : 1915 P.C. 41; *Pratap Singh* v. *Agarsingji*, 46 I.A. 9 : 43 B. 778 : 24 Bom. L.R. 496 : 24 C.W.N. 57; *Advi* v. *Fakirappa*, 42 B. 547 : 20 Bom. L.R. 703.

adoption is to cut off all connection with the natural family in respect of the *gotra*, the *riktha* or wealth or heritage, *pinda* or funeral oblation, and *Swadha* or *Sraddha* etc. (w) and to transplant him in the adoptive family (x) and the adoptee's status in the adoptive family cannot be altered by the adopter by any deed or instrument cancelling the adoption. (y) The adopted son has in his new family precisely the same rights as a natural son, except when there is a question of competition between the natural and the adopted son. (z) In contemplation of law, the adopted child is the continuation of his adoptive father's line exactly as an aurasa son with no *hiatus* in the continuity of the line. (a) The fundamental idea is that the boy given in adoption gives up the natural family and everything connected with it and becomes new born in the family of his adoptive father so as to be qualified to provide efficaciously the offerings of which the dead have need, by first dying in the family of his birth out of which he is given and in which his offerings will be no longer efficacious or desired. (b) The fiction of adoption operating as civil death in the natural family and new birth in the adoptive family has been extended both ways to the extent that the adopted son is to be treated as having been born from his birth in the adoptive family and as having never been born in the natural family. But in neither way can the fiction be literally applied. If the *Upanayanam* is performed in the natural family, it is not annulled on account of the adoption. Nor does the adoption obliterate the tie of blood, and the disabilities against adoption and marriage in the boy's natural family still continue in spite of the adoption (c) Besides, the issue born to the adopted person before adoption in case where the adoption of a married person is valid, remain in the natural family and do not become members of the adoptive family by the adoption, (d) but issue born to the adoptee after adoption, though conceived before it, belong to the adoptive family. (e)

(w) *Bai Kesarba* v. *Shivsangji*, 1932 B 654—34 Bom. L.R. 1332—56 B. 619-Mann, ix. 142.

(x) *Lal Harihar* v. *Bajrang*, 41 C.W.N. 1126—39 Bom. L.R. 1014 -1937 P.C 242.

(y) *Bhupati* v *Basanta*, 1936 C. 856-. 63 C. 1098- 40 C.W.N. 1330; *Ma Chit Sa* v. *Kyaw Maung*, 1933 R. 128

(z) *Krishnamurthi Ayyar* v. *Krishnamurthy Ayyar*, 50 M 508-26 I.W 186—25 A.L.J. 945 29 Bom L.R. 969-31 C.W.N. 910 53 M L.J. 57 -1927 M.W.N. 467—54 I A. 248 1927 P.C. 139; *Padmakumari* v. *Court of wards*, 8 C. 302—8 I. A. 229 P.C.; *Kali Komul Mozoomdar* v. *Uma Shunkur*, 10 C. 232—10 I.A. 138 (P.C.).

(a) *Pratapsing* v. *Agarsingji*, 43 B. 778 —10 L.W. 339—1918 P.C. 192—17 A.L.J. 522 21 Bom L.R 196—24 C.W.N 57 36 M L.J 511 P C 16 I A 97 1919 M.W.N. 213

(b) *Tewari Raghuraj Chandra* v *Rani Subhadra Kunwar*, 7 Luck 76 55 M L.J 774—1928 P.C. 87 55 I.A. 139 -26 A.L.J. 609—30 Bom L.R 829-32 C.W.N. 1009.

(c) *Bai Kesarba* v. *Shivsangji*, 56 R 619-34 Bom L.R. 1332 1932 B 651; *Meotin* v *Upper*, (1858) Mad. Decisions, P. 117; Dattaka Chand. iv-8; Dattaka Mimamsa. vi-10

(d) *Bai Kesarba* v. *Shivsangji*, 1932 B. 651 34 Bom. L.R. 1332. 56 B 619; *Kalgavda* v *Somappa*, 33 B. 669—11 Bom. L. R. 797; See also S. 143

(e) *Adri* v *Fakirappa*, 42 B. 547—46 I C 641 20 Bom L R 703

148. Rights in the natural family.—The effect of adoption being as described in the previous section, the adoptee must necessarily forfeit all his future rights of inheritance in his natural family both *ex parte paterna* and *ex parte materna*,(*f*) and, *vice versa*, all his relations in the natural family,(*g*) can no longer be his heirs,(*h*) unless they happen to be his heirs even if he were actually born in the adoptive family or he has been adopted in the *dvyamushyayana* form. But properties which have already become vested in him before adoption as an absolute owner, either as the sole surviving coparcener,(*i*) or by inheritance,(*j*) or by partition in his natural family,(*k*) are not forfeited by the adoption and the adopted boy continues to hold them even in his new family. The text of Manu that the adopted boy should not take with him the wealth (Riktha) of his begetter is explained as applying only to the rights which may come to him in future if he remains unadopted and not to the rights which have already accrued to him as an absolute owner. But the Bombay High Court interprets the text as referring also to the right which have already become vested in the adopted boy prior to his adoption but confines "the wealth of the begetter" in Manu's text to mean the family property in his hands, and in this view, while holding that properties vested in him either as heir to his natural father or as the sole surviving coparcener(*l*) would be lost to him as if he were dead on the date of adoption (Ibid), it holds that properties vested in him otherwise than as above, either as self-acquired or inherited from his maternal grandfather, or properties obtained on partition are still retainable by him even after adoption with the relations in the adoptive family as his heirs.(*m*) But if the adoptee and the adopter were near relations even before the adoption, the adoptee and his relation in the natural family may still retain the mutual rights of inheritance as when a person adopts his own brother's son. The conflict between the view of the Bombay High Court and the view of the High Courts of Calcutta and Madras has been well brought out and the reason for preferring the latter view clearly explained

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(*f*) *Bhausaheb* v. *Ramachadra*, 25 Bom L.R. 813 1923 B 471.

(*g*) *Muthayya* v. *Minakshi*, 25 M. 394; *Tewari Raghuraj Chandra* v. *Rani Subhadra Kunwar*, 3 Luck. 76—55 M.L.J. 778 = 1928 P.C 87 55 I A. 139- 26 A.L.J. 609 = 30 Bom. L.R 829 -32 C.W.N. 1009.

(*h*) *Ibid*—*Muthayya* v. *Minakshi*, 25 M. 394.

(*i*) *Venkata Narasimha* v. *Rangayya*, 29 M. 437—16 M.L.J. 178. But see contra in *Bai Kesarbai* v. *Shivsangji*, 56 B. 619—34 Bom. L.R. 1332=1932 B. 654.

(*j*) *Shyamcharan Chattopadhyaya* v. *Srichurn*, 56 C 1135—1929 C. 337 33 C. W.N. 153.

(*k*) *Rulia Rem* v. *Sadhan*, (1930) L. 470

(*l*) *Dattatreya* v. *Govind*, 40 B. 429—18 Bom. L.R. 258 34 I.C. 423 *followed* in *Bai Kesarbai* v. *Shivsangji*, 1932 B. 654—34 Bom. L.R. 1332- 56 B. 619.

(*m*) *Mahableshwar* v. *Subramanya*, 25 Bom. L.R. 274—47 B. 542—1923 B. 297; See also *Manikbai* v. *Gokuldas*, 49 B. 526—1925 B. 363=27 Bom. L.R. 814; *Bai Kesarbai* v. *Shivsangji*, 56 B. 619—34 Bom. L.R. 1332=1932 B. 654.

in the following extracts from the decision of the Calcutta High Court in *Shyamacharan Chattopadhyaya* v. *Srichuran* (j):—

"It is difficult to imagine how a person, by reason of his [illegible] adopted subsequent to his father's death, can be deprived of property, which at the time of his adoption, was his own. It is to be noticed that the Bombay High Court, in the year 1922, held that a person governed by the Mitakshara law does not, on his adoption, lose the share which he has already obtained on partition from his natural father and brothers in his family of birth. See *Mahableshwar Narayana Bhat Devte* v. *Subramanya Shastri Joshi* (n) and the same Court in the case of *Manickbai* v *Gokuldas Ramdas Karadi* (o) held that the adoption of a married Hindu by sole owner of ancestral property acquired by survivorship on the death of his father, does not deprive his daughter of her right of inheritance to that property. It was pointed out in that case by Sir Norman Macleod, Chief Justice, that, by his adoption, Ramdas lost all rights of inheritance in his natural family, as if he had died, but it was quite unnecessary to add a further fiction, viz., as if he had never been born in the family. It is difficult to reconcile the case of *Mahableshwar Narayan Bhatt Devte* (n) with the broad view taken in the case of *Dattatraya Sakharam Devli*, (p) In the case of *Sri Raja Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row*, (q) the learned Judges followed the decision of the Calcutta High Court in *Behari Lal Laha's case*, (r) and after examining the texts of Hindu Law, held that the adoption into another family, of the only surviving member of a joint family, in whom the family estate vested solely and absolutely, does not in law operate to divest him of his rights in such estate.

* * * * *

The authors of "Dattaka Munangsha" and "Dattaka Chandrika" cite the text of Manu and explain the same by stating that from the very act of giving (in adoption), the extinction of the giver's son's proprietary right in the giver's property and the extinction of the giver's *gotra*- take place With regard to these texts, we agree with the observations of the learned Judges of the Madras High Court in the case of *Venkata Narasimha Appa Row*. (s) The learned Judges said:—"We do not think that there is anything in these passages which necessarily carries with it the idea that the adopted son is divested of property which is his own absolutely at the time of adoption. The more correct view seems to be that by the adoption the filial relationship, as the author of the Chandrika says, is extinguished in one family and is created in the other family, and that, thereafter, the person adopted cannot claim or take any property in his natural family by virtue of the extinguished filial relationship therein. The fact that, under Dayabhaga law in force in Bengal, a son has no vested coparcenary interest with his father in ancestral property and that his interest in the ancestral property of the father only accrues on the father's death rather favours the view that Mimangsha, when adopting the interpretation of the Chandrika, had in mind the loss of rights that might accrue after the date of adoption rather than rights to property which had already vested."

(j) See p. 150 foot note (j).
(n) 47 B. 542=25 Bom. L.R. 274=1923 B. 297.
(o) 49 B. 520=27 Bom. L.R. 814=1925 B. 263.
(p) 10 B. 129=18 Bom L.R 258=34 I.C 123.
(q) 29 M. 137-16 M.L.J. 178.
(r) (1896) 1 C.W.N. 121.
(s) 29 M. 437, 449=16 M.L.J. 178.

149. Liabilities in his natural family.—In the same way as he loses all his rights in his natural family, the adopted son is discharged also from those obligations such as family debts for which he would have been liable as a member of his natural family. Thus the personal obligation to maintain the aged parents cannot be enforced by the natural parents after they have given their son away in adoption. But in respect of property which has become vested in him prior to adoption either by inheritance or as the sole surviving coparcener and which he carries to his new family he would be liable for those obligations which are incidental to the possession thereof, (t) such as the maintenance of dependent members, discharge of binding debts, etc., with which the said property can be said, in a sense, to have remained burdened in his hands prior to his adoption.

150. Rights in the adoptive family.—An adopted son occupies the same position and has the same rights and privileges in the family of the adopter as the aurasa son, except in a few specified instances which have been clearly and carefully noted and defined by the writers on the subject of adoption. (u) Those instances relate to the marriage of the adoptee and to competition between an adopted son and an aurasa son subsequently born to the adoptive father. (v) But his rights are never higher than those of the aurasa son and he cannot impeach an alienation by the adoptive father made prior to adoption when he was the sole owner of the property (w) nor can he claim that his adoption implies a contract by his adoptive father not to gift or will away his self-acquired property in consideration of his receiving the boy in adoption. (x) The argument based on such an implied contract is a novel one, and, if countenanced, would result in placing an aurasa son in an inferior position to that of the adopted son. But an adopter may deprive himself of his absolute rights over his own property by an express agreement that he will not deal with his property to the detriment of the adopted son. (y) The adopted son is in the same position as an aurasa son except in a few matters where the aurasa son is placed in a more favourable position, (z) and he can inherit

(t) *Pranvallubh* v. *Deocristin*, 1824 Bom. S.R. 4.

(u) Per *Mitter J.* in *Uma Shunkur* v. *Kali Komul*, 6 C. 259 approved in *Nagindas* v *Bachoo*, 40 B. 270=3 L.W. 259=1915 P.C. 41=14 A L.J. 185=18 Bom. L.R. 172 =20 C.W.N. 702=30 M.L.J. 193=43 I.A. 56 (1916) 1 M.W.N. 258; *Kali Komul Mozoomdar* v. *Uma Shunkur*, 10 C. 232=10 I A. 138 (P.C.).

(v) *Nagindas* v. *Bachoo*, 40 B. 270=14 A.L.J. 185=18 Bom. L.R. 172=20 C.W.N. 702=30 M.L.J. 193=43 I.A. 56 (1916) 1 M. W.N 258 =3 L.W. 259=1915 P.C. 41.

(w) *Brij Raj Saran* v. *Alliance Bank*, 1936 L. 946 -17 L. 686.

(x) *Venkata Surya* v. *Court of Wards*, 22 M. 383-9 M.L.J. Sup. 1=26 I.A. 83 (P.C.); *Subba* v. *Doraisami*, 17 M L.J. 269 -30 M. 369, See also *Bhupendra* v. *Amarendra*, 43 I A. 12=43 C. 432=18 Bom. L. R. 347=20 C.W.N. 169; *Asita Mohan* v. *Nirode*, 47 I.A. 140=24 C.W.N. 794.

(y) *Surendro Keshub Roy* v. *Doorgasoondery*, 19 C. 513=19 I.A. 108 (P.C.).

(z) See Ss. 153 and 155.

both lineally and collaterally in his adoptive family. On a partition between the aurasa son of one deceased brother and the adopted son of another deceased brother of a Hindu joint family, the adopted son shares equally with the aurasa son. (v)

151. Rights of inheritance.—An adopted son is entitled to inherit both lineally (a) and collaterally (b) and *ex parte materna* (c) as well as *ex parte paterna*. (d) in his adoptive family. An adopted son of a daughter shares equally with the natural son of another daughter in the estate of his maternal grandfather. (e) As the law at present stands an adopted boy is entitled to succeed to all his adoptive father's relations, whether related through males or through females. (f)

152. Succession ex parte materna.—Where the adopter has one wife, the adopted son would be entitled to succeed to her stridhana as well as to her relations even though the adoption is made against her will or even after her death. (g) What exactly will be the position in the case of an adoption by a widower who had had several wives who were all dead at the time of the adoption and whether the adopted son will become the son of all those wives or only of the wife who died last, and whether in the case of an adoption made by a bachelor who subsequently marries a number of wives, the adopted son is to be deemed to be the son of one or all or which of those wives are interesting questions which have not been decided so far. But owing to the obvious difficulty in answering such questions by giving an adoptive mother to the adopted boy, the simplest solution will be to hold that if the adopter has no wife at the time of the adoption the adopted boy cannot have an adoptive mother. In this view the recent decision of the Madras High Court in *Sountharapandian* v. *Periaveeru* (h) affirming an earlier ruling in *Sundaramma* v. *Venkatasubba Ayyar* (i) is, it is submitted, not acceptable. But when there are more than one wife to the adopter and one of them is associated with him during the adoption, it is only that wife who joins in the adoption that

(v) See p. 152, foot note (r).

(a) *Mokunda* v. *Bykunt*, 6 C 289.

(b) *Padmakumari* v. *Court of Wards*, 8 C. 302=8 I.A. 229 (P.C.).

(c) *Sountharapandian* v. *Periaveeru*, 65 M L.J. 58=1933 M.W.N. 1061 56 M. 759 =38 I.W. 45=1933 M. 550 (F.B.); *Kali Komul Mozoomdar* v. *Uma Shunkur*, 10 C. 232=10 I.A. 138 (P.C.); *Sham Kuar* v. *Gaya Din*, 1 A. 225 (F.B.); *Surjokant* v. *Mohesh Chunder*, 9 C. 70.

(d) *Kali Komul Mozoomdar* v. *Uma Shunkur*, 10 C. 232=10 I.A. 138 (P.C.).

(e) *Surjokant* v. *Mohesh Chunder*, 9 C. 70.

(f) *Pudda Kumaree* v. *Juggut Kishore*, 3 C 615 approved in *Padmakumari* v. *Court of Wards*, 8 C 302 8 I.A. 229 P.C; *Chandreshwar* v. *Bisheshwar*, 5 P. 777=1927 P 61 8 P.L.T 510.

(g) *Sundaramma* v. *Venkatasubba Ayyar*, 49 M 941=1926 M.W.N 776=51 M.L. J. 545=1926 M. 1203; *Sham Kuar* v *Gaya Din*, 1 A. 255 (F.B.); *Sountharapandian* v. *Periaveeru*, 38 I.W. 45=1933 M.W.N. 1061=63 M L.J. 58=56 M. 759=1933 M. 550 (F.B.)

(h) 38 I.W 45=56 M. 759=1933 M. 550 =1933 M.W.N. 1061=65 M.L.J. 58 (F.B.).

(i) 49 M. 941=51 M L.J. 545=1926 M. 1203=1926 M W N. 778.

steps into the position of the mother to the adopted boy giving him the right of inheritance both to herself and to her relatives,[j] and the other wives of the adopter take the position of step-mothers to the adopted boy. Where a person dies leaving two or more widows with authority to adopt and all of them concurrently make the adoption, the act of adoption should be deemed to have been made by the senior widow only and to herself as mother, even though all the widows have concurred in making the adoption. In such a case the adoption is not invalid, only the junior widows would be in the position of step-mothers to the adoptee.[k] If authority has been given to only one of several widows and she makes the adoption, she alone will be deemed to be the adoptive mother.[l]

153. Competition with aurasa son.—As no adoption can take place so long as there is an aurasa son, the question of competition between an adopted son and an aurasa son of the same father can arise only when an aurasa son is born subsequent to an adoption. As against an after-born aurasa son, the adopted son occupies an inferior position. In the case of succession to an impartible estate, the aurasa son, though younger than the adopted son, excludes him,[m] and as regards performance of religious ceremonies, the aurasa son naturally takes precedence, the reason being that the adopted son is only a substitute for an aurasa son and when the latter comes into existence he excludes the substitute. On partition, the aurasa son gets a larger share than the adopted son owing to this ceremonial superiority. As regards the shares to be taken by an adopted son in competition with an after-born aurasa son, according to Vasishta he must take a fourth share while according to Devala he must take a third. Devala's text is followed by the Bengal School while Vasishta's text is adopted by the Mitakshara though the same is interpreted differently in different provinces. Thus while the Bengal School gives him according to the text of Devala 1/3 of the father's estate, he gets 1/5 of the estate in Bombay and Madras,[n] and 1/4 in Benares.[o] To this rule there

(j) *Narasimha* v. *Parthasarathy* 37 M. 199=26 M.L.J. 411=23 I.C. 166=12 A.L.J. 315=16 Bom. L.R. 328=18 C.W.N. 554=1914 M.W.N., 299=41 I.A. 51 (P.C.); *Annapurni* v. *Forbes*, 23 M. 1=9 M. L.J. 209=21 I.A. 246 (P.C.); *Vyankatrav* v. *Jayavantrav*, 4 Bom. H.C. R. 191; *Dattatraya* v. *Gangabai*, 46 B. 541=24 Bom. L.R. 69; *Radha Prasad* v. *Ranee Mani*, 33 C. 947=10 C.W.N. 695; *Kali Komul Mozoomdar* v. *Uma Shunkur*, 10 C. 232=10 I.A. 138; *Sham Kuar* v. *Gaya Din*, 1 A. 255.

(k) *Tiruvengalam* v. *Butchayya*, 52 M. 979—98 L.W. 727=1929 M 11=55 M.L.J. 757=1928 M.W.N. 53.

(l) *Annapurni* v. *Forbes*, 23 M. 1=9 M L J 209=21 I.A. 246.

(m) *Ramasami* v. *Sundaralingasami*, 17 M. 422.

(n) *Giriapa* v. *Ningapa*, 17 B. 100; *Balakrishnayya* v. *Venkata*, 43 M. 398=38 M.L.J. 86=1920 M.W.N. 272=11 L.W. 379=55 I.C. 371; *Ayyavu* v. *Niladatchi*, 1 M. H.C.R. 45; *Tukaram* v. *Ramchandra*, 49 B. 672=1925 B. 425=27 Bom. L.R 921; *Ananthachari* v. *Krishnaswami*, 46 L.W. 568 (up-holding equal division in the particular circumstances of the case).

(o) See *Rukhab* v. *Chunilal*, 16 B. 347

is an exception engrafted by the Madras and Bengal Schools in respect of Sudras amongst whom the adopted son and the aurasa son share the inheritance equally.(p) But in Bombay the adopted son amongst the Sudras gets only his 1/5 and nothing more. (q) *See* S. 155.

154. Rights of adopted and aurasa sons in the case of collateral succession.—Although under Hindu Law an adopted son gets a lesser share in his adoptive father's estate as against the natural born son, so far as succession to collaterals is concerned they stand on an equal footing and get equal shares.(r) So also in the case of succession to the Stridhanam of a woman, the aurasa son of one of her co-wives and the adopted son of another co-wife share the property equally. (s)

155. Partition in the adoptive family.—(*See* S. 348)—On partition with his adoptive father, the share that an adopted son gets will be the same share as an aurasa son gets, but if an aurasa son has been subsequently born and is alive at the time of the partition, his share will be 1/3 in Benares, 1/4 in Madras and Bombay and 1/2 in Bengal of what the aurasa son or the father takes. Thus in a partition between an adopted son, an after-born aurasa son and their father, their respective shares in Madras will be four shares for the father, four shares for the aurasa son and one share for the adopted son. (t) But this rule is inapplicable in a case of partition among collaterals, as, for instance, where the division is between the adopted son of one brother and the aurasa son of another brother in a joint family, (u) in which case they share equally. So also among Sudras in the Madras Presidency, the adopted and the aurasa son of the same person take equal shares. (u)

156. Renunciation by adopted son.—A boy once validly adopted gets fixed up in his adoptive family and cannot renounce his status as an adopted son and return to his natural family, though

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(p) *Perraju* v. *Subbarayudu*, 44 M. 656=3 P.L.T. 1=48 I.A. 280=1921 M.W.N. 540=19 A.L.J. 621=22 Bom. L.R. 920=26 C.W.N. 1=41 M.L.J. 33=14 L.W. 270=1922 P.C. 71; overruling *Gopalam* v. *Venkataraghavulu*, 40 M. 632=29 M.L.J. 710=31 I.C. 574; *Asita* v. *Nirode*, 20 C.W.N. 901=35 I.C. 127

(q) *Tukaram* v. *Ramchandra*, 49 B. 672=1925 B. 425=27 Bom. L.R. 921

(r) *Gangadhar* v. *Hira*, 43 C. 944=20 C.W.N. 489=34 I.C. 10; *Krishnayya Rao* v. *Rajah of Pittapur*, 51 M. 893=28 L.W. 422=1928 M. 994=55 M.L.J. 894; *Nagindas* v. *Bachoo*, 40 B. 270=3 L.W. 259=1915 P.C. 11=14 A.L.J. 185=18 Bom. L.R. 172=20 C.W.N. 702=30 M.L.J. 193=13 I.A. 56=(1916) 1 M.W.N. 258

(s) *Gangadhar* v. *Hira*, 43 C. 944=34 I.C. 10=20 C.W.N. 489.

(t) See p. 154, foot note (r).

(u) *Nagindas* v. *Bachoo*, 40 B. 270=3 L.W. 259=1915 P.C. 11=14 A.L.J. 185=18 Bom. L.R. 172=20 C.W.N. 702=30 M.L.J. 193=13 I.A. 56=(1916) 1 M.W.N. 258

(u) *Perraju* v. *Subbarayudu*, 44 M. 656=3 P.L.T. 1=48 I.A. 280=1921 M.W.N. 540=19 A.L.J. 621=22 Bom. L.R. 920=26 C.W.N. 1=41 M.L.J. 33=14 L.W. 270=1922 P.C. 71.

he is at perfect liberty to give up his rights to inheritance in his new family,[v] in which case the next heir gets the inheritance.[w]

157. Succession to adopted son.—In the same way as an adopted son is entitled to succeed to his relations, both maternal and paternal in his adoptive family, those relations are in turn entitled to succeed to him.[x] But his relations in the natural family are not entitled to inherit to him since adoption operates as a complete severance of the boy given from his natural family. Hence even the natural brother cannot succeed to the adopted boy in his adoptive family.[y] When a person having a plurality of wives makes an adoption, then it is only that wife who has been associated by the husband in the ceremony of adoption, even though she is the junior wife, that will be entitled to succeed to the adopted son on his death[z] to the exclusion of the other wives who have not been so associated. But this distinction has no place where the adoption is made by their husband without doing anything to indicate any preference in favour of any of the wives and in such a case all the wives are entitled to inherit to the adopted son and the senior wife cannot claim any preference though in the case of an impartible estate, the senior wife's claim will prevail to the exclusion of the others.[z] But where the adoption is made by one of the co-widows, the widow adopting becomes the mother of the adopted boy and is entitled to inherit to his estate to the exclusion of the other co-widows who are relegated to the position of step-mothers to the adoptee.[z] *See* also S. 152.

158. Divesting of estate.—(*See* also Ss. 127 to 129).—On the valid adoption of a boy by a widow,[a] the property vesting in her either as her husband's heir,[b] or as the heir of her son dying issueless and without leaving a widow,[c] or as one of the widows of her deceased husband,[d] or as the widow of a *gotraja sapinda*[e] of the last male holder[e] becomes at once divested and gets vested in the adopted son. This question of divestment will never arise

(v) *Mahadu* v. *Bayaji*, 19 B. 239.

(w) *Lunkurn* v. *Burji*, 57 C. 1322=1931 C. 219; *Mahadu* v. *Bayaji*, 19 B. 239.

(x) *Kali Komul Mozoomdar*, v. *Uma Shunkur*, 10 C. 232=10 I A. 138 (P.C.); *Dattatraya* v. *Gangabai*, 46 B. 541=1922 B. 321=24 Bom. L.R. 69; *Radha Prasad* v. *Ranee Mani*, 33 C. 947=10 C.W.N. 895 (F.B.); *Annapurni* v. *Forbes*, 26 I.A. 246 =23 M. 1=3 C.W.N. 730; *Anandi* v. *Hari*, 33 B. 404=11 Bom. L.R. 641; *Gungapersad* v. *Brijessoaree*, *Ben.* S.D.A. 1859 P. 1091.

(y) *Tewari Raghuraj Chandra* v. *Rani Subhadra*, 3 Luck. 76=55 M.L.J. 778=1928 P.C. 87=26 A. L.J. 609=30 Bom. L.R. 829= 32 C.W.N. 1009=55 I.A. 139.

(z) *Annapurni Nachiar* v. *Collector of Tinnevelly*, 18 M 277=5 M.L.J. 121; *Gunamani* v. *Prosanna*, 23 C.W.N. 1038.

(a) For the valid exercise of the power to adopt, see Ss. 127 to 129.

(b) *Dhurm Das* v. *Shama Soondri*, 3 M. I A. 229; *Bamundoss* v. *Mt. Tarinee*, 7 M. I.A. 169.

(c) *Vellanki* v. *Venkata*, 1 M. 174=4 I. A. 1 (P.C.); *Ravji* v. *Lakshmibai*, 11 B. 381.

(d) *Narayanasami* v. *Mangammal*, 28 M. 315=15 M.L.J. 143; *Rakhmabai* v. *Radhabai*, 5 Bom. H.C.A.C. 181; *Mondakini* v. *Adinath*, 18 C. 69; *Gopal* v. *Vishnu*, 23 B. 250.

(e) *Ramchandra* v. *Mt. Yamuni*, 1936 N. 65 (F.B.)

when the adopter is the husband himself or the widow of a coparcener because in such a case the adopted son merely steps in as a coparcener with another or others. The circumstance that the adopter is one of the co-widows is immaterial and their husband's estate vesting in them jointly will become divested by the adoption, though the adoption is made by only one of them.[d] But if the estate has become vested by inheritance in the adopting widow after it was inherited by her son's widow,[f] or son's son,[g] her power to adopt has become terminated and any adoption made by her is void and cannot have the effect of divesting the estate.[h] So also an adoption made by a co-widow after the estate has become vested in another co-widow as the heir of the latter's deceased son, though may be valid within the ruling in *Amarendra's* case, cannot divest the estate vested in the latter widow.[i] Nor does an adoption by a widow divest an estate vested after her son's death in the son's widow[j] because in such a case the adoption itself is invalid.[k] In order that an adoption made by a widow may divest an estate which stood vested in her husband or son prior to its passing by survivorship or inheritance to its present possessors, the estate must not have vested after her son's death in the son's widow or son.[l] The ruling, that held that an adoption by a widow is invalid when the estate is vested in her mother-in-law as heir to her step-son,[k] or as the heir of her father-in-law who survived the adopting widow's husband,[l] cannot be sound after the decision in *Amarendra's* case, but those rulings would be good that held that an adoption would be invalid when it is vested in the son's widow either as the heir of the son,[m] or as the heir of the son's son of the adopting widow.[n] But when the adopting widow has succeeded to her grandson as his next heir immediately on his death and the grandson himself had succeeded to his grandfather immediately on the latter's death, then the adoption divests the estate vested in the adopting mother and vests it in the adopted son.[o] But neither the stridhana property of the adopting widow nor the self-acquired property of her pre-deceased son vested in her as his heir[p] would

(d) See p. 156, foot note (d).

(f) *Manikyamala* v. *Nanda Kumar*, 33 C 1306=11 C.W.N. 12; *Krishnarav* v. *Shankarrav*, 17 B. 164.

(g) *Ramkrishna* v. *Shamrao*, 26 B. 526=4 Bom. L.R. 315.

(h) *Amarendra* v. *Sanatan*, 38 L.W. 1=1933 M.W.N. 769=14 P.L.T. 399=35 Bom. L.R. 859=37 C.W.N. 938=65 M.L.J. 203=1933 A.L.J. 710=60 I.A. 242=12 P. 642=1933 P.C. 155.

(i) *Anandibai* v. *Kashibai*, 28 B. 461=6 Bom. L.R. 464; *Faizuddin* v. *Tincowri*, 22 C. 565.

(j) *Bhoobun Moyee* v. *Ram Kishore*, 10 M I.A. 279; *Padmakumari* v. *Court of Wards*, 8 C. 302=8 I.A. 229 (P.C.).

(k) *Drobomoyee* v. *Shama Churn*, 12 C. 246.

(l) *Dharnudhar* v *Chinto*, 20 B. 250.

(m) *Bhoobun Moyee* v. *Ram Kishore*, 10 M. I.A. 279.

(n) *Chandra* v. *Gajarabai*, 14 B. 463.

(o) *Narhar* v. *Baivant*, 48 B. 559=1924 B 437=26 Bom. L.R. 529.

(p) But see *Suryanarayana* v. *Ramadoss*, 41 M 604=7 L.W. 12=43 I.C. 528=34 M.L.J. 87=1918 M.W.N. 208.

become divested by the adoption, though the adoption will have the effect of divesting any property which the widow might have received with absolute rights under her husband's will.[q] The whole position can be summarised as follows :—

If the husband of the adopting widow died undivided and the coparcenary to which he belonged continues on the date of adoption by at least one member of that coparcenary being in existence, though in his mother's womb, then the son adopted steps into that coparcenary in the position of his deceased adoptive father (*Nagindas* v. *Bachoo*, 40 B. 270=.3 L.W. 259=14 A.L.J. 185=18 Bom. L.R. 172. 20 C.W.N. 702. 30 M.L.J. 193=43 I.A. 56=(1916) 1. M.W.N. 258=1915 P.C. 41). If, on the other hand, that coparcenary has ceased to exist on the date of adoption, either by a partition among the surviving members or by the death of the last surviving coparcener, the adoption will not divest the estate vested in the separated coparceners or in the heir of the last surviving coparcener, unless in the latter case that heir happens to be a remoter heir than the heir introduced by the adoption with reference to that last surviving coparcener (*Umabai* v. *Nani*, 1936 B. 135=60 B. 102=38 Bom. L.R. 100).[q-a] If, on the other hand, the husband of the adopting widow died as a separated Hindu and not as a member of a coparcenary, the adoption will divest the husband's estate vested in anybody who has taken it from him either by reverter or inheritance immediately after her husband's death (*Amarendra* v. *Sanatan*, 12 P. 642=38 L.W. 1=1933 M.W.N. 769=14 P.L.T. 399=35 Bom. L.R. 859=37 C.W.N. 938=65 M.L.J. 203=1933 A.L.J. 710=60 I.A. 242=1933 P.C. 155). Even if the estate has become vested in the widow adopting, not as the heir of her husband but as the heir of her deceased son or as *Gotraja sapinda*, the adoption will divest that estate from her.

Illustrations.

(i) A, B and C are undivided brothers. A dies giving his widow D authority to adopt. D adopts E. E becomes a coparcener with B and C (*Bachoo* v. *Mankorebai*, 31 B. 373=9 Bom. L.R. 646=11 C.W.N. 769=17 M.L. J. 343=34 I A. 107; *Raghunada* v. *Brojo*, 1 M. 69=3 I.A. 154.)

(ii) A, B and C are undivided brothers. A dies giving his widow D authority to adopt. Then B dies, and then C dies. C's widow who was *enciente* at the time of C's death subsequently gives birth to a son E, D then adopts F. F becomes a coparcener with E because at the time of adoption the coparcenary to which A belonged was alive. The result would be the same even if the adoption of F had preceded the birth of E, as the coparcenary was alive by E being in his mother's womb at the time of F's adoption. (*Nagindas* v. *Bachoo*, 40 B. 270=1915 P.C. 41=3 L.W. 259=14 A.

(*q*) Per Phillips, J. in *Sukdevdoss* v. *Choti Bai*, 27 L.W. 145=1928 M.W.N. 32=1928 M. 116; *Krishnamma* v. *Lakshminarayana*, 1928 M. 271=1927 M.W.N. 625; But see *Bepin Behari* v. *Brojo*, 8 C. 357.

(*q-a*) See S. 160.

L.J. 185=18 Bom. L.R. 172=20 C.W.N. 702=30 M.L.J. 193=43 I.A. 56=(1916) 1 M.W.N. 258).

(iii) A, B and C are undivided brothers. A dies leaving a widow D with authority to adopt. B then dies, and then C dies leaving a widow E who takes the property as the widow of the last surviving coparcener C. D then adopts F. F cannot divest the estate vested in E as the coparcenary had come to an end at the time of adoption by the death of C (*Chandra v. Gojarabai*, 14 B. 463 ; *Adivi v. Nidamarty*, 33 M. 228=1910 M.W.N 251).

(iv) A and B are coparceners. A being the uncle and B his brother's son. A dies leaving a widow C, and the family property is taken by B by survivorship. Then B dies and his sister D succeeds to the property as his heir. Then C adopts E. E cannot divest D of the estate as the coparcenary has come to an end by the time of adoption and the property has vested in a nearer heir to the last male-holder B than the adopted boy. (*Dhondi Dnyanoo v. Ramu*, 1936 B. 132=60 B. 38=38 Bom. L.R. 94. See also *Shankar v. Ramrao*, 37 Bom. L.R. 786 1935 B. 427=60 Bom. 89)

(v) A and B are father and son of a coparcenary. B dies leaving a widow C with authority to adopt. A then dies and the property is taken by his daughter D as A's heir. C then adopts E. E divests the estate vested in D even though the coparcenary had come to an end by the death of A prior to adoption, the reason for such divestment being that the adopted boy is a nearer heir to A the last male-holder than his daughter D (*Umabai v. Nani*, 1936 B. 135=60 B. 102=38 Bom. L.R. 100). See also S. 160

(vi) A and B are undivided brothers. A dies leaving a widow C and then B dies leaving a widow D. The property is taken by D as B's heir. Then D adopts E. Then C adopts F. F does not become a coparcener with E, as the coparcenary had come to an end with the death of B and the subsequent adoption of E did not revive the coparcenary.

(vii) A, B and C are undivided brothers. A dies leaving a widow D with authority to adopt. B and C divide the estate as between them. D then adopts E. The adoption, though valid, (*Panyam v. Ramalakshmamma*, 35 M. 581=1932 M.W.N. 23=35 L.W. 182=62 M.L.J. 187) does not enable the adopted son to claim any interest in the estate, as the coparcenary had come to an end at the date of adoption by partition.

(viii) A dies leaving a widow B with authority to adopt. B adopts C. C divests the estate vested in B (*Dhurm Das v. Shama Soondri*, 3 M.I.A. 229)

(ix) A dies leaving his widows B. C and D. B adopts E under authority from her husband. E divests the estate vested in B, C and D (*Narayanasami v. Mangammal*, 28 M. 315=15 M.L.J. 143; *Mondalini v. Adinath*, 18 C. 69).

(x) A dies leaving a widow B and a son C by B. C dies leaving his mother B as his heir. B then adopts D under her husband's authority. D divests the estate vested in B. (*Vellanki v. Venkata*, 1 M. 174=4 I.A. 1).

(xi) A dies leaving his widows B and C and a son D by C. D then dies and C takes the property as his heir. B then adopts E. E's adoption is valid within the ruling in *Amarendra's* case, but will not divest the estate vested in C as her son's heir. (*Anandibai v. Kashibai*, 28 B. 461=6 Bom. L.R. 464; *Faizuddin v. Tincowri*, 22 C. 565).

(xii) A dies leaving a widow B and a son C. C dies unmarried and the estate is taken by a distant collateral male relation D to the exclusion of B under a custom which excludes females from succession. B then adopts E.

E divests the estate vested in D, as E is a nearer heir to the last male holder C than D. (*Amarendra* v. *Sanatan*, 12 P. 642=1933 P.C. 155=38 L.W. 1=1933 M.W.N. 769=14 P.L. T. 399=35 Bom. L.R. 859=37 C.W.N. 938=65 M.L.J. 203 =1933 A.L.J. 710=60 I.A. 242).

(*xiii*) A, the holder of a maintenance grant died issueless and leaving a widow. Under the custom of the family the grant reverted to the grantor on the death of the grantee without issue. Subsequently the widow adopted B. B would divest the estate which has reverted to the grantor. (*Pratapsingh* v. *Agarsingji*, 43 B. 778=1918 P.C. 192 =17 A.L.J. 522=21 Bom. L.R. 496=24 C.W.N. 57. 36 M.L.J. 511=10 L.W. 339=1919 M.W.N. 313 =46 I.A. 97; *Dundoobai* v. *Vithalrao*. 1936, B. 182=60 B. 498 =38 Bom. L.R. 193).

(*xiv*) A dies leaving a grandson by his predeceased son and a widow. The grandson dies issueless and without leaving a widow and his grandmother succeeds to his property as his heir. The grandmother then makes an adoption. The adopted son divests the estate vested in her as heir to her grandson. (*Narhar* v. *Balvant*. 48 B. 559=1924 B. 437=26 Bom. L.R. 528.)

(*xv*) A and B are undivided brothers. A dies leaving his widow C, and the property devolves upon B by survivorship. B then dies leaving his mother D to succeed to the property as his heir. D then dies and the property devolves upon C as B's Gotraja sapinda, the parties being governed by the Bombay School. C then adopts E. The adoption divests the property which has vested in the adopting widow as the Gotraja sapinda of the last male-holder B. (*Ramchandra* v. *Mt. Yamuni*. 1936 N. 65 F.B.)

Note. In all the above illustrations the adoption is valid according to the test of validity laid down in *Amarendra* v. *Sanatan*, 12 P. 642=1933 P.C. 155=38 L.W. 1=1933 M.W.N. 769=14 P.L.T. 399=35 Bom. L.R. 859=37 C.W.N. 938=65 M.L.J. 203=1933 A.L.J. 710=60 I.A. 242 P.C. The conclusion in each illustration will be the same if the widow adopts, not under her husband's authority, but in the exercise of her inherent power in the Bombay Presidency and with the consent of the sapindas in the Madras Presidency.

159. Divestment in the case of impartible estate.—Where the holder of an impartible estate dies leaving an undivided brother and the latter succeeds to the estate by survivorship, then an adoption made by the widow of the deceased brother divests the impartible estate in the hands of the surviving brother and vests it in the adopted son, the principle being that the claim of the adopted son prevails over that of one who, though he may take before the widow, can yet take only after the son.[r] The same will be the case even where the impartible estate is the separate property of the last male holder and has become vested by inheritance at the time of adoption by his widow in a distant male relation under a custom excluding females from succession.[s]

160. Adoption by widow of a coparcener.—An adoption made by the widow of a deceased member of a Mitakshara joint family

(r) *Raghunada* v. *Brozo*, 1 M. 69=3 I.A. 154 (P.C.).

(s) *Amarendra* v. *Sanatan*, 14 P.L.T. 399=35 Bom. L.R. 859=37 C.W.N. 938=60 I.A. 242=65 M.L.J. 203=1933 A.L.J. 710=1933 M.W.N. 769=38 L.W. 1=12 P. 642=1933 P.C. 155.

which remains joint at the time of the adoption, enables the adopted son to step into the joint family with all the rights and interests in the coparcenary which his adoptive father had.(t) Even if the coparcenary comes to an end by the surviving coparceners having come to a partition of the joint family property, the widow's power to adopt does not come to an end, and an adoption made by her with the consent of the sapindas according to the Dravida School is quite valid.(u) No doubt cases have held that if the coparcenary has come to an end at the time of adoption by the joint property passing by succession from the last survivor to his own heirs the adoption itself is invalid on the ground that the power of the widow comes to an end with the natural extinction of the coparcenary by the death of the last surviving coparcener.(v) But these rulings cannot be regarded as laying down the correct principle in regard to the validity or otherwise of the adoption in such cases. The true principle is whether the adopting power of the widow, whether she is the widow of a separated Hindu or a coparcener, is alive or not at the date of adoption, and for this, the test as is furnished by the case of *Amarendra* v. *Sanatan* is the only test. If that test is satisfied and in accordance with that test the power continues to exist in the widow even though the coparcenary of her husband has come to an end by the death of the last surviving coparcener and the passing of the estate to his heir, the adoption made by the widow will be perfectly valid.(w) This question was recently considered by a Full Bench of the Bombay High Court in the case of *Bala Sakharam* v. *Lahoo Sambhaji*(w) where the facts were these: One S was the last surviving coparcener of a joint Hindu family. He died leaving a widow G and a sister A. The widow who succeeded to the estate as the heir of S, subsequently remarried, and the estate passed to A as the next heir of S. While the estate thus stood vested in A, the widow of a predeceased brother of S then adopted a son to her husband. On these facts it was held that the adoption was valid being within the principle of the ruling in *Amarendra's* case but that the adoption did not divest the estate vested in A. The questions that were referred to the Full Bench were as follows:—

(t) *Bachoo* v. *Mankorebai*, 31 B 373=34 I.A. 107—17 M.L.J. 343—9 Bom. L.R. 646=11 C.W.N. 769 (P.C.); *Vithoba* v. *Bapu*. 15 B. 110; *Surendra* v. *Sailaja*, 18 C. 385; *Raghuneda* v. *Brozo*, 1 M. 69=3 I.A. 154 (P.C.); *Hira* v. *Piari*. 51 A. 54=1928 A. 505=26 A.L.J. 849.

(u) *Paniyam* v. *Ramalakshmamma*, 35 L. W. 182=55 M. 581=1932 M. 227=62 M.L.J. 187=1932 M.W.N. 23.

(v) *Adivi* v *Nidamarty*, 33 M 228=1910 M W.N. 251. 4 I.C. 386; *Shivbasappa* v. *Nilava*, 47 B. 110—1923 B. 17—24 Bom. L. R. 1162; *Chandra* v. *Gojarabai*, 14 B. 463; *Dharmidhar* v. *Chinto*, 20 B. 250; *Shivappa* v. *Rudrava*, 57 B 1 34 Bom. L.R. 539=1932 B. 410; *Vishnu* v. *Lakshmi*, 37 Bom. L.R. 193 -1935 B 182.

(w) *Bala Sakharam* v. *Lahoo Sambhaji*, 39 Bom L.R. 382—1937 B. 279.

I. Does the fact of the coparcenary being extinct at the date of an adoption by a widow other than the widow of the last male-holder invalidate the adoption?

II. If not, does such an adoption have the effect of divesting property in favour of the adopted son in the following cases:—

(*a*) When the property at the date of the adoption has already vested in an heir of the last maleholder remoter than a natural born son of the adoptive father?

(*b*) When the property at the date of the adoption has already vested in an heir of the last maleholder nearer than a natural born son of the adoptive father?

III. If so, when does the divestment take place—immediately, or on the death of the heir in possession?

The majority of the Full Bench consisting of the Chief Justice (Beaumont, C.J.) and N. J. Wadia, J. (Rangnekar, J. dissenting) answered questions I and II (*a*) and (*b*) in the negative and left question III unanswered as not arising in view of their answers to the previous questions. One does not hesitate to agree with the answers of the majority to the questions I and II (*b*) (*See Dhondi* v. *Rama*, 60 Bom. 83=38 Bom. L.R. 94=1936 B. 132). But the answer to question II (*a*) does not commend itself, as the rulings in *Amarendra's* case and *Vijayasangji* v. *Shivsangji*[x] would appear to support the contrary answer. The ruling in *Amarendra's* case was to the effect, though only impliedly, that even though on the death of the last male-holder the estate had vested in an heir other than the adopting widow, the son adopted by her would divest that estate, the reason presumably being that in that case the son adopted was nearer in the line of succession to the last male-holder, namely, the deceased son of the adopting widow, than the person in whom the estate had vested prior to the adoption. In this view the adopted son must be held to divest the estate vested in A and the answer to question II (*a*) must be in the affirmative. The III question which was left unanswered by the Full Bench must be answered as, that the divestment takes place immediately the adoption is made and not on the death of the heir in possession. This is also supported by the implications in *Amarendra's* case.

It cannot be held that a coparcenary has become extinct either because there is only one coparcener alive[y] or because that sole coparcener is in the womb[z] so long as there is a widow

(*x*) 59 B. 360=42 L.W. 1=39 C.W.N. 682 1935 A.L.J. 690=35 Bom. L.R. 562=1935 M.W.N. 534=1935 P.C. 95=68 M.L.J. 701.

(*y*) *Surendra* v. *Sailaja*, 18 C. 385.

(*z*) *Bachoo* v. *Mankorebai*, 31 B. 373=34 I.A. 107=17 M.L.J. 343=9 Bom. L.R. 646=11 C.W.N. 769.

in the family who can adopt to her husband. The mere fact that the sole surviving coparcener has alienated all the coparcenary property prior to an adoption by the widow the deceased coparcener does not invalidate the adoption.[a]

161. Consent of the person in whom the estate vests, if can validate an adoption.—It has been held that an adoption by a widow while her husband's estate stands vested in another is invalid and cannot operate to divest that estate and vest it in the adopted son[b] even though the adoption is made with the consent of the person in whom the estate is vested.[c] Consent cannot validate what will otherwise be an invalid adoption so as to work a divestment of the estate in the hands of the person consenting. But the Bombay decisions[d] holding that such consent can validate an invalid adoption can be justified if at all only on the ground that the consent may operate as an estoppel against the assenting parties impeaching the adoption afterwards. But it is not correct to say that what is a void act can be made a valid one by the consent of those affected. Besides, as was recently held by the Privy Council[e] an adoption does not become invalid merely because the estate has vested in some one other than the adoptive widow. The real test to determine whether the adoption is valid is whether the widow's power to adopt is subsisting or is already at an end A widow's power to adopt comes to an end only when the duty of providing for the continuance of the line for spiritual purposes which has been laid upon her by her husband conditionally has been assumed by her son and by him passed on to a grandson or to the son's widow, and hence if the widow has no son or had a son who himself died without leaving his own son or widow, her power to adopt is not extinguished and an adoption made by her is valid and will divest the estate vested in another either by survivorship,[f] reverter[g] or as the heir of her husband or son.[h]

(a) See *Veeranna* v. *Sayamma*, 52 M. 398=29 L.W. 309=1929 M. 296=56 M.L.J 491.

(b) *Adivi* v. *Nidamarty*, 33 M 228=1910 M.W.N. 251=4 I.C. 386.

(c) *Adivi* v *Nidamartu*, 33 M. 228=4 I.C. 386=1910 M.W.N 251, *Annammah* v. *Mahbu Bali*, 8 M.H.C 108.

(d) *Siddappa* v. *Ningangavda*, 38 B 724=27 I.C. 51=16 Bom. L.R 663; *Bhimappa* v. *Basawa*, 29 B. 400=7 Bom L.R. 405; contra in *Vaman* v *Venkaji*, 15 B. 329=1921 B. 55=23 Bom L.R. 269; *Dharmidhar* v. *Chimlo*, 20 B. 250, *Anandibai* v. *Kashibai*, 28 B. 461=6 Bom. L.R. 464; *Sangangouda* v. *Hanmantgouda*, 55 B. 699=33 Bom. L.R 1225=1932 B. 8.

(e) *Amarendra* v. *Sanatan*, 35 Bom. L. R. 859=37 C.W.N. 938=60 I.A. 242=65 M. L.J 203=1933 A.L.J. 710=60 I.A. 242=1933 M.W.N 769=14 P.L.T 399=38 L.W. 1=12 P. 642=1933 P.C 155.

(f) *Bhimabai* v *Gurunathgouda*, 57 B. 157=37 L.W 81=1933 P.C 1=35 Bom L.R. 206=1933 A.L.J. 363=1933 M.W.N 1=61 M. L.J 31=37 C.W.N 210 60 I.A 25; *Bachoo* v. *Mankorebai*, 31 B 373=34 I.A 107=17 M.L.J 343 (P.C)=9 Bom. L.R. 646=11 C. W.N 769

(g) *Pratapsing* v *Agarsingji*, 43 B 778 =10 L.W. 339=1918 P.C. 192 17 A.L.J. 332=21 Bom L.R 496 46 I.A 97=1919 M W.N. 313 24 C.W.N 57=36 M.L.J. 511.

(h) *Amarendra* v. *Sanatan*, 35 Bom. L. R. 859=37 C.W.N 938=60 I.A. 242=65 M. L.J. 203=1933 A.L.J 710=60 I.A. 242= 1933 M.W.N 769=14 P.L.T. 399=38 L.W. 1=12 P. 642=1933 P.C. 155.

162. Law of divestment if applicable to Government Grant.—The Hindu Law of divestment of a widow's estate by an adoption does not apply to trust property given to her by Government under a grant that she should manage it as head of the family for the time being. Such a grant creates a right which is different from the right of a widow who enjoys property for her lifetime after the death of her husband.(i)

163. Widow's maintenance on divestment.—On the adoption by a widow, the limited estate of inheritance in the huband's family which she has been enjoying, at once comes to an end, and her rights are reduced to a claim for maintenance out of the estate,(j) though, if the adopted son is a minor, she continues to hold the property in trust for him as his guardian.(k)

164. Widow's alienations and adoption.—If the widow has made any alienation or created any encumbrance in respect of her husband's estate which would be beyond her legal powers as a limited owner, then the adopted son becomes, on adoption, entitled to set aside the same and recover possession from the alienee.(l) But if the alienation was made by the widow for legal necessity, the adopted son cannot impeach the alienation.(m) In the case of an alienation which is not sustainable either on the ground of legal necessity or benefit or on the ground of *bona fide* enquiries by the alience in respect of the existence of such necessity, the adopted son is entitled to recover possession of the property immediately after adoption and need not wait for such relief till the death of the adopting widow.(n) The circumstance that a previously adopted son had died without questioning the widow's alienation does not preclude the subsequently adopted son from questioning that alienation, because the second adopted son is not the representative of the first adoptee.(o)

165. Doctrine of relation back.—The fiction of adoption operating as civil death in the natural family and new birth in the

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(i) *Pratapa Simha* v. *Simji Raja*, 98 I.C. 442=51 M.L.J. 652—1926 M.W.N. 793=1927 M. 50.

(j) *Dalel* v. *Ambika*, 25 A. 266; *Jamnabai* v. *Raychand*, 7 B. 225.

(k) *Dhurm Das* v. *Shama Soondri*, 3 M.I.A. 229; *Jamnabai* v. *Raychand*, 7 B. 225; *Vrandavandas* v. *Yamunabai*, 12 Bom. H.C.R. 229. See in this connection the effect of the Hindu Women's Rights to Property Act of 1937.

(l) *Vaidyanatha* v. *Savithri*, 41 M. 75=33 M.L.J. 387=1917 M.W.N. 653=6 L.W. 542=42 I.C. 245 (F.B.); *Ramkrishna* v. *Tripurabai*, 33 B. 88=10 Bom. L.R. 1029=1 I.C. 647; *Lakshman* v. *Radhabai*, 11 B. 609; *Sakharam* v. *Thama*, 51 B. 1019=1928 B. 26=29 Bom. L.R. 1571.

(m) *Lakshmana Rao* v. *Lakshmi Ammal*, 4 M. 160, *Moro Narayan* v. *Balaji*, 19 B. 809.

(n) *Ramkrishna* v. *Tripurabai*, 33 B. 88—10 Bom. L.R 1029—1 I.C. 647, *Vaidyanatha* v. *Savithri*, 41 M. 75=6 L.W. 542=42 I.C. 245.-33 M.L.J. 387-1917 M.W.N. 653 (F.B.); *Sakharam* v. *Thama*, 51 B. 1019—1928 B. 26=29 Bom. L.R. 1571; *Solaimalai* v. *Sokkammal*, 67 M.L.J. 618=40 L.W. 559=1934 M. 567.

(o) *Hanmant* v. *Krishna*, 49 B. 604=1925 B. 402=27 Bom. L.R. 642.

adoptive family cannot be literally applied in all cases so as to treat the adoptee as having been born in the adoptive family at the time he was really born in his natural family. If the Datta Homam is performed in the natural family, it is not annulled on account of the adoption. The natural tie so far as the prohibition of marriage is concerned, is not annulled and the natural relationship is recognised for the purpose of prohibiting marriages within the sapinda relationship in the natural family. Besides, the rights of the adoptee come into existence only on the date of adoption for purposes of limitation.'(p) But an adopted son's right to set aside an invalid alienation by the adopting widow relates back to the death of her husband so that all alienations effected by the adopting widow after her husband's death can be set aside by the adopted son provided they were unauthorised.'(q) But this does not mean, as already stated, that his rights in other respects relate back to the death of the adoptive father. Thus, for instance, where a man empowers his wife under a will to make an adoption and under the same instrument makes certain dispositions of property,(r) or where a man gifts away his property to his daughters knowing that the widow of his predeceased son has been authorised by him to make an adoption,(s) the son subsequently adopted, either by the widow in the former case or by the daughter-in-law in the latter case, cannot question the dispositions. The argument that the existence of a power to adopt in a widow is to be considered as tantamount to the widow being pregnant and that therefore the son subsequently adopted has all the rights of a posthumous son has been rejected by the Privy Council.(t) In the same way an adoption does not enable the adopted son any more than an after-born aurasa son to question the alienations,(u) or contracts made by the adoptive father or any intermediate male owner prior to adoption, and even in the case of an unauthorised alienation made by the adopting widow prior to the adoption, the adopted son is not entitled, on avoiding it, to claim mesne profits from the date of the alienation.(v) Except in the cases abovementioned, the rights

(p) *Bai Kesarbai* v. *Shivsangi*, 34 Bom. L.R. 1332—56 B. 619—1932 B. 654.

(q) *Vadyanatha* v. *Savithri*, 41 M. 75—6 L.W. 542—42 I.C. 215 33 M.L.J. 387—1917 M.W.N. 653 (F.B.).

(r) *Krishnamurthi* v. *Krishnamurthi*, 59 M. 508—26 L.W. 186—54 I.A. 248—25 A.L.J. 945—29 Bom. L.R. 969—31 C.W.N. 910—53 M.L.J. 57=1926 M.W.N. 467—1927 P.C. 139.

(s) *Veeranna* v. *Sayamma*, 52 M. 398=29 L.W. 309=1929 M. 296=56 M.L.J. 401.

(t) *Bamundoss* v. *Mt. Tarinee*, 7 M. I.A. 169

(u) *Surendranath* v. *Kalachand*, 12 C. W.N. 668, *Runganna* v. *Atchama*, 4 M. I. A. 1, *Venkata Narasimha* v. *Subba Rao*, 46 M. 300—17 L.W. 31—1923 M. 376 1533 M.W.N. 111; *Rambhai* v. *Lakshman*, 5 B. 630. *Kamalabai* v. *Pandurang*, 40 Bom L. R. 428; *Kalyanasundaram* v. *Karuppa*, 54 I.A. 89—29 Bom L.R. 833—50 M. 193—25 A.L.J. 113 31 C.W.N. 509=52 M.L.J. 346—1927 P.C. 42

(v) *Raghunada* v. *Brozo*, 1 M. 69=3 I. A. 154 (P.C.).

of an adopted son spring only from the moment of his adoption and the adoption cannot invalidate a prior surrender validly made by the adoptive widow in favour of her daughters,[w] even assuming, what is extremely doubtful, that the adoption itself is valid in such a case.

166. Adoption if affects adoptive father's rights over property.—An adopted son cannot have higher rights than an aurasa son, and hence the absolute powers of the adoptive father in respect of his self-acquired or separate property are not affected by the adoption. Though an express agreement made by the adoptive father at the time of adoption that he will not prejudice the rights of the adopted son by any disposition made subsequent to the adoption will preclude the father from making such a disposition,[x] such an agreement cannot be implied from the mere factum of adoption,[y] and, in the absence of such an express agreement, the adoptive father is at perfect liberty to dispose of his separate property by gift or will to whomsoever he likes.[z] The mere fact that an adoption has been made does not revoke a will executed by the adoptive father in respect of his separate property or invalidate a gift of ancestral property already made by him when he was the sole owner whether the adoption is made by him,[a] or by his widow.[b] But if the adoption is made by the husband, his will is revoked by his adopted son surviving him so far as the ancestral properties are concerned. But a will made by the husband even in respect of ancestral properties is not invalidated by an adoption made by his widow.[c]

167. Results of an invalid adoption.—Where the adoption is for any reason invalid,—and an adoption may be declared invalid on the ground, *inter alia*, that it was brought about by fraud, force, mistake or coercion[d]—the adopted son does not acquire any right in the new family nor does he forfeit any of his rights in his natu-

(w) *Rama* v. *Dhondi*, 17 B 678=1923 B. 432: 25 Bom. L.R. 361.

(x) *Surendra Keshub* v. *Doorgasoonderry*, 19 C. 513=19 I.A. 108 (P.C.)

(y) *Venkata Surya*, v *Court of Wards*, 22 M 383 26 I.A. 83 9 M.L.J. Sup. (1) (P.C.); *Purshotam* v. *Vasudev*, 8 Bom. H.C.R 196, *Surendranath* v *Kalachand*, 12 C.W N 668

(z) *Subha Reddi* v. *Doraisami*, 30 M. 269 17 M.L.J. 269.

(a) *Vinayak* v. *Govindrao*, 6 Bom. H.C. R. 234, *Kamalabai* v. *Pandurang*, 40 Bom. L R 428; *Kalyanasundaram* v. *Karuppa*, 54 I A. 89.=29 Bom. L.R 833=50 M. 193= 31 C W N. 509=52 M L.J. 346=1927 M.W. N. 149=25 A.L.J. 113=25 L.W. 336=1927 P C 42.

(b) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508=54 I.A 248 .25 A L.J. 945=29 Bom. L.R. 969=31 C.W.N. 910=57 M.L.J. 57=1926 M.W N 467=26 L.W. 186=1927 P.C 139.

(c) *Shivappa* v. *Rudrava*, 57 B. 1=34 Bom L.R. 539=1932 B. 410; See also *Kamalabai* v. *Pandurang*, 40 Bom. L.R. 428 (a case of father's gift and his subsequent adoption where the gift was upheld against the adopted son.)

(d) *Bayabai* v. *Bala*, 7 Bom. H.C. App. 1, *Somasekhara* v. *Subhadramaji*, 6 B. 524; *Ranganayakamma* v. *Alwar Setti*, 13 M. 214.

ral family,[e] even though his Upanayanam has been performed in the adoptive family[f] and he was *sui juris* at the time of the adoption.[g] [An adoption will be invalid if it has been brought about by force or fraud or by any means which shews that the person giving the boy or receiving him or whose consent is necessary for the adoption has not exercised a free and conscientious discretion in the matter,[h] and such an adoption cannot be validated by subsequent ratification.[i]] This is the only view in conformity with reason and goodsense,[j] the other view that has been taken in some of the cases, namely, that an invalidly adopted son forfeits all his rights in his natural family and retains only the right of maintenance in his adoptive family,[k] countenances an unwarrantable hardship upon a boy of tender years who is not in the least responsible for his being thrusted out of his natural family by his indiscreet parents without any corresponding satisfaction to him in the new and perhaps a strange family into which he has the misfortune to be thrown.

168. Validity of gift to an invalidly adopted son.—The question whether a gift to a particular person described as an adopted son is valid or not when the adoption is invalid or has never in fact taken place is to be answered with reference to the intention of the donor in making the gift to him. If the intention is that the donee should take the property only if he is a validly adopted son, and the adoption is the reason, the motive and the condition of the gift, the gift cannot take effect either when there has been no adoption or the adoption itself is invalid. Thus, where the deed of gift recited "I authorise you by this to offer oblations of water and pinda to me and my ancestors after my death by virtue of your being my adopted son," it was held that the gift failed with the failure of adoption as it was clear from the words "by virtue of being my adopted son" that the donor intended the donee to take the property only as his adopted son[l] and not when his adoption failed.[m] But when the gift is made to a person absol-

(e) *Vaithilingam* v. *Murugaiam*, 37 M 529=23 M.L.J. 189=15 I.C. 299; *Vaman* v *Venkaji*, 45 B. 829=23 Bom. L.R. 269 = 61 I.C. 460; *Ram Kishore* v *Jainarayan*, 40 C. 966=25 M.L.J. 512=29 I.C. 958=40 I.A. 213. 17 C.W.N. 1189 15 Bom L.R 867=11 A.L.J. 865; *Harilas* v *Manmatha*, 41 C.W.N. 322=1936 C. 1.

(f) *Viswasundara* v. *Somasundara*, 43 M. 876=59 I.C. 609.

(g) *Sajanisundari Dasi* v. *Jogendra Chandra*, 58 C. 745=1931 C. 591.

(h) *Ranganayakamma* v. *Alwar Setti*, 13 M. 214; *Sitaram* v. *Harihar*, 35 B 169=12 Bom. L.R. 910=8 I.C 625; *Venkata* v. *Rangayya*, 29 M. 437=16 M.L.J. 178; *Dasa-katti* v *Balasundara*, 36 M 19=18 I.C. 959

(i) *Sattiraju* v *Venkateswami*, 40 M 925. 5 L.W 607=40 I.C 518=32 M.L.J. 119; but see *Venkata* v *Ramayya*, 29 M 477.

(j) *Bawani* v *Ambabay*, 1 M.H.C.R. 363, *Rajkumari* v *Nobocoomar*, 1 Boul. 137.

(k) *Ayyaru* v *Niladatchi*, 1 M.H.C.R. 45

(l) *Fanindra Deb* v. *Rajeswar*, 11 C. 463=12 I.A. 72 (P.C.); *Nidhoomoni* v. *Saroda*, 3 I.A. 253

(m) *Surendro Keshub* v. *Doorgasoondery Dassee*, 19 C 513=19 I.A. 108 P.C; *Karamsi Madhowji* v. *Karsandas*, 23 B. 271.

utely as a *persona designata*, the addition of his relationship as an adopted son being purely a matter of description and identification, the donee takes the gift even though his being described as an adopted son is incorrect. Thus when the testator declares in his will that he gives his property to one K whom he has adopted and that his wives should perform the ceremonies and bring him up, the bequest to K is valid even if the contemplated ceremonies are not performed.[n] The guiding principle in all such cases is that, if a gift is made to a particular person described as possessing a particular character for purposes of mere identification and not with the intention of making the possession of that character or relationship a condition precedent to the gift becoming operative, then, on the identification becoming complete, the gift takes effect in favour of the person named, even though the description of that person as holding a particular character or relationship is incorrect or false.[o] Where, on the other hand, the description of the donee as possessing a particular relationship is intended by the donor as the essential limitation to determine the person who is to take the property, the gift cannot take effect, if the relationship or description with reference to which alone the donee is to be determined does not exist.[p] Thus, where a legacy is given to a person under a particular character which he has falsely and fraudulently assumed, which false character alone can at all be the motive for the bounty, as when the donee has fraudulently induced the testator to enter into a bigamous marriage with her, the testator not being in the know of the real facts, the legacy is invalid and cannot be enforced by the legatee.[q]

169. Ante-adoption agreements.—Under the Hindu Law, ante-adoption agreements entered into between the natural father of the boy and the adoptive father or mother having the effect of limiting the rights of the adopted boy, though they are not absolutely void and can be ratified and accepted by the adopted son on coming of age,[r] are of no validity except in so far as such agreements are sanctioned by custom and regulate the right of the

(n) *Nidhoomoni* v. *Saroda*, 3 I.A. 253.

(o) *Venkata Surya* v. *Court of Wards*, 22 M 382=9 M.L.J. 87=26 I.A. 83 (P.C.); *Hira Naikin* v. *Radha Naikin*, 37 B. 116=14 Bom. L.R. 1129=17 I.C. 834; *Subbaraya* v. *Subbammal*, 24 M. 214=27 I.A. 162=4 C.W.N. 805=2 Bom. L.R. 982 (P.C.); *Lali* v. *Murlidhar*, 28 A. 488=33 I.A. 97=8 Bom. L.R. 402=3 A.L.J. 415=10 C.W.N. 730 (P.C.); *Nidhoomoni* v. *Saroda*, 3 I.A. 253 (P.C.); *Standen* v. *Standen*, 2 Ves. Jun. 589; *Dhondubai* v. *Laxmanrao*, 47 B. 65=24 Bom. L.R. 794=1922 B. 352; *Bireswar* v. *Arda Chunder*, 19 I.A. 101=19 C. 452 (P.C.).

(p) *Fanindra Deb* v. *Rajeswar Das*, 11 C. 463=12 I.A. 72 (P.C.); *Shamsachoo* v *Dwarakadas*, 12 B. 202; *Abba* v. *Kuppammal*, 16 M. 355; *In re Boddington*, 25 Ch. D 685 (C.A.); *Lali* v. *Murlidhar*, 33 I.A. 97=28 A. 488=8 Bom. L.R. 402=3 A.L.J. 415=10 C.W.N. 730; *Doorga Sundari* v. *Surendra*, 12 C. 686.

(q) *Rishton* v. *Cobb*, 5 Myl. and Cr. 145.

(r) *Ramasami Aiyan* v. *Venkataramaiyan*, 2 M. 91=6 I.A. 196 (P.C.); *Subramania* v. *Sankara*, 1931 M. 804=34 L.W. 689=1931 M.W.N. 1169=55 M. 408=62 M L. J. 479; *Kali* v. *Bijai*, 13 A. 391.

widow for her lifetime against the adoptee.(s) Where, however, such arrangements, though assented to by the natural father, go beyond this and give the widow property absolutely or give the property to strangers or authorise future alienations of the property in which the adopted boy by his adoption acquires a right, they are not binding on the adopted son, and, if he be a minor, the principle of approbation and reprobation can have no application in his case.(t) It cannot be laid down as a general proposition that all arrangements consented to by the natural father and of benefit to the adopted boy in the sense that, half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid.(u) Hence an agreement between the natural father and the adoptive father to the effect that during the life-time of the adoptive father and the adoptive mother or either of them, the adoptee has no right of any kind to the property and that after the death of the adoptive parents the adoptee should maintain an aunt by adoption who had no legal claim against the property falls within the prohibition contained in *Krishnamurthi's* case (s) and is not binding on the adopted son.(v) A passage in *Krishnamurthi's* case,(s) that an ante-adoption arrangement giving property to the adopting widow absolutely is against the radical view of the Hindu Law has been considered by the Madras High Court in *Raju's* case,(w) wherein it was held that even where a portion of the adoptive father's property is given absolutely to the adoptive mother, if the arrangement was fair and reasonable and beneficial to the adopted son, the agreement itself would be binding upon the adopted son although under it some property is given absolutely to the adoptive mother.(x) Besides, the dictum in *Krishnamurthi's* case prohibiting the giving of property to strangers under an ante-adoption agreement does not apply to invalidate *bona fide* and reasonable reservations of benefit in favour of those who are within the degree of mainten-

(s) **Bhaiya Rabidat Singh** v **Indar Kunwar.** 16 C. 556–16 I.A 53 (P.C.), **Krishna murthi Ayyar** v. **Krishnamurthy Ayyar,** 50 M. 508–26 L.W 186 –1927 P.C 139 54 I.A. 248· 25 A.L.J. 945 29 Bom L.R 969- 31 C.W.N. 910–57 M.L.J. 57- 1926 M.W.N. 467 (P.C.); **Hemendra** v **Jnanendra,** 40 C.W.N. 115–1935 C 702.

(t) **Krishnamurthi Ayyar** v. **Krishnamurthi Ayyar,** 50 M. 508 -26 L.W. 186 1927 P.C. 139 -54 I.A 248: 25 A.L.J. 945 =29 Bom. L.R. 969 -31 C.W.N. 910 –57 M. L.J. 57- 1926 M W N. 467 (P.C.); **Parvatibai** v. **Vishvanath,** 1926 B. 90 27 Bom. L.R. 1509 ; **Mst. Sarupa** v. **Korat,** 18 N.L.J. 32 ; **Pemraj** v. **Rajibai,** 39 Bom. L.R. 1039 =1938 B. 63 ; **Shankardas** v. **Chanappa,** 40 Bom. L.R. 443.

(u) **Krishnamurthi Ayyar** v. **Krishnamurthi Ayyar,** 50 M 508 26 L.W 186 1927 P C 139 54 I A 248 25 A L.J. 945 29 Bom L R 969 31 C W N 910 57 M L J. 57 1926 M W N 467 (P.C.).

(v) **Pemraj** v **Rajibai,** 39 Bom L.R. 1069 1938 B 61 ; **Venkappa** v **Fakirgowda,** 18 Bom L.R 316 ; **Vyasacharya** v. **Venkubai,** 37 B 251 ; **Shankardas** v. **Chanappa,** 40 Bom L.R. 443

(w) **Raju** v **Nagamma,** 52 M 128 56 M L J 41 29 L.W. 77 -1928 M 1249 = 1928 M.W N 732 . See also **Sudarsana Rao** v. **Seethamamma,** 1933 M.W.N. 1148.

(x) **Vedakeshi** v **Sivaramier,** 27 M 577 –14 M L J 310 F B See also **Seethiah** v. **Muthyar** 130 I.C. 460 1930 M.W.N 1011 =33 L.W 86 -1931 M. 106.

ance from the adoptive father, such as his mother or daughter.[u] But an adopting widow, though entitled to impose stipulations which are reasonable and proper for her own protection, still cannot be permitted to benefit her own relatives and friends by bargaining for money or property to be made over to them,[z] though if the adopted son is of age, he is not prevented from undertaking any such liability in himself in consideration of being adopted.[a] So also an agreement between the adoptive father and the natural father whereby full powers of disposal over the property are reserved to the adoptive father is not binding on the adoptee, the same being opposed to the principles of the Hindu Law of adoption.[b] But an adoption cannot be declared invalid by reason merely of a collateral arrangement between the natural father and the adopter.[c] But if the adopted son is of full age and deliberately agrees to an arrangement under which he is to get no more than half of the property of his adoptive father the agreement is binding upon him.[d] In a recent case the question whether when an adoption is made by a widow both in fulfilment of her religious duties and also for the purpose of getting a gain for herself, the adoption should be upheld, holding only the arrangement for her personal benefit invalid, or both the adoption and the arrangement should be held void was left open by the Privy Council.[e] But a widow who before making the adoption stipulates that the adopted son should pay her debts or make some provision for their discharge, though the debts may not be binding on the estate in his hands, is not doing anything corrupt or immoral, and an adoption made on the understanding that the widow should have half the estate for the discharge of her debts cannot, on that ground, be held to be invalid.[e] Presumably even the said arrangement on the basis of which the adoption is made will be held valid.

170. Proof of adoption.—In no case should the rights of wives and daughters be transferred to strangers or more remote relatives, unless the factum of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud,

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(*u*) *Raju* v. *Nagamma*, 52 M 128 27 L.W. 77-56 M L J 41 1928 M 1289-1923 M.W.N. 732. See also *Ramiah* v *Mahalakshmamma*, 33 L.W. 30-136 I C. 205

(*z*) *Sudarsana* v. *Seetharamamma*, 1933 M.W N. 1148

(*a*) *Mittar Sain* v *Data Ram*, 24 A L J. 185-90 I.C. 1000 1926 A. 194; *Vithal Laxman* v. *Yamubai*, 58 B. 231-36 Bom. L.R. 144 1934 B. 121.

(*b*) *Parvatibai* v. *Vishvanath*, 1926 B. 90-27 Bom. L.R. 1509; *Mst. Sarupa* v *Korat*, 160 I.C 632; *Pem Raj* v *Rajibai*, 39 Bom. L.R. 1069-1938 B. 63.

(*c*) *Subbarayju* v *Narasimharaju*, 24 L.W. 716 1926 M 1053-51 M L J. 366.

(*d*) *Pandurang* v. *Narmadabai*, 34 Bom. L R. 1209 56 B. 395 1932 B. 571; See also *Kashibai* v. *Totya*, 40 B. 668-36 I C. 546-18 Bom L.R. 740

(*e*) *Krishnayya Rao* v. *Rajah of Pittapur*, 40 C.W.N. 1 42 L.W. 267 37 Bom. L R 872 69 M L J 388-1935 M.W.N. 1216 = 1935 P.C. 190; *Banarsi* v. *Sumat*, 1936 A. 641-1936 A.L J. 1237 (holding that an arrangement under which the widow was to remain in possession for her life was valid).

and so consistent and probable as to give no occasion for doubt of its truth. (f) There is a very heavy and serious onus resting on a person who seeks to displace the natural succession of property by the act of an adoption. In such a case the proof of adoption as well as of the power to adopt of the adopter requires almost a strict and severe scrutiny (g) and the longer is the time between the date when the power was given and the time when it comes to be examined, the more is it necessary having regard to the fallibility of human memory and the uncertainty of evidence given after the lapse of time, to see that the evidence is sufficient and strong. (h) But very slight evidence may be sufficient for this purpose where the alleged adopted son has been treated as such for a long series of years. (i) Circumstances may exist in any particular case to strengthen or weaken the probability of adoption. For instance, if the alleged adoptive father was young and could have reasonably hoped for begetting issue on his wife, (j) the adoption would be rendered very unlikely. If, on the other hand, the adoptive father had no hopes of issue on the wife with whom he had been living, and was inimically disposed towards his other wife and those relations who would succeed to him in default of issue, (k) the probability is that he would have made an adoption so as to leave the wife with whom he had been living in the more advantageous position of the mother and guardian of an adopted son. But there is no presumption in favour of an adoption, (l) and on the question whether there has been any adoption in any particular case, the conduct of the parties both before and after the adoption, (m) the attendant and antecedent circumstances, (n) the existence or absence of any writing with reference to the adop-

(f) *Diwakar* v. *Chandanlal*, 44 C. 201=18 Bom. L.R. 992=21 C.W.N. 314=1917 M W.N. 50=5 L.W. 103=1916 P.C. 81=32 M L.J. 636.

(g) *Lal Harihar* v. *Bajrang*, 41 C.W.N. 1126=39 Bom. L.R. 1014 (1937) 2 M.L.J 711=1937 M W.N. 810=1937 P.C. 242; *Durga Baksh* v. *Brij Raj*, 1938 P.C. 40

(h) *Dal Bahadur* v. *Bijai Bahadur*, 52 A. 1=1930 A.L.J. 122=34 C.W.N 369=32 Bom. L.R. 487=58 M.L J 446=31 L.W. 434=1930 P.C. 79=57 I.A. 14; *Padmalav* v. *Fakira*, 33 L.W. 477=12 P.L.T. 563=60 M.L.J. 619=35 C.W. N. 465=33 Bom. L.R. 904=1931 M.W N. 561=1931 P.C. 84; *Kishuki Lal* v. *Chunni Lal*, 31 A. 116=19 M.L J. 186=1 I.C. 128 (P.C.).

(i) *Kailash Chandra* v. *Bejoy Chandra*, 72 I.C. 680=1923 C. 18; *Ramakrishna* v. *Tirunarayana*, 55 M. 40=1932 M.W N. 31 =35 L.W. 73=62 M.L.J. 116=1932 M. 194.

(j) *Sutroogun Sutputty* v. *Sabitiri Devi*, 5 W.R P.C 10 I.

(k) *Ramyama* v. *Atchama*, 4 M. I.A. 1; *Huradhun* v. *Mutharanath*, 4 M. I A. 414; *Puttu Lal* v *Parbati*, 42 I.A. 155=37 A. 359 17 Bom. L.R 519=19 C.W.N. 841=1915 P C 15-13 A L J. 721=29 M.L.J. 63 =2 L W 881=1915 M W.N. 514.

(l) *Kishorilal* v. *Chunilal*, 31 A. 116=19 M.L.J. 186=1 I.C. 128 P.C.; *Venkata* v. *Papayya*, (1913) M W N. 828-21 I.C. 737; *Lal Kunwar* v. *Chirenji Lal*, 32 A. 104=6 M L J 182 5 I C 549=37 I.A 1.

(m) *Diwakar* v *Chandanlal*, 44 C. 201 =18 Bom L R 992 21 C.W.N. 314=1917 M W N. 50=5 L W. 103=32 M.L.J. 636= 1916 P C. 81, *Prem Devi* v. *Shambhu*, 42 A. 382=18 A L J 473; *Pudum Singh* v. *Godey Singh*, 12 M.I.A. 350; *Soonkoro* v. *Soonkoro*, 6 M L.T 267=4 I.C. 1045 (1); *Durga Baksh* v. *Brij Raj*, 1938 P.C. 40.

(n) *Huradhun* v. *Mutharanath*, 4 M.I. A. 414; *Sutroogun Sutputty* v. *Sabitri Devi*, 5 W.R. P.C. 109.

tion, [o] and any previous adjudications on the matter by proper courts, though not *inter* parties, will all be relevant. It is not necessary in every case to have direct evidence of the fact of adoption. Where the adoption is alleged to have taken place long ago, [p] and the adopted son has been treated as such in public documents and by the members of the family, there is a presumption that every circumstance has taken place to account for such state of things as is proved or admitted. [q] If it is proved that an adoption is apparently valid as performed, the onus is upon the person attacking the adoption to demonstrate in what particular respects there has been a failure of ceremonial or ritual. [r] But where a man who was alleged to have been delirious and in *extremis* and not in full possession of his faculties was alleged to have made an adoption, the onus is upon those propounding the adoption to prove that the adopter was in a fit state of mind so as to understand the nature of the act that he was performing [s] and if it is proved that the alleged adopted son did not perform the obsequial or the Shradh ceremonies of the adoptive father but did perform them for his natural father, that is a circumstance against the factum of the alleged adoption. [t] A prior decision upholding the validity of an adoption in a suit brought during the adopting widow's life-time by the presumptive reversioners impeaching it will be binding upon the actual reversioners after the widow's death. [u]

171. Estoppel.—Under S. 115 of the Evidence Act "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, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." The misrepresentation to operate as an estoppel must be with refer-

(o) *Diwakar* v. *Chandanlal*, 44 C. 201 =5 L.W. 103—18 Bom. L.R. 992 21 C.W.N. 314—1917 M.W.N. 50—1916 P.C. 81=32 M.L.J. 636; *Mt. Binda Kuer* v. *Lalita Prasad*, 38 Bom L.R. 1256=41 C.W.N. 161= 44 L.W. 546=1936 P.C. 304=17 Pat. L.T. 636.

(p) *Ramakrishna* v. *Tirunarayana*, 55 M. 40—35 L.W. 73=1932 M 198=1932 M. W.N. 31=62 M.L.J. 116.

(q) *Perkash Chunder* v. *Dhunmonee*, (1853) S.D. 96; *Rajendranath* v. *Jogendranath*, 14 M.I.A. 67; *Lal Achal Ram* v. *Kazim Hussain*, 27 A. 271=32 I.A. 113= 15 M.L.J. 197—9 C.W.N. 477 P.C; *Vyaschimanlal* v. *Vyas Ramachandra*, 24 B. 173—2 Bom. L.R. 163; *Kailash Chandra Nag* v. *Bejoy Chandra Nag*, 36 C.L.J. 434 —1923 C 18; *Rup Narain* v. *Gopal*, 36 C. 780—19 M.L.J 548.3 I.C. 382—6 A.L.J. 567 —13 C.W.N. 920—11 Bom. L.R. 833=36 I.A 103 (P.C.); *Chhote Lal* v. *Chandra*, 45 A. 59 1923 A. 176.

(r) *Chattibai* v. *Srimathi Kundi Bai*, 88 I C 573=1925 S. 223.

(s) *Maharajah of Kolhapur* v. *Sundaram Ayyar*, 48 M. 1—1925 M. 497.

(t) *Lal Durga* v. *Brij Raj*, 1937 Oudh. W.N. 641=168 I.C 993.

(u) *Punnamma* v. *Perrazu*, 29 M. 390; See also *Venkatanarayana* v. *Subbammal*, 38 M. 106=42 I.A. 125=17 Bom. L.R. 468 —19 C.W.N. 461.

ence to a fact (v) and not about a matter of opinion, as for instance, an opinion as regards the validity of an adoption. (w) Besides, estoppel merely creates a personal disqualification against the person who made the representation or his representative and cannot affect the right of others claiming under an independent title to challenge the validity or the factum of adoption. (x) Thus where a widow governed by the Mitakshara School, representing that she had her husband's authority, adopted a boy and got him married, and subsequently the reversioners sued to have the adoption declared invalid, it was held that the widow was estopped from denying the existence of her husband's authority and the validity of the adoption, (y) but that the reversioners were not bound by the widow's representation since the estoppel was only personal to her. (z) What the law of estoppel regards as the position of the person who was induced to act. If the person who made the statement did so without full knowledge or under error, *sibi imputet*, it may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The principle on which the law of estoppel rests is, that it would be most inequitable and unjust to a person that if another, by a representation made or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. (a) But when a party relies upon an estoppel, whether it be by negligence, conduct or representation, he must show a breach of duty by the party said to be estopped as being implicit in such negligence, conduct or representation. (b)

172. Acquiescence and Limitation.—Mere acquiescence by those whose interest it is to deny or impeach the adoption set up,

(v) *Dhanraj Jaharmal* v *Soni Bai*, 55 C. 482=23 A L J. 273. 27 Bom. L.R. 837= 52 I A. 231 ·1925 M W N 692 30 C W N 601 · 49 M L J 173 ·1925 P.C. 118.

(w) *Gopee Lal* v. *Chandraolee*. (1872) I.A. Sup Vol. 131; *Dhanraj Jaharmal* v. *Soni Bai*. 52 C 482 at 496-49 M L J. 173 -23 A.L.J. 273 27 Bom L.R. 837—52 I. A. 231 ·1925 M W N. 692-30 C W.N 601= 1925 P C. 118.

(x) *Lala Parbhu* v. *Mylne*. 14 C 401; *Dharam Kunwar* v *Balwant Singh*. 31 All. 398=39 I A. 142=14 Bom. L R. 485 -23 M. L.J. 200=15 I C. 673 -16 C W.N. 675=9 A.L.J. 730=1912 M W.N. 641 (P.C.); *Dhanraj Jaharmal* v. *Soni Bai*, 52 Cal. 482=23 A.L.J. 273=27 Bom. L R. 837=52 I.A. 231 =1925 M.W.N. 692—30 C W.N. 601=49 M. I.J. 173= 1925 P.C. 118; *Har Shankar* v. *Lal Rachuraj*. 29 All 519 -17 M L J. 354 31 I A 125 4 A L J. 497 9 Bom I.R. 757 11 C W N 811 (P C)

(y) *Venkata Subbamma* v. *Vedala Venkamma*. 46 M L J 52- 1924 M 308 -19 L W. 83 1924 M W N J; *Dharam Kunwar* v *Balwant Singh* 31 A 398 39 I A 142— 14 Bom L R 485 23 M L J. 200 -15 I.C. 673-16 C W N 675 9 A L J 730=1912 M W N. 641

(z) *Dharam Kunwar* v *Balwant Singh*, 34 A 398 39 I A 142 14 Bom. L R. 485 -23 M L J 200 15 I C. 673-16 C W.N. 675 -9 A L J 730 1912 M W N 641.

(a) *Sant Chunder Day* v. *Gopal Chunder Lahe*. 20 C 296 19 I A 203 (P.C.).

(b) *Mercantile Bank of India* v. *Central Bank*, 17 L W. 329— (1938) 1 M.L.J. 268 (P.C.)

will not preclude them from subsequently challenging the factum or the validity thereof, [c] provided they are not barred by the statute of Limitation. Under Art. 118 of the Limitation Act a suit for a declaration that an alleged adoption is invalid or never in fact took place must be brought within 6 years from the date when the plaintiff comes to know of the adoption, and under Art. 119, the period of limitation for a suit to obtain a declaration that an adoption is valid is 6 years from the date when the rights of the adopted son, as such, are interefered with.[c-a] But the particular limitation prescribed in Art. 118 of the Limitation Act applies only to a suit falling under S. 42 of the Specific Relief Act, and a condition of obtaining a particular relief sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as 6 years. But this does not prevent a reversioner who has not brought a declaratory suit within 6 years under Art. 118 to bring a suit for possession of the immovable properties within 12 years after the death of the adopting widow under Art. 141 of the Limitation Act, even if it be necessary in that suit to decide the factum or validity of the adoption. [d] The same reasoning applies to a suit for possession by an adopted person who has not brought a suit within 6 years under Art. 119 of the Limitation Act, and a suit for possession brought within 12 years but more than 6 years after his rights have been interfered with will be in time. [e] Where a presumptive reversioner brings a suit of the nature mentioned in Art. 118 it is a representative suit on behalf of the whole body of reversioners,[e-a] and in the absence of fraud or collusion on the part of the person suing, a decree in that suit in favour of the adoption binds the entire reversion.[e-b] A decision of the Madras High Court in *Venkatasivayya* v. *Ademma*[e-c] has gone a step further and held that limitation under this Article commences to run from the date

(c) *Vaithilingam* v. *Natesa*, 37 M. 529 =23 M.L.J. 189 15 I.C. 299=1912 M.W.N. 1127; *Gurulingaswami* v. *Ramalakshmamma*, 18 M. 53=4 M.L.J. 237.

(c-a) As to what is interference. see *Maunt Gyi* v. *Maung On Gaing*, 1 Rang. 186=1924 R. 34; *Ningawa* v. *Ramappa*, 28 B. 94; *Chendania* v. *Salig Ram*, 26 A. 40.

(d) *Kalyandappa* v. *Chanbasappa*, 48 B. 411=51 I A. 220=22 A.L.J. 508=26 Bom. L.R. 509=28 C.W.N. 666=46 M.L J. 598=1924 M.W.N. 414=20 L.W. 109=1924 P.C. 137; *Bagirathi* v. *Appa*, 1934 B. 110=36 Bom. L.R. 185=58 Bom. 280; *Doddava* v. *Yellava*, 46 B. 776 =24 Bom. L.R. 158; *Ramachandra* v. *Ranjit*, 27 C. 242=4 C.W. N. 405; *Joti* v. *Khazana*, 8 Lah. 48=1926 L. 654; *Lali* v. *Murlidhar*, 24 A. 195; *Mangamma* v. *Veerayya*, 30 M. 108; *Padmalav* v. *Fakira*, 35 C.W.N. 465=33 Bom. L.R. 904=1931 M.W.N. 561=33 L.W. 477 :60 M.L.J. 619 :1931 P.C. 84.

(e) *Chendania* v. *Saligram*, 26 A. 40; *Jagannath* v. *Ranjit*, 25 C 354; *Kalyandappa* v. *Chanbasappa*, 26 Bom. L.R. 509; See also *Ratnamasari* v. *Akilandammal*, 26 M. 291; *Bhagirthibai* v. *Appa*, 58 B. 280=36 Bom. L.R. 185=1934 B. 110.

(e-a) *Varamma* v. *Gopela*, 41 M. 659=35 M L J 57.

(e-b) *Mata Prasad* v. *Nageshar Sahai*, 47 A. 883 52 I.A. 398 :28 M.L.J. 535=30 C W.N. 626=28 Bom. L R. 1110=1925 P.C. 272; *Venkatanarayana* v. *Subbamma*, 42 I. A. 125=38 M. 406=28 M L.J. 535.

(e-c) 44 M. 218=39 M.L.J. 681=12 L.W. 499=1920 M.W N. 783=1921 M. 380.

of the knowledge of the presumptive reversioner, so that even if owing to fraud or collusion he does not sue, a suit under this Article by a remoter reversioner must be brought within 6 years from the date of the presumptive reversioner's knowledge. This view cannot be supported as the third column of the Article mentions, as the starting point of limitation, the date of the knowledge of the plaintiff and not the date of the knowledge of some other person who might have been but has not been the plaintiff and can be justified, if at all, only on the ground that even where a remoter reversioner sues the suit must be deemed to have been brought by the presumptive reversioner, he being considered to be the plaintiff for purposes of this Article. The question whether an alleged right to take in adoption can be the foundation of a suit for declaration even before the adoption takes place is not altogether free from difficulty. No doubt such suits have been entertained and decided on the merits (f) but it is not easy to see how any adjudication in such a suit will affect the person subsequently adopted. However that be, there can be little doubt that it is desirable in the interests of every body concerned that that question should be adjudicated so as, at least, to serve as a warning against future trouble and litigation for those who want to go against the decision on the question.

173. Status cannot be created by estoppel or limitation.—Neither the law of Limitation nor that of estoppel can confer on a particular person who is not adopted the status of an adopted son. The law of Limitation can prevent suits being brought to eject him from his position as an adopted son and the law of estoppel will preclude the denial by certain persons of his rights as an adopted son. But neither of these will enable the alleged adopted son to sue as such to enforce rights of which he is not in possession without proving the validity of his adoption as against those who are not precluded from challenging it. (g)

174. Dvyamushyayana.—Dvyamushyayana is the name given to a person who is given in adoption under an agreement that he should be considered to be the son of both the adoptive father and the natural father. This kind of adoption, which is common among the Nambudris of Malabar, (h) is an exception to the rule that the adopted son is severed from his natural family, since a dvyamushyayana inherits in both the families, (i) and performs the

(f) *Surayya* v. *Annapurnamma*, 42 M. 699; *Sivasuryanarayana* v. *Audinarayana*, 44 L.W. 876—1937 M. 110—1936 M.W.N. 1333.

(g) *Lal Kunwar* v. *Chiranji Lal*, 32 A. 104—20 M.L.J. 182=5 I.C. 549=37 I.A. 1= 12 Bom. L.R. 244=14 C.W.N. 285=1910 M. W.N. 8 (P.C.).

(h) *Vasudevan* v. *Secretary of State*, 11 M 157; *Shankaran* v. *Kesavan*, 15 M. 6 (no ceremonies are necessary).

(i) *Woomut Dace* v. *Gokoolanund*, 3 Cal. 387 5 I.A. 40 (P.C.); *Nilmadub Doss* v. *Bishumber Doss*, 13 M.I.A. 85; *Behari* v. *Shib*, 76 A 172—1 A.L.J. 137.

funeral oblations to both the natural and the adoptive parents. In the absence of any agreement to the effect that an adoption is to be in the dvyamushyayana form, the presumption is that it is in the ordinary form even if the adoption is that of the only son of the adoptive father's undivided brother. (j) The power of making the dvyamushyayana adoption is not confined to brothers only, and even their widows may give and receive in adoption an only son in the dvyamushyayana form. (k) The consequences of a dvyamushyayana adoption are different from those of an ordinary adoption inasmuch as the children of a dvyamushyayana adopted son revert to their natural family thereby disabling the adoptive father from perpetuating his own line of male succession. (l) On the death of a dvyamushyayana, his relations in both families are entitled to succeed to his property. Thus when an unmarried dvyamushyayana adopted son died, it was held that both the natural mother and the adoptive mother of the boy were entitled to inherit equally as co-heiresses to his estate irrespective of the question whether the estate originally belonged to the natural or the adoptive family. (m)

175. Dvyamushyayana and after-born son.—Where subsequent to an adoption in dvyamushyayana form a legitimate son is born to the adoptive father, the share of the dvyamushyayana is ½ of what a Dattaka son would take in competition with an after-born aurasa son. If, however, a legitimate son is subsequently born to the natural father of the dvyamushyayana, the latter takes half the share of the former. (n)

176. Illatom adoption.—Illatom adoption is a customary adoption of a son-in-law by his father-in-law prevalent among the Reddies, Kapus and Kammas of the Madras Presidency based on the necessity of having men in the family to look after the cultivation, (o) and is purely of a secular nature without any religious significance, the same being brought about in consideration of the adoptee's future assistance in the management of the family property. This relationship commences with the admission of a person into another family with a view to marry him to the daughter of

(j) *Mohna Mal* v. *Mula Mal*, 89 I.C. 688 ; *Wooma Daee* v. *Gokoolanund*, 3 C. 587=5 I A. 40 (P C.); *Lakshmipati Rao* v. *Venkatesh*, 41 B. 315=19 Bom. L.R. 23= 38 I.C. 552; *Huchrao* v. *Bhimarao*, 42 B. 277= 20 Bom L.R. 161 =44 I.C. 851; See contra in *Krishna* v. *Paramshri*, 25 B. 537 =3 Bom. L.R. 73.

(k) *Krishna* v. *Paramshri* 25 B. 537=3 Bom. L.R. 73.

(l) *Wooma Daee* v. *Gokoolanund*, 3 C. 587 5 I.A 40 (P.C.).

(m) *Basappa* v. *Gurlingawa*, 35 Bom. L.R. 75—1933 B. 137 =57 B. 74 ; *Behari* v. *Shib*, 26 A. 472=1 A.L.J. 137.

(n) *Dattaka Chandrika* v. 33 & 34.

(o) *Sitanna* v. *Viranna*, 39 L.W. 607= 1934 P C 105=1934 M.W N. 414 .15 P.L.T. 497 =1934 A.L.J. 433=.38 C.W.N. 697=36 Bom L.R. 563—67 M.L.J. 20—61 I.A. 200= 57 Mad. 749.

the adopter, [p] though the marriage itself may not take place till after the latter's death. Such an affiliation is not prevented by the existence of an aurasa or Dattaka son to the adopter [q] nor does it prevent the adopter from making a subsequent Dattaka adoption to himself. [r] But it requires very strict proof to establish illatom relationship to the brother of the father-in-law which is very uncommon. [s] The rights of an illatom son depend upon custom. He is not a coparcener with the natural or adopted son of his adopter and hence there is no right of survivorship between them, [t] though he counts as a son on partition in the new family and takes a share equal to that of an aurasa son. [u] But he loses no rights of inheritance in his natural family, [v] and the property he takes in the adoptive family is taken by his own relations to the exclusion of those of his adoptive father. [w] The children of the person affiliated do not become members of the new family [x] and the illatom son takes the property which he gets in the new family as his own absolute property and his descendants cannot claim any right therein. [y] By the illatom affiliation, the adopter does not deprive himself of his absolute powers of disposing of his property in any way he likes, and hence the illatom son is not entitled to interdict the adopter's alienation on the ground that it is unauthorised. [z]

177. Kritrima adoption.—*"A son of the same caste and affectionately disposed, whom his mother or father gives with water at a time of distress, is Dattaka son. A son of the same caste able to discriminate between right and wrong and having filial affection, when adopted, is called Kritrima son."* Manu, ix. 168-169.

An adoption resembling in several respects the illatom adoption is prevalent in the Province of Mithila and among the Nambudris of Malabar, [a] and is known as Kritrima adoption.

(p) *Ramakrishna*, v *Subbakka*, 12 M 142; *Balarami* v. *Pera*, 6 M. 267; See also *Hanumantamma* v. *Rami Reddi*, 4 M. 272

(q) *Kristnamma* v *Venkatasubbayya*, 42 M. 805 -46 I.A. 168 17 A L.J. 662 21 Bom L R 906—23 C W N. 1010—37 M.L.J. 1 1919 M.W.N. 551—10 L.W. 193 1919 P. C. 162. But see Quaere in *Sitanna* v. *Viranna*, 39 L W 107- 1934 P.C. 105 -1931 M.W N. 414 15 P.L.T. 497—1934 A L.J. 433 -38 C W.N. 697—36 Bom. L R. 563—67 M L.J. 20. 61 I A. 200 - 57 Mad. 749.

(r) *Chenchamma* v *Subbayya*, 9 M. 114.

(s) *Subba Rao* v. *Mahalakshmamma*, 32 L W. 233- 54 M. 27=1930 M. 883- 59 M.L.J. 558.

(t) *Chenchamma* v. *Subbayya*, 9 M. 114; *Chinna Obayya* v. *Sura Reddi*, 21 M. 226; *Narasimha* v. *Veerabhadra*, 17 M 287.

(u) *Hanumantamma* v. *Rami*, 4 M. 272; *Chenchamma* v *Subbayya*, 9 M 114; But see *Sidda Reddi* v *Subbamma*, 10 Mys. L J 352

(v) *Balarami* v. *Pera*, 6 M. 267.

(w) *Balarami* v *Pera*, 6 M 267; *Ramakrishna* v. *Subbakka*, 12 M. 442, *Chenchamma* v *Subbayya*, 9 M. 114.

(x) *Muthala Reddiar* v. *Sankarappa*, 67 M L J. 706 1935 M 3.

(y) *Challa Papi* v. *Challa Koti*, 7 M. H C R. 25

(z) *Subba Rao* v *Mahalakshmamma*, 32 L W 233—54 M 27. 1930 M. 883—59 M L.J. 558

(a) *Secretary of State* v *Sankaraja*, 25 M L J. 411—1914 M.W.N. 333—21 I C. 432 (2); *Shiv Dev* v. *Dwarka Das*, 1933 Lah. 1050

This kind of adoption has nothing to do with the obsolete form of the adoption of a *Kritrima* son as known to the Smritikars but is purely a modern development springing from a desire on the part of the Mithila community to circumvent the prohibition against the widow making a *dattaka* adoption. This adoption also is purely secular in its nature as the illatom and the adoptee's rights in the natural family are unaffected by the adoption as in the case of the illatom adoption. [b] The Kritrima adoption is made with the express object that the adoptee should perform the exequial rites of the adopter and inherit the properties of the adopter and hence is not permissible when the adopter has male issue. All that is necessary is that the adoptee should be acquainted with the merit of performing the obsequies of the adopter and with the sin of omitting them.[c] By his adoption the adoptee becomes the son of the adopter and he is not entitled to claim any relationship and any right of succession to any one other than the adopter in the new family.[d] For instance, he has no right of collateral succession.[e] Besides the adoptee's own sons do not take any interest in the property of the adoptive father, the relationship not extending beyond the contracting parties on either side.[f] This kind of adoption can be made by either a man or a woman, or jointly by both the husband and wife, but when it is made by a woman, it is made to herself and not to her husband and no consent of the husband is at all necessary.[g] The consent of the adoptee when he is *sui juris* is absolutely necessary[h] for the validity of the adoption, but if he is a minor, the adoption will be valid if he has attained years of discretion and his parents consent to the adoption.[c] The affiliation being purely secular, the initiatory ceremonies including the Upanayanam having been performed in the natural family does not invalidate the adoption.[d] Any person, provided he is of the same caste, may be adopted, though he be the father or a brother of the adopter, and the prohibitions against the adoption of particular persons in the case of a Dattaka adoption are not applicable to a Kritrima adoption.[i] No ceremonies or sacrifices are necessary for its validity, the only requisite being the consent of both the parties;[j] nor is a document necessary for its validity.[k]

(b) *Woomu Dutt* v. *Gokoolanund*, 3 C 587= 5 I.A. 40 (P.C.); *Chandu* v. *Subba*, 13 M. 309.

(c) *Lalita Prasad* v. *Sarnam Singh*, 1933 P 165=14 P.L.T. 27.

(d) *Shiboo Koeree* v. *Joogun*, 8 W.R. 155

(e) *Mela Singh* v. *Gurdas*, 3 Lah. 362 1922 L. 433 (F.B.).

(f) *Juswant* v. *Doolee*, 25 W.R. 255.

(g) *Shibkoeree* v. *Joogun*, 8 W.R. 155.

(h) *Lalita Prasad* v *Sarnam Singh*, 1933 P. 165 14 P.L.T. 27; *Luchmun* v. *Mohun*, 16 W.R 179; *Sutputtee* v. *Indranund*, 2 S.D. 173.

(i) *Oomun Dub* v. *Kunhia*, 3 S.D. 145; *Chowdree* v *Hanooman*, 6 S.D. 192.

(j) *Durgopal* v. *Roopun*, 6 S.D. 271; *Kullean* v. *Kirpa*, 1 S.D 9; *Shibkoeree* v. *Joogun* 8 W R 155.

(k) *Kamala Prasad* v. *Manohar*, 13 P. 550 1934 P. 398=15 P.L.T. 715.

178. Adoption among Jains.—According to the customary law prevailing among the Jains no authority express or implied is necessary for a widow of a sonless man making an adoption to him,[t] and the son adopted may even be a grown up and married man. The only essential ceremony for the validity of the adoption is the giving and taking of the adopted son.[tn] The Jains differ particularly from the Brahmanical Hindus in their conduct towards the dead, omitting all the obsequies after the corpse is burnt or buried. The birth of a son has no effect according to them on the future state of his progenitor, and consequently adoption is merely a temporal arrangement, having no spiritual object.[to]

179. Adoption among Agarwallas.—Similar reasoning as in the previous section applies to the Agarwallas,[tp] the qualifying age for adoption extending to 32 years.[tq]

180. Adoption of girls.—Adoption of a daughter is invalid[tr] except in the case of the Dancing Girl community.[ts] [see contra in[tt]]. Adoption of girls is not known to the general law of the Hindus[tu] and the onus of establishing a local, tribal or family custom validating such an adoption is upon those who allege it.[tv] Even amongst the Dancing Girls, if the purpose of the adoption is immoral,[tw] the adoption is invalid and there can be no question of estoppel in favour of the adoptee,[tx] since an estoppel cannot defeat a prohibition on grounds of public policy. But if the adoption of a girl is not to promote prostitution, but to wean the girl away from it and settle her in married life, a custom validating such

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(t) *Asharfi* v *Rup*, 30 A. 197=5 A.L.J. 200, *Manik* v. *Jugat*, 11 C. 518, *Ramrao* v. *Somal*, 1926 A 641=1926 A.L.J. 1247, *Rupchand* v. *Jambu*, 32 A. 247=37 I.A. 93=14 C.W.N. 545—7 A.L.J. 349=20 M.L.J 139=1910 M.W.N. 132=12 Bom. L.R 102=6 I.C. 272, *Maharaja Govind* v *Celab*, (1851) 3 S.D.A 276, *Jwaraj* v *Mt. Sheokuer*, 56 I.C 65=1920 N. 164 affirmed in 1921 P.C 77=1920 M.W.N 627=25 C.W.N 273 *Harnath* v *Mandil*, 27 C 379, *Sundar* v. *Baldeo*, 14 L. 78=1932 L. 426; *Sheo Singh* v *Dakho*, 1 A. 688=5 I.A. 87; but see contra in *Gatempa* v. *Eramma*, 50 M. 228=26 L.W. 498=51 M.L.J. 757=1927 M. 228 on the ground that no such custom contrary to ordinary Hindu Law was proved.

(tn) *Sheokuarbai* v. *Jeoraj*, 61 I.C. 481=1920 M.W.N. 627=1921 P.C. 77=25 C.W.N. 273.

(to) *Sheo Singh* v. *Mt. Dakho*, 6 N.W.P. H.C.R. 38=5 I.A. 87.

(tp) *Dhanraj Joharimal* v. *Soni Bai*, 52 Cal 482=49 M.L.J. 173=23 A.L.J. 273=27 Bom. L.R 837=1925 P.C. 118=52 I.A. 231=1925 M.W.N 603=39 C.W.N. 601.

(tq) *Ganpatbai* v *Anaata*, 13 B. 690, *Gaddelett* v. *Ganapati*, 27 M.L.J 493=17 I.C 122=1914 M.W.N 1138.

(tr) *Muthukannu* v *Parumasami*, 12 M. 211, *Venkit* v *Mahalinga*, 11 M. 393.

(ts) *Narendra* v *Dina Nath*, 36 C. 824=3 I.C 996, *Hira* v *Radha*, 37 B 116=17 I.C 881=11 Bom L.R 1129.

(tt) *Ram Pari* v *Shiv Ram*, 1934 L. 659=35 P.L.R. 700; In the matter of *Munshi Ram*, 12 I 658=1931 L 399

(tu) *Ghasiti* v *Umrao*, 21 C. 149=20 I.A. 194 (P.C.)

(tv) *Kandamma* v. *Chokkammal*, 12 L.W. 7=59 I.C. 211, *Venkit* v. *Mahalinga*, 11 M. 393, *Kamatakshi* v *Ramaswami*, 19 M. 127; *Manjamma* v. *Sheshgirirao*, 26 B. 471-4 Bom. L.R 116, *Muthukannu* v. *Parumasami*, 12 M. 211

(tw) *Kandamma* v *Chokkammal*, 12 L.W. 7=59 I.C 211, *Veerauna* v. *Sarasiratnam*, 43 M.L.W. 755=1936 M.W.N 585=1936 M. 659=71 M.L.J. 53

adoption can be upheld by the Court[w] in the case of Dancing Girls and there is no presumption that such an adoption is for the purpose of prostitution.[v] There is, no doubt, a clear cut conflict on the question of the validity of such customary adoptions among dancing women of the prostitute class between the Madras and the Bombay High Courts, the Bombay High Court holding that such adoption is opposed to public policy and hence void because it is invariably meant to promote prostitution. But, as observed by Muthuswamy Ayyar J., in *Venku* v. *Mahalinga*, 11 M. 393, prostitution is neither an essential condition nor a necessary consequence of such an adoption but is only an incident due to social influences. Adoption is resorted to partly for continuing the family and partly for securing a person competent according to the custom of the caste to perform the funeral obsequies of the adoptive parents and to take their property. To ignore this essential object of adoption and to confound it with prostitution is to obliterate altogether the line of distinction between the province of ethics and that of law and to damn a thing *in praesenti* for what may or may not be its consequences in future. For, it must be remembered that there is nothing to prevent the adopted girl from subsequently saying that she is not going to lead the promiscuous life of a prostitute but only the life of a respectable married woman wedded to one man. Hence the adoption of a daughter by a dancing woman cannot by itself, without anything further being proved, be said to offend public policy. To hold the contrary would result in shutting the door on what may in many instances be an innocent act of adoption,especially in these days when the torch of reason and culture is fast lighting up even the darkest recesses of insane and immoral traditions and guiding their followers into the sunny paths of moral civilisation and progress. *See* also S. 22.

(w) *Shanmugam* v. *Krishnaveni*, 1931 M.W.N. 288; *Manjamma* v. *Seshagirirao*, 26 B. 491=4 Bom. L.R. 116; *Veeranna* v. *Sarasiratnam*, 43 M.L.W. 755=1936 M.W.N. 555=1936 M. 639=71 M.L.J. 53; *Venku* v. *Mahalinga*, 11 M. 393; *Muttukannu* v. *Paramaswami*, 12 M. 214; *Queen Empress* v. *Ramanna*, 12 M. 273; *Kamalakshi* v. *Ramaswami*, 19 M. 127; *Nagamuthu* v. *Dasi Sundaram*, 32 I.C. 743—See contra in *Mathura* v *Esu*, 4 B. 545; *Guddati* v. *Ganapati*, 23 M.L.J. 493=1912 M.W.N. 1138; *Visalakshi* v. *Dorasinga*, 29 I C. 974; *Hira* v. *Radha*, 37 B. 116; *Girimallappa* v. *Kenchava*, 45 B. 768.

(v) See p. 179. foot note (v).

CHAPTER VI

MINORITY AND GUARDIANSHIP

181. Age of majority.—According to the early writers and the view taken in Bengal and Madras [a] a person attains his majority under the Hindu Law on the completion of the 15th year, but in other parts of India, a person is said to attain his age of majority on the completion of the 16th year. Under the Indian Majority Act of 1875 which applies also to the Hindus in all matters except marriage, divorce and adoption, in the case of every minor of whose person or property a guardian has been appointed by any Court of justice and of every minor under the jurisdiction of any Court of Wards, minority terminates on the completion of the 21st year, and in all other cases on the completion of the 18th year. Once a guardian has been appointed by a Court of justice, minority continues till the completion of the 21st year whether the guardian appointed continues or fails to continue to act.[b]

182. Minor's contracts.—The Indian Contract Act, IX of 1872, governs the contractual acts of a minor, and a contract by a minor is absolutely void and not merely voidable. No personal remedy, can be obtained against a minor even in respect of supply of necessaries to him which are suited to his position in life, though under S. 68 of the Contract Act, the person who supplied those necessaries can claim to be reimbursed from his estate [c] But a minor can be a transferee of property and can sue for possession of the property under a sale in his favour[e] or the enforcement of a mortgage[f] if there is no part of the consideration remaining to be executed by him. For the same reason he can be a payee under a promissory note[g]. He can also bind himself by a contract of apprenticeship provided it is for his benefit.[h] There can be no estoppel against a minor even when he has fraudulently represented himself to be

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(a) *Callychurn* v *Bhuppobutty*, 10 Beng. L.R. 231; *Mothoormohun* v *Soorendro*, 1 C. 108 (F.B.); *Sattiraju* v. *Venkataswami*, 40 M. 925=40 I C 518=5 L W 603=32 M. L.J 119.

(b) *Shivji* v. *Datu*, 12 Bom H C R. 281; *Mata Baksh* v. *Ajodhiya*, 1936 Oudh 340.

(c) *Mt. Durga Devi* v *Gur Narain*, 1924 L. 157; *Shaikh Abdul Rahim* v. *Mt. Barira*, 1921 P. 166 (2)=2 P L T 556, *Jambagathachi* v. *Rajamannarsamu*, 11 L. W. 596=57 I.C. 678; *Sadho* v. *Murlidhar*, 29 A. 672 (F.B.) 4 A.L.J. 597

(d) *Mohari Bibee* v. *Dharmodas*, 30 I. A. 114=30 C. 539=5 Bom. L.R. 421=7 C. W N 441 P C; *Balwant Singh* v *Clancy*, 31 All. 296 39 I A 109=14 I.C. 629—9 A L J 509—16 C.W.N. 577—1912 M.W N 462 :23 M L J 18—14 Bom. L R. 422 (P.C.).

(e) *Narain* v *Mt Dhania*, 53 A. 154=14 A L J 65 .75 I C. 23; *Ulfat Rai* v *Gauri Shankar*, 33 All 657=11 I C. 26. 8 A L J. 670

(f) *Raghava Chariar* v. *Srinivasa Raghavu Chariar*, 40 M 308 31 M L J. 575=36 I C 931 (1916) 2 M W.N. 363 (F B.).

(g) *Ramyanna* v *Basappa*, 24 M.L.J. 363.

(h) *Pollard* v *Rouse*, 33 M 288=6 I.C. 754=1910 M.W.N. 187.

of age and has thereby induced another to contract with him.[i] In *Raghavachariar* v. *Srinivasa Raghava Chariar*[j] the question that arose was whether a minor was entitled to enforce a mortgage executed in his favour. In answering the question in the affirmative, Sir John Wallis, C. J., observes as follows : —

" WALLIS, C.J.—The question referred to us is *whether a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by any other person on his behalf.* In considering this question the starting point is the decision of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*,[j] which decided, so far as is material for the present case, that a mortgage by a minor was void. A mortgage is a transfer of property, and their Lordships pointed out that under section 7 of the Transfer of Property Act persons competent to contract are competent to transfer property, and went on to show that under the Contract Act a minor was not competent to contract. They, therefore, as I understand, held that the transfer by the minor was bad, and went on to hold with reference to certain other contentions which were raised that, as an infant was not competent to contract, the question whether the contract was void or voidable could not arise in the case of an infant. The earlier decision of the House of Lords in *Nottingham Permanent Benefit Building Society* v. *Thurstan*,[k] was practically to the same effect. In a later case *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*[l]—their Lordships held that it was not competent to the guardian of a minor or the manager of his estate to bind the minor or his estate by a contract for the sale of immovable property, and that in the absence of mutuality the contract could not be enforced on behalf of the minor. These decisions do not, in my opinion, affect the question arising in the present case whether a transfer by way of mortgage in favour of a minor is enforceable. Under section 6 of the Transfer of Property Act, property may be transferred to a minor as he is not "a person legally disqualified to be a transferee" within the meaning of sub-section (*h*) of that section. It is quite clear that a transfer of full ownership or of a mortgage interest in immoveable property may be made by way of gift in favour of a minor, just as a minor may inherit specific immoveable property or an interest in it by way of mortgage. The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt, according to their Lordships' decision in such a case the minor could not bind himself by contract to pay the price or advance the mortgage money, but, when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect?.....

(*i*) *Mahomed Syedol Ariffin* v. *Yeon Ooi Gark*, 43 I.A. 256=39 I.C. 401=19 Bom. L.R. 157—21 C.W.N. 257—1917 M.W.N. 162 =1916 P.C. 242 adopting *Leslie Ltd.* v. *Sheill*, (1914) 3 K.B. 607. See also *Raghavayya* v. *Subbiah*, 7 L.W. 124 followed in A.S. No. 412 of 1931 short-noted at page 8 of 48 L.W. (*Summary of Recent cases*) holding that where an alienation by a minor is set aside, the court has power under S. 41 of the Specific Relief Act to award compensation to the alienee if he was not aware of the alienor's minority.

(*j*) See p. 181, foot note (*j*).

(*j*) (1903) I.L.R. 30 Cal. 539=30 I.A. 114=5 Bom. L.R. 421=7 C.W.N. 441 (P.C.).

(*k*) 1903 A.C. 6.

(*l*) (1912) I.L.R. 39 Cal. 232=39 I.A. 1 16 C.W.N. 74=9 A.L.J. 33 14 Bom. L. R. 5—1912 M.W.N. 22=21 M.L.J. 1156—13 I C 331 (P.C.).

"The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be a strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money. . . . . .

"On the contrary the general scheme of the Transfer of Property Act, as appears from the definition, is that minors may be transferees but not transferors, and I do not think the intention of the Legislature to except from this rule the most important classes of transfers by way of sale and mortgage is sufficiently made out." *Re In re Chamar v. Sivarama Raviara Chariar*, 40 M. 308 *at* pp. 312-315.

183. Kinds of Guardians.—Guardians are of four kinds: (1) Natural Guardians, (2) Testamentary guardians, (3) Court Guardians and (4) *De facto* Guardians

184. Natural Guardians A natural guardian is one who by virtue of his or her relationship to the child has a claim to be its guardian. The father's right to be the guardian of the person and property of the minor is paramount and comes first[m] and the right of the mother to the guardianship comes next[n] Under the Hindu Law, nobody else than the father and the mother of the minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors) is entitled as a matter of natural right to be and to act as a guardian of a minor's person and property Where there is no natural guardian alive, recourse must be had to the Court as representing the rights of the King for the appointment of a guardian.[o]

185. Father's right as guardian.- By reason of *Patria Potestas*, the father's right to have the custody of the person and property of his legitimate children is recognised to be supreme, and so long as he is competent to discharge his function as a guardian no Court has any power to appoint any body else as the guardian of his minor children.[p] Consequently, there is no jurisdiction in a Court to appoint or declare the father as the natural guardian, and he cannot seek any such declaration [q] Neither the father's loss of caste,[r] nor his conversion to another religion,[s] nor his re-

(m) *Nanabhai* v. *Janardhan*, 12 B 110

(n) *Sundar* v. *Bennud*, 4 C. 76. *Kunlesra* v. *Jorai*, 28 A. 233 -2 A.L.J 663; *Ramabai* v. *Gopal*, 5 Bom. L.R 542. *Chanviappa* v. *Danava*, 19 B 593.

(o) *Thayammal* v *Kuppanna*, 38 M. 1125- 27 M.L.J 385- 26 I.C. 179; *Kristo* v *Kadermoye*, 2 C L.R. 583; *Mt. Bhikuo* v. *Mt. Chanela*, 2 C.W.N. 191; *Narana Bhatta* v. *Lakshminarasamma*, 11 Mys. L.J. 56.

(p) *Besant* v *Narayaniah*, 38 M. 807= 41 I A. 314 -27 M.L.J 30- 12 A.L.J. 1155= 16 Bom L.R. 625.-18 C.W.N. 1089=1914 M.W.N. 585=1 L.W. 320=24 I.C. 290 (P C)

(q) *Lakshmibai* v *Shridhar*, 3 B. 1; *Narain* v *Kishen Soonsary*, 19 W R 133 (P C); *Venkatesvaran* v *Saradambal*, 13 R. 500- 1936 R 67; *Govind* v *Ram*, 1935 A L.J 1016 1935 A. 838.

(r) *Putlabai* v *Mahadu* 33 B 107 10 Bom L R. 1131 1 I C 659. *Kaulesra* v. *Jorai* 28 A 233 -2 A L.J. 663.

(s) *Mahomed* v *Radhibu*, 47 I.C. 817; *Shameng* v *Santabai*, 25 B. 551 3 Bom L.R. 89. *Muchoo* v *Arzoon*, 5 W R 235. *Harichand* v *Ghulam*, 14 Lah 176 -33 P L R 419 -1932 Lah. 385

marriage[t] nor the circumstance that he is indigent, diseased or leading an immoral life,[u] will in itself be sufficient to dislodge his right to be the guardian of his minor children. His "guardianship is in the nature of a sacred trust, and he cannot, therefore, during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary, take back such custody and education once more into his own hands. If, however, the authority has been acted on in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interest to disturb or disappoint, the Court will interfere to prevent its revocation."[v] Besides, the father can appoint a guardian by his will even to the exclusion of the mother,[w] but he cannot appoint a testamentary guardian in respect of the joint family property.[x] But a childless Hindu without coparceners, authorising by his will his widow to adopt, can at the same time appoint a guardian to manage the property of the boy to be so adopted during his minority.[y]

In rejecting the contention that a father can appoint a testamentary guardian in respect of the joint family property Justice Coutts-Trotter has the following observations to make in 41 M. 561.

"To speak of natural rights has always been recognized as a slippery path for the political thinker to tread from the days of Hobbes and Rousseau. It is an even greater pitfall to a lawyer. To appoint a guardian to the person of his infant children may be a 'natural' right vested in the father. To clothe him with authority over property which belongs to so complex an institution as a Hindu joint family may be, seems to me to be something which cannot be derived from nature, but must be founded on some legal warrant. In England the warrant is statutory, and it is not pretended that there is any statutory authority in force in India. The citations from Manu seem to show that the original conception was that the custody of properties of the joint family where there was no adult member should be the care of the King,

(t) *Audiappa* v. *Nallendran*, 28 M.L.J. 442=39 M. 473=1915 M.W.N. 330 29 I C 4; *Subramania* v. *Ammayyee*, (1915) M. W N 414=29 I C. 976=28 M L.J. 642.

(u) *Kalidas* v. *Subbanna*, 7 M. 29; *Muniyamma* v. *Munisamappa*, 10 Mys L. J. 156

(v) *Lyons* v. *Blenkin*, (1821) Jac. 245; *Besant* v. *Narayaniah*, 38 M. 807=24 I C 290 41 I.A. 314=27 M.L.J. 30=12 A.L.J. 1155=16 Bom. L.R. 625 18 C W N. 1089=1914 M W.N 585=1 L.W. 520

(w) *Raj Lukhee* v. *Gokool Chunder*, 13 M I A. 209; *Deba Nand* v. *Anandmani*, 43 A. 213 18 A.L.J. 1127—1921 A. 346; *Budhilal* v *Morarji*, 31 B 413=9 Bom. L.R. 553; *Jagannadha* v. *Ramayamma*, 44 M. 189=1921 M 132—13 L.W. 91=40 M.L J 46

(x) *Chidambara* v. *Rangasami*, 41 M. 561 7 L.W. 454=45 I C. 905=34 M L.J. 381. 1918 M.W.N. 265 (F.B.); *Brijbhukandas* v *Ghashiram*, 50 B. 316=37 Bom. L. R 1=1935 B. 124 (F B.).

(y) *Jagannadha* v. *Ramayamma*, 44 M. 189—1921 M 132—13 L.W. 91=40 M.L.J. 46

which in modern language means the Courts of the country. No case has been cited which can be said to recognize the suggested right. *Soobah Doorgah Lal Jha* v. *Rajah Neelamud Singh*(z) contains expressions which tend to show that the learned Judges supposed that such a power would be possible; but they do not definitely so decide. Mr. K. Srinivasa Ayyangar supported that judgment on the ground that as the properties dealt with were the properties of the father absolutely and were not joint properties, his right to appoint a guardian for them might be considered as an inherent part of his total right of ownership. That seems to me to be lapsing into abstract speculation, and . may be the Mr. T. R. Ramachandra Ayyar's attack on this theory - which not misconceived almost the whole of his argument—was well-founded. Beyond that his argument seemed to me to come merely to this. The thing is convenient, it is consonant with all right notions of what a father ought to be able to do for his children: it is nowhere expressly prohibited: therefore it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action. They cannot in my opinion suffice to set in motion a court of law."

186. Adoptive Parents.—As between the natural father and the adoptive father, the latter has a preferential right to the guardianship of the adopted boy,(a) the reason being that, on adoption, the boy passes to the control and authority of the adoptive father. So also the adoptive mother has the preferential right to the guardianship of the adoptee as against the natural father, though in any particular case, on a consideration of the welfare of the minor, which is the paramount consideration for the Court, the Court may, in its discretion, consign the care and custody of the minor to the natural parent in preference to the claim of the adoptive parent.(b)

187. Mother's right as guardian.—The mother who is entitled to the guardianship of her children next to the father,(c) cannot appoint a testamentary guardian.(d) Her remarriage does not by itself work a forfeiture of her right to guardianship of her son.(e) But if the widowed mother has married a Christian, she ceases to be a proper personal guardian of her Hindu minor son by her former Hindu husband, since the boy should ordinarily be brought up as a Hindu like his father and a Christian household is no proper

(z) 7 W.R. 74.

(a) *Sreenarain* v. *Kishen*, 11 Beng. L.R. 171 (P.C.); *Lakshmibai* v. *Shridhar*, 3 B. 1.

(b) *Rathnammal* v. *Govindaswami*, 1933 M.W.N. 1293 39 L.W. 85=1934 M. 44; *Purushottama* v. *Brindabana*, 1931 M. 597 =33 L.W. 661 1931 M.W.N. 417.

(c) *Kaulesra* v. *Joral*, 28 A. 233.=2 A.L.J. 663; *Bachchan Singh* v. *Kamta Prasad*, 32 A. 392=7 A.L.J. 337=5 I.C. 585; *Swaath Ram* v. *Ram Ballabh* 47 A. 784=1925 A. 595 23 A.L.J. 625; *Honappa* v. *Mhalpi*, 15 B. 259; *Soonder Narain* v. *Bennud Ram*, 4 Cal. 76, *Doraiswami* v. *Nondiswami*, 38 M. 118 21 I.C. 410 25 M.L.J. 405.

(d) *Venkayya* v. *Venkata*, 21 M. 401=8 M.L.J. 112

(e) *Ganga Pershad* v. *Jhalo*, 38 C. 862 =15 C.W.N. 579 10 I.C. 69; *Ranganaikt* v. *Ramanuja*, 21 M.L.J. 600=11 I.C. 570 =25 M. 728 (1911) 2 M.W.N. 285; *Pullabai* v. *Mahadu*, 33 B. 107=1 I.C. 659 10 Bom. L.R. 1134; *Bindo* v. *Sham Lal*, 29 A. 210 4 A.L.J. 22; *Ram Lakhai* v. *Durga*, 15 L. 28=35 P.L.R. 30=1933 L. 817.

place for him.[f] In the case of the illegitimate children, the natural guardian is the mother in preference even to the putative father.[g] But if she is leading an immoral life and is likely to corrupt the morals of her children, or by depriving her of the custody of the child, the child will have the advantage of a higher mode of life and education, the Court will consign the care of the children to somebody else.[h] But the mere apostacy of the mother is not a ground to vacate her guardianship,[i] unless her conduct is clearly to the prejudice of the infant.[j]

188. Manager's right in joint family.—After the death of the father, the management of the joint family property comprising also the interest of a minor member vests in the eldest male member of the family,[k] and the mother of the minor is entitled only to the guardianship of the minor's person and his separate property.[l] Where a Court appoints a guardian in respect of a joint family on the ground that all its members are minors,[m] the guardianship ceases on the attainment of majority by any of the members, and the guardian appointed by the Court must then hand over the properties to him.[n]

189. Husband's right to guardianship.—The husband is the guardian of the person and property[o] of his minor wife, however young she may be,[p] and in the absence of a custom enabling her parents to retain her with them till she attains puberty, minority or tenderness of age of the wife will afford no ground for refusing the company of the wife to her husband.[q] After the death of the husband, his relations are entitled to the guardianship of his minor wife in preference to her own relations in her father's family.[r]

(f) *Ganesha* v. *Ratan*, 1937 M. 976=46 L.W. 514.

(g) *Venkamma* v. *Savitramma*, 12 M. 67; *Saithri*, In re, 16 B 307; See contra in *Mt. Prem Kuar* v *Banasi*, 15 L 630=1934 L. 1003.

(h) *Venkamma* v. *Savitramma*, 12 M. 67; *Lal Das* v. *Nekmnjo*, 4 C. 374; *Koriyadan* v *Kayat*, 19 M. 461; *Kooverji* v. *Motibai*, 1936 Sind. 63.

(i) *Dwijapada* v. *Baileau*, 34 I C. 632=20 C W.N. 608.

(j) *Vembu* v. *Srinivasa*, 23 M.L J. 638; 17 I.C. 609; *Skinner* v. *Orde*, 14 M.I.A. 309.

(k) *Gourah* v. *Gujadhur*, 5 C. 219, *Ramchandra* v. *Krishna Rao*, 32 B. 259=10 Bom. L.R. 279; *Rajaram* v. *Rameshwar*, 1936 Oudh. W.N. 354=1936 Oudh. 270.

(l) *Virupakshapa* v. *Nijangava*, 19 B. 309; *Gharib Ullah* v. *Khalak Singh*, 30 I. A. 165 25 A. 407 5 Bom. L.R. 478 7 C.W. N. 681 (P.C.); *Sham Kuar* v. *Mohanunda*, 19 C. 301; *Sadhu Ram* v. *Pirthi Singh*, 1936 L. 220 38 P L R 201.

(m) *Bindaji* v. *Mathurabai*, 30 B 152=7 Bom L.R. 809; *Chandrapal* v *Sarabjit*, 16 Luck 67 1935 Oudh. 334.

(n) *Ramchandra* v. *Krishna Rao*, 32 B. 259. 10 Bom L.R. 279; *Jagannath* v. *Chunni Lal*, 1933 A. 180 1932 A.L.J. 1110; *Ramachandran* v. *Balasubramania*, 47 L. W. 268—(1938) 1 M.L.J. 285 1938 M. W N. 198; *Chandrapal* v. *Sarabjit*, 16 Luck. 67=1935 Oudh. 334.

(o) *Lakshmidevamma* v. *Dhanalakshmama*, 42 Mys. H C.R. 464=15 Mys. L J. 443.

(p) *Dhuronidhur*, *In the matter of*, 17 C. 298.

(q) *Arumuga* v. *Viraraghava*, 24 M. 255 :11 M L.J. 69; *Navnitlal* v. *Purshotam*, 50 B 268 1926 B. 228 28 Bom. L.R. 143; *Lakshmanachari* v. *Subbamma*, 12 Mys. L.J. 180.

(r) *Khudiram* v. *Bonvari Lal*, 16 C. 584; *Alagumperumal* v. *Vinayagathammal*, 29 L.W. 6=1929 M. 110 55 M L J. 861.

though her father may be appointed as her guardian in preference to the husband's relations when such a course would be for her benefit.(s)

190. Minor's conversion.—Though a child in India under ordinary circumstances must be presumed to have his or her religion and his corresponding civil and social status, and it is, therefore, ordinarily and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion,"(t) this rule is not an inflexible rule and can be departed from where the welfare of the minor demands it."(u) Where a Hindu minor becomes converted to an alien faith, the Court must consider whether it will be in the interest of the child that he should be restored back to his Hindu parents.(v) But if the minor is sufficiently aged to exercise an intelligent preference, his wishes may be considered by the Court in exercising its discretion as to the custody in which he should be ordered to remain. In the case of *Mokoond* v. *Nobodip*(w) which was the converse case of a converted father and his Hindu son, the following observations occur :—

"I do not think there is any substantial difference in the law applicable to a case such as this, between the law of England and the law of India, except so far as the Guardians and Wards Act (VIII of 1890) may create any difference. That Act is, mainly, if not entirely, based upon the principles of English law. The English authorities establish that, even as against the *prima facie* legal right of the father to the custody and control of the education of his child, the real object to be considered is the welfare of the child, and under section 17 of the Guardians and Wards Act the Court has to be guided by what, consistently with the law to which the minor is subject, appears under the circumstances to be for his welfare. The boy has been examined, and has expressed a preference to remain with his Hindu uncle, and to continue in the Hindu religion, and not to become a Christian, and though, having regard to his age, and to the possibility that this expression of his wishes may have been suggested to him by his Hindu relations, too much importance must not be attached to what he says, it is a feature in the case which ought not to be left entirely out of consideration. There is no doubt that under the Hindu law, as under the English, the father is *prima facie* entitled to the custody and control of his infant child, and it is for those who maintain the contrary to show that, under the particular circumstances of the particular case, he ought to be deprived of such initial parental right. That he can and may be so deprived if the circumstances justify it, is well established by many cases in the English Courts, one of the most recent being that of *In re Newton*,(x) and also in the Indian Courts [see *In the matter of Saithri*,(y) and the recent case in this Court before Mr. Justice Sale of

(s) *Tota* v. *Ram*, 33 A. 222 : 8 I.C. 785 : 7 A.L.J. 1149.

(t) *Skinner* v. *Orde*, 14 M.I.A. 309; *Reade* v. *Krishna*, 9 M. 391.

(u) *In re Mc. Grath*, 1 Ch. 143.

(v) *Sarat Chandra* v. *Forman*, 12 A. 213; *Bindo* v. *Sham Lal*, 29 A. 210=4 A.L.J. 221 *Saithri*, In re, 16 B. 307; *Albrecht* v. *Bathee*, 22 M.L.J. 247 : 13 I.C. 453 : 1912 M.W.N. 53, *In re Jesky Assam*, 23 C. 250; *Mokoond* v *Nobodip*, 25 C. 881 : 2 C.W.N. 379

(w) *Mokoond* v. *Nobodip*, 25 C. 881=2 C.W.N. 379.

(x) L.R. (1896) Ch. D Vol. I. 740.

(y) 16 B. 307.

In re Joshy Assam.(z)] In the above case in the Bombay High Court, Mr. Justice Bayley very carefully reviewed all the authorities, English and Indian, upon the point.

"There are some matters incident to this question, and one can scarcely avoid, if not concluding, at any rate suspecting, that the real question in this litigation is as to whether this child is to be brought up as a Christian or as a Hindu,—which to my mind are fairly well established. The authorities appear to me to establish that *prima facie* the father is entitled to say in what religion his infant child should be brought up, but, at the same time, that, in a proper case, there is undoubted jurisdiction in the Court to disregard those wishes. But the circumstances must be at least unusual to justify the Court in so acting." 25 C. 881 at 883. See also *Reade* v. *Krishna*(a)

191. Right of others to be appointed guardians.—Though it may be said that after the parents the paternal relations of the minor have a better claim to be appointed guardians than the maternal relations, yet, barring the parents, no relation, either paternal or maternal, is entitled as of right to the guardianship of a minor. The mere legal right to be appointed a guardian, the preference of the minors, and the existing or previous relations, are very minor considerations as compared with the main question, what order would be for the welfare of the minor. In making orders appointing guardians for the persons of minors, the most paramount consideration for a Judge ought to be, what order under the circumstances of the case would be best for securing the welfare and happiness of the minors, with whom will they be happy and who is most likely to contribute to their well-being and look after their health and comfort, who is likely to bring up and educate the minors in the manner in which they would have been brought up by their parents if they had been alive? In fact the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardians, is, who amongst the relations, or, for the matter of that, friends, of the minors can be selected who will supply as nearly as possible the place of their lost parent or parents;(b) due regard will no doubt always be paid to the nearness of the relationship of the person to be appointed in considering the question as to who is best qualified to step into the position of the parent.(b) But nearness of relationship should not always be the guiding test. The kind treatment of another person's child by a relative, however near, cannot be so certainly relied upon as in the case of a parent. On the other hand there are often, in the case of relations claiming to

(z) (1895) 23 C. 290.

(a) 9 M. 391.

(b) *Re Gulbai Lilbai*, 32 B. 50=9 Bom L.R. 923; *Kristo* v. *Kader Moye*, 2 C.L.R 583; *Bhikuo Koer* v. *Chamela Koer*, 2 C. W.N. 191; *Bindo* v. *Sham Lal*, 29 A. 210=4 A.L.J. 22; *Emperor* v. *Sital Prasad*, 42 All. 146—18 A.L.J. 64=54 I.C. 402; *Thayammal* v. *Kuppanna*, 26 I.C. 179=27 M.L.J 285=38 M. 1125.

be guardians of children, conflicting considerations which it is impossible to overlook. The near relations are generally those who would succeed to the child's share of the property, if the child died, and to ignore this consideration altogether, would be contrary to Hindu Law.[c] (*See* also S. 197).

192. Powers of a natural guardian. A natural guardian can do all acts which are reasonable and necessary for the protection of the minor's property.[d] He can charge any portion of the minor's property by mortgage or sale in case of necessity or for the benefit of the estate.[e] The power of the Manager for an infant heir to charge an estate not his own, is under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. 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, so support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. 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

(c) *Kristo* v. *Kader Moye*, 2 C.L.R. 583.

(d) *Krishna* v. *Nagamani*, 39 M. 915 : 30 I.C. 574; *Sonu* v. *Dhomiu*, 28 B. 330.

(e) *Hunoomanpersaud* v. *Mussumat Babooee*, 6 M.I.A. 393; *Gharib Ullah* v. *Khalak Singh*, 25 A. 407=30 I.A. 165=5 Bom. L.R. 478=7 C.W.N. 681 (P.C.); *Roshan* v. *Nur Kishan*, 3 A 535; *Hurry Mohun* v. *Ganesh Chunder*, 10 C 827 (F. B.), *Ramjuhanee* v. *Indrajit*, 45 A. 7=1922 A 526 (2) 20 A.L.J. 886. *Bai Amrit* v. *Bai Manek*, 12 Bom. H.C.R. 79; *Soonder Narain* v. *Beenud Ram*, 4 C. 76.

which a loan is wanted are often future as respects 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. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." (f) What constitutes legal necessity in any particular case depends upon the facts and circumstances of that case. The maintenance of the minor,(g) the repairs to his property,(h) the performance of his father's funeral ceremonies(i) and the payment of his debts,(j) are all legal necessities for which a guardian can validly transfer the minor's property. But the marriage of a minor in contravention of the Child Marriage Restraint Act is not a legal necessity which would justify a mortgage of the minor's property by his guardian.(k)

A natural guardian can bind the estate of a minor by executing a promissory note on his behalf(l) but not by any personal covenant,(m) and no decree can be passed either against the person or the estate of a minor on such a personal covenant except when there is a liability on the estate in respect of an obligation under his personal law.(n) Neither can he bind the minor or his estate by a contract for purchase of immovable property and as there is no mutuality the minor cannot obtain specific performance of such contract.(o) He cannot revive a time-barred debt,(p) though he can acknowledge a debt when it is for the benefit of the minor.(q) He is not authorised to carry on trade embarking the minor's property in the business in order to liquidate family debts, and a minor does not become a partner by virtue of any contract of partnership made by the guardian.(r) He can contract and compromise,(s)

(f) *Hunooman persaud* v. *Mussumat Babooee*, 6 M. I A. 393.

(g) *Soonder Narain* v. *Bennud Ram*, 4 C. 76.

(h) *Harry Mohun* v. *Ganesh Chunder*, 10 C. 823 (F.B.).

(i) *Nathuram* v *Chhagan*, 14 B. 562.

(j) *Murari* v. *Tayana*, 20 B. 286.

(k) *Ramjas* v. *Chand Mandal*, 41 C.W. N. 1176.

(l) *Satyanarayana* v. *Mallayya*, 41 L.W. 514=68 M.L.J. 540=1935 M.W.N. 349=58 M. 735. 1935 M. 447 (F.B.) overruling *Swaminatha* v. *Natesa*, 56 M. 879 =38 L.W. 430 =1933 M. 710 (2) =65 M.L.J. 350; But see *Keshao* v. *Balaji*, 34 Bom. L.R. 996 =1932 B. 460 and *Shankar* v. *Nathu*, 34 Bom. L. R. 1001 1932 B. 480.

(m) *Waghela* v. *Shekh Masludin*, 11 B. 551 14 I.A. 89 (P.C.); *Narain Das* v. *Ramanuj*, 25 I.A. 46=20 A. 209=2 C.W.N. 193 (P.C.).

(n) *Ramajogayya* v. *Jagannadham*, 42 M. 185 49 I.C. 872=9 L.W. 229 36 M.L.J 29 .1919 M.W.N. 148 (F B.); *Meenakshisundaram* v. *Ranga*, 35 L.W. 397 -1932 M. 696.

(o) *Mir Sarwarjan* v. *Fakhruddin*, 39 I A. 1- 13 I.C 331=21 M L.J. 1156—16 C. W N. 74 9 A.L.J. 33—14 Bom. L.R. 5.= 1912 M.W N. 22 .39 C. 232.

(p) *Subramania* v. *Arumuga*, 26 M. 330.

(q) *Subramania* v. *Arumuga*, 26 M. 330, *Sobhanadri* v. *Sriramulu*, 17 M. 221; *Ram Charan* v. *Gaya Prasad*, 30 A. 422=5 A L. J. 375 (F.B.); *Annapagauda* v. *Sangadiyyapa*, 26 B. 221=3 Bom. L.R. 817; See contra in *Wajibun* v. *Kadir Buksh*, 13 C. 292; *Chhato Ram* v. *Billo Ali*, 26 C. 51=3 C.W.N. 313; See Limitation Act, S. 21(1).

(r) *Venkatasuryanarayana* v. *Ramayya*, 13 L.W. 553=40 M.L.J. 153=1921 M.W.N. 100=1921 M. 98.

(s) *Nirvanayya* v. *Nirvanayya*, 9 B. 365.

make a reference to arbitration(t) and do everything on the minor's behalf which is reasonable and proper for the protection of his property or for his benefit,(u) but the guardian cannot bind his ward by any act not done on the minor's behalf.(v) Whether an act alleged to have been done on the minor's behalf was so done or not must be decided with reference to the circumstances of the case and the language of the document, if any, and the mere omission of the minor's name in the document is not conclusive that the transaction evidenced by the document was not entered into on behalf of the minor.(w) As regards the powers of a natural guardian of a minor to deal with the minor's estate and bind the minor by his contract, the following propositions are well established: (1) the guardian may in case of necessity sell or mortgage his ward's property to the extent of such necessity; (2) the guardian may also, without charging the estate, contract loans for necessary purposes which he could not otherwise meet; the term 'necessary purposes' being understood as comprising all that is necessary to meet the wants of the minor and of the other members of his family, who have claims either against him personally or against his estate. The creditor in such cases cannot enforce the claim against the minor personally, but may enforce it against his properties subject to the condition that this right of recourse of the creditor is not claimable where the creditor is not able to show that on a general taking of account between the minor's estate and the guardian, an amount would be due to the guardian from that estate;(x) (3) the guardian cannot enter into any covenants in the name of the ward so as to impose a personal liability upon him.(y) An agreement to sell immovable property belonging to a minor entered into on his behalf by his natural guardian is not specifically enforceable against him even though the same is entered into for purposes binding on the minor, and where the said property is subsequently sold to a third party, the promisee cannot recover it even from such third party or enforce his agreement against him even though he has taken the sale with knowledge of the agree-

(t) *Ramanier* v *Langat*, 13 Pat L T 101=1931 Pat 92; *Mohan* v. *Mt. Gurdevi*, 12 Lah. 767 33 P.L.R. 196=1931 Lah 728.

(u) *Subramania* v. *Arunuga*, 26 M. 330

(v) *Muthuswami* v. *Annamalai*, 44 M. L.W. 775 1937 M. 1—1936 M.W.N. 919

(w) *Indur Chunder* v. *Radhakishore*, 19 I.A. 90 19 C 507 (P.C.); *Watson & Co.* v *Sham Lal*, 14 I.A. 178=15 C 8 (P.C.); *Balwant Singh* v *Clancy*, 23 M.L.J 18=9 A.L.J 509=16 C.W.N 577=1912 M.W.N. 462=14 Bom L.R. 422 39 I.A. 109=14 I.C 629=34 A. 296 (P.C.).

(x) *Natesa* v *Manicka*, 47 L.W 175; *In re Johnson, Shearman* v. *Robinson*, (1880) 15 Ch Div. 548; *Muthuswami* v *Annamalai*, 41 L.W 775 1937 M 1; *Vishwanath* v *Raghunath*, 40 Bom L.R 158.

(y) *Swaminatha* v *Natesa*, 56 M 879=58 L.W 430 1933 M.W.N 121 65 M.L.J 350=1933 M 710 (2); *Ramakrishna* v *Chidambara* 27 L.W 322=51 M.L.J. 412 1928 M.W.N 185 1928 M 407; *Muthuswami* v. *Annamalai*, 1937 M 1 44 L.W 775; *Suchit Chaudhuri* v *Harnandan*, 12 P 112 1933 P 29

ment.[z] Where a mortgage deed by the guardian of a minor contains a personal covenant and a suit on the deed fails for want of proof of attestation of the deed but succeeds on an alternative claim of a vendor's lien on the suit property, a decree should not be granted against the general assets of the minor.[a]

193. Decrees.—A decree obtained against a minor, whether after contest or by compromise, is binding upon the minor provided he was properly represented in the suit.[b] But in the case of a consent decree the leave of the Court whose duty it is to see if it is really for the benefit of the minor is absolutely necessary.[c] A compromise decree obtained by fraud,[d] and a decree obtained against a minor owing to the gross negligence amounting to misconduct on the part of the minor's guardian,[e] can be set aside by the minor by a fresh suit[e] or by review[f] or under O. 9, R. 13 of the Civil Procedure Code if the decree is *ex parte*.[g]

194. Testamentary guardians.—Owing to the peculiarity of the corporate life led by the ancients, what is known as testamentary disposition was practically unknown to them and this explains the dearth of texts in the ancient writings in respect of wills. But the inherent power of the father, which at one time was absolute, to control and guide the conduct and disposition of his sons, led to the recognition of his testamentary power to appoint guardians for his sons when disposition by wills became a recognised feature of Hindu Society. But the appointment of a testamentary guardian can be made only by a Hindu father.[h] The father's power of appointing a testamentary guardian is so absolute that he can even exclude his wife from the guardianship.[i] But it is not competent for him to appoint a testamentary guardian in respect of the joint family property[j] though the sole owner of ancestral property can

(z) *Ramakrishna* v. *Chidambara*, 27 L. W. 322—54 M L J. 412—1928 M.W.N 185 = 1928 M 407.

(a) *Zamindar of Polavaram* v. *Maharajah of Pittapur*, 59 M. 910—71 M.L.J. 347 —44 L.W. 452 = 1936 M.W.N. 791.

(b) *Kamaraju* v. *Secretary of State*, 11 M 309, *Lekraj* v *Mahtab*, 14 M. I.A. 393.

(c) *Rajagopal* v. *Muttupalem*, 3 M. 103; *Kalavati* v. *Chedi Lal*, 17 A 531; *Virrapakshapa* v. *Shidappa*, 26 B 109=3 Bom. L.R 565.

(d) *Lekraj* v. *Mahtab*, 14 M I.A. 393.

(e) *Mungniram* v. *Gursahai*, 16 I A. 195 = 17 C. 317 (P.C.); *Ram Autar* v. *Mahammad Mumtuz*, 24 I.A. 107 24 C. 853=1 C. W.N. 417 (P.C.); *Mt. Siraj* v. *Mahomed*, 54 A. 646=(1932) A.L.J. 437 1932 A. 293.

(f) *Ram Sarup* v. *Shah*, 29 C. 735.

(g) *Katha Sawmy* v. *Ramachandran*, 57 M. 1069—39 L W. 653=66 M.L.J. 683=1934 M. 428.

(h) *Kontholathammal* v *Thangasamy*, 46 M 873—45 M.L J. 481 1923 M.W.N. 902 18 L.W. 256=1924 M. 327.

(i) *Raj Lukkhee* v. *Gokool Chunder*, 13 M I A 209; *Deka Nand* v. *Anandamani*, 43 A 213—1921 A. 346 18 A L.J. 1127; *Jagannatha* v. *Ramayamma* 44 M. 189—1921 M. 132—13 L.W. 91=40 M L.J. 46; *Alagappa* v. *Manpathai*, 40 M. 672—30 M L J. 504 —34 I.C. 766.

(j) *Chidambara* v. *Rangasami*, 41 M 561—7 L.W. 454—45 I.C. 905 34 M.L.J. 381 —1918 M.W.N. 265 (F B.); *Harilal* v. *Mani*, 29 B. 351—7 Bom. L.R. 255; *Ambalavana* v. *Gowri*, 44 M.L.W. 467—1936 M. 871 —1936 M.W.N. 1274; *Brijbhukandas* v. *Ghashiram*, 59 B. 316—37 Bom. L.R. 1—1935 B. 124 (F.B.) overruling *Mahableshwar* v. *Ramchandra*, 38 B. 94; See also S. 185,

appoint a testamentary guardian for a son to be adopted after his death.[k] A testamentary guardian can act only in conformity with the conditions and restrictions imposed by the will under which he has been appointed. (S. 27 of the Guardians and Wards Act, 1890). Though a mother cannot appoint a testamentary guardian,[l] yet her wishes as mentioned in the will may be given due consideration to by the Court in appointing a guardian.

195. Court guardians.—A Court guardian is one who is appointed either under the Guardians and Wards Act of 1890 by a District Court or Chartered High Court in its ordinary original civil jurisdiction, or in the exercise of its inherent powers by a Chartered High Court. Under the Guardians and Wards Act, a guardian can be appointed only with reference to the separate property of the minor and not with reference to his undivided interest in a Mitakshara joint family[m] nor can the court appoint a guardian for the estate of an infant when it does not vest in him *in praesenti*: thus when the minor is only a beneficiary and the estate vests in trustees until he comes of age[n] or in the executors under his father's will,[o] the Court has no jurisdiction to appoint a guardian in respect of the minor's interest so long as the trusteeship or executorship continues. But a Chartered High Court in the exercise of its inherent jurisdiction can appoint the manager of a Hindu joint family as the guardian of a minor member of the coparcenary even in respect of his undivided interest,[p] and can empower him to alienate the minor's interest if it thinks it beneficial to do so.[q] In the recent case of *Dattatraya, In re*,[r] it was held by the Bombay High Court that though the High Court has inherent jurisdiction to appoint a father as the guardian of the minor's property including his interest in the joint family estate, it would not entertain an application from the guardian for permission to alienate the property absolving the alienee of the obligation to make necessary enquiries as to the real existence of the necessity thus depriving the minor of his right to challenge the alienation on coming of age.[s] But the true effect of the sanction of the Court for the alienation of the minor's property has been correctly indi-

(k) *Jagannadha* v. *Rameswamma*, 44 M 189–1921 M 132 13 L.W. 91–40 M.L.J 46.

(l) *Venkayya* v. *Venkata*, 21 M. 401–8 M.L.J. 112.

(m) *Kajikar* v. *Maru*, 32 M 139–1 I.C 999; *Garibullah* v. *Khalak Singh*, 25 A. 407–30 I.A 165 5 Bom L.R 478–7 C.W.N. 681; *Hiran Devi* v. *Chanan*, 1937 Lah. 918.

(n) *Ashrafi* v. *Jai Narain*, 6 I.C 862.

(o) *Gangaprasad* v. *Hara*, 15 C.W.N. 558 –7 I.C. 234.

(p) *Bibou Kumar Singh, In re*, 59 C. 570 1932 C 502; *Govind Prasad, in re*, 50 A 709. 1928 A 709.

(q) *In re. Hari Narain Das*, 50 C 141–1923 C 109; *In re. Manilal Hurgovan*, 25 B 353 3 Bom L.R. 411.

(r) 56 B 519 1932 B 537–34 Bom. L.R. 1156.

(s) See also *Venkatasami* v. *Viranna* 43 M 429 1922 M. 135 15 L.W. 373–42 M.L.J. 333 1922 M.W.N. 357; *Gangapershad* v. *Maharani Bibi*, 12 I.A. 47–11 C. 379 (P.C.).

cated in the following passage in the judgment in *Venkatasami* v. *Viranna*.(t)

"On the question of law argued by the learned counsel for the appellants I wish to add a few words I think that the true rule as to the effect of the sanction of the District Court authorizing an alienation by the guardian of the minors is stated in *Sikher Chand* v. *Dulputty Singh*.(u)

At page 370, PRINSEP J, says:

"The fact that the District Judge on the application and representation of a guardian under section 18, Act XL of 1858, may have sanctioned an alienation, cannot in my opinion, affect the present cases, except in so far as it may rightly be considered as a general rule to throw the onus on the plaintiff to show that the alienations were improperly made contrary to the usual rule requiring the purchaser to establish the validity of the alienations or that he acted with due care and caution after making such inquiry as an honest and prudent man would make."

At page 381, GARTH, C.J., says:

"If the Court upon the materials and information brought before it by the guardian makes an order for sale I think that a purchaser who buys in good faith under that order acquires a good title to the property sold, unless the minor or those claiming under him can show at some future date that the sale was fraudulent and improper."

Again at page 388, GARTH, C.J. adds:

"But then I also consider that as the sales took place under the order of the Civil Court, the onus lies on the plaintiff to make out a *prima facie* case, such as she has alleged in her plaint, of fraud or illegality, and to show that the debt or sum of money which formed the consideration for the sale in each case was one for which the minor was not responsible."

These observations are quoted with approval and followed in *Jugul Kishori Chowdhurani* v. *Ananda Lal Chowdhuri*.(v)

It is contended before us that *Akil Chandra Saha* v. *Girish Chandra Saha*,(w) lays down a different rule, namely, that it is necessary to bring fraud home to the purchaser in order to impeach the transaction. I do not understand *Akil Chandra Saha* v. *Girish Chandra Saha*(w) as laying down a general rule that fraud should be made out. It may be observed that *Akil Chandra Saha* v. *Girish Chandra Saha*,(w) and *Gangapershad Sahu* v. *Maharani Bibi*(x) relate to sanction of the Court for the raising of loans by mortgage, whereas the present case and *Sikhar Chand* v. *Dulputty Singh*,(y) relate to sales. To give effect to the policy of the legislature in section 31 of the Guardians and Wards Act, I think it is enough to hold as in *Sikher Chand* v. *Dulputty Singh*,(y) that the burden of proof is shifted to the plaintiff, and that it is not necessary to say that fraud has to be made out on the part of the purchaser to impeach the transaction." 45 M. 429 at 432—434.

(t) 45 M. 429=1922 M. 135=15 L.W. 373 =42 M.L.J. 333=1922 M.W.N. 357; *Ramden* v. *Sheonandan*, 14 Pat. 410=16 Pat. L.T. 135=1935 Pat. 225; *Benares Bank* v. *Dip Chand*, 1936 A.L.J. 155=1936 A. 172; *Brij Raj* v. *Alliance Bank*, 17 Lah. 688=1936 Lah. 946; *Balaji* v. *Sadashiv*, 38 Bom. L.R. 796=1936 Bom. 389.

(u) 5 C. 363.

(v) 22 C. 543, 548.

(w) 21 C.W.N. 864=41 I.C. 302.

(x) 11 Cal. 379=12 I.A. 47 (P.C.).

(y) 5 C. 363.

The appointment of a guardian by Court puts an end to the guardianship of any other, even though he be the natural guardian[z] and if the natural guardian himself has been appointed guardian under the Act, his powers as natural guardian are cut down to those under the Act.

196. Power of Court to make order as to guardianship.—Where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such guardian, the Court may make an order accordingly (see S. 7 of Act VIII of 1890). But the Court has no power to appoint or declare a guardian of the person of a minor who is a married female or a minor whose father is alive, and the husband or the father is not in the opinion of the Court unfit to be the guardian of the minor's person (see S. 19 of Act VIII of 1890). Besides, a guardian cannot be appointed for a joint Hindu family when there is an adult member. So on the attainment of adult status by one of the minors in joint family for whom a guardian has been appointed, *ipso facto* the Court guardianship terminates.[a]

197. Matters to be considered by the Court in appointing guardian.—In appointing or declaring the guardian of a minor the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the Court may consider that preference, but it cannot appoint or declare any person to be a guardian against his (the proposed guardian's) will (see S. 17 of Act VIII of 1890). See also S. 191 *ante*.

198. Fiduciary relation of guardian to ward.—A guardian stands in a fiduciary relation to his ward, and save as provided by the will or other instrument if any, by which he was appointed or by the Guardians and Wards Act, he must not make any profit out of his office. This fiduciary relation extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the

(z) *Krishnamurthi* v. *Parvathi*, 6 L.W. 760=42 I.C. 505; *Arumugam* v. *Vellaichami*, 37 M. 38=21 M.L.J. 1077=(1911) 2 M.W. N. 461=12 I.C. 568; *Ramchander* v. *Chheda Lal*, 2 A.L.J. 460.

(a) *Jagannath* v. *Chunni Lal*, 143 I.C. 706=1933 A. 180 1932 A.L.J. 1110. See also S. 198, *Ramachandran* v *Balasubramania*, 47 L.W. 268=(1938), 1 M.L.J. 285=1938 M.W.N. 188.

ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent (S. 20 of Act VIII of 1890).

199. Capacity of minors to act as guardians.—A minor is incompetent to act as guardian of any minor except his own wife or children, or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family (S. 21 of the Act VIII of 1890).

200. Guardian of the person.—A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires. (S. 24 of Act VIII of 1890).

201. Guardian of property.—A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property. Where a person other than a Collector or than a guardian appointed by will or other instrument has been appointed or declared by the Court to be the guardian of the property of the ward, he should not without the previous permission of the Court, (i) mortgage or charge or transfer by sale, gift, exchange or otherwise any part of the immoveable property of his ward, or (ii) lease any part of that property for a term exceeding five years or for any term exceeding more than one year beyond the date on which the ward will cease to be a minor. (Ss. 27 and 29 of Act VIII of 1890). Permission to the guardian to do any of these acts should not be granted by the Court except in case of necessity or for an evident advantage to the ward (see S. 31 of Act VIII of 1890). A transfer by the guardian without such permission is voidable at the instance of any other person affected thereby (see S. 30 of Act VIII of 1890).

202. De facto guardian.—A *de facto* guardian is one who is not a legal guardian in the sense that he is either a natural guardian or a testamentary guardian or a Court guardian, but who, being interested in the minor, though a stranger, takes charge of the management of the minor's property; he has all the powers of a natural guardian in the matter of alienating the minor's property. A fugitive or an isolated act of a person with regard to a minor's property would not make him a *de facto* guardian of the minor, nor would staying with a minor for a time make him a *de facto* guardian. In order to enable one to become a *de facto* guardian, there must be a continuous course of conduct as guardian of a minor in regard to his property; the length of the period required to consti-

tute one a *de facto* guardian would depend upon the circumstances of each case.[b] The first act of intermeddling with the estate of a minor would not be the act of a *de facto* guardian, if he had not become one before that act, nor would subsequent management of the estate of the minor by such person make the first act which is one of alienation of the minor's property, the act of a *de facto* guardian. The powers of alienation of a *de facto* guardian under the Hindu Law are the same as those of a lawful guardian.[c]

The right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the *de facto* with the *de jure* title.[d] A *de facto* guardian can validly sell the minor's property to a third party for legal necessity[e] or benefit[f] and recoup himself for the expenses incurred by him on behalf of the minor by alienating the said property.[g]

But a *de facto* guardian cannot extend the period of limitation by payment or acknowledgment.[h] So also an unauthorised or improper alienation of a minor's property by a *de facto* guardian is absolutely void and does not require to be set aside.[i] The decisions of the Madras and Bombay High Courts[j] that a sale by a step-mother as the *de facto* guardian is void even if it be for necessity are not, it is submitted, correct.

"Coming to decided cases, it was held in *Mohamud Mondul* v *Nafur Mondul*[k] on the authority of the Privy Council Case in *Hunoomanpersaud Panday*

(b) *Alagumperumal* v. *Vinayagatham-mal*, 29 L.W. 6 -1929 M 110 55 M L J. 861; *Harilal* v. *Gurdhan*, 51 B. 1040- 1927 L. 611 - 29 Bom. L R 1414; *Hanumnayamma* v *Lakshmidevamma*, 1938 M W N 942

(c) *Alagumperumal* v. *Vinayagathammal*, 29 L.W. 6 -1929 M 110-55 M.L.J. 861. *Thayammal* v. *Kuppanna*, 38 M 1125 -27 M.L.J. 285—26 I.C. 179, *Adhar Chandra* v. *Kirtibash*, 12 C.L.J. 586 .6 I.C. 638

(d) *Hunoomanpersaud* v. *Mt. Baboozee*, 6 M.I A. 393, *Ramchander* v. *Brojonath*, 4 C. 929 (F.B.), *Thayammal* v. *Kuppanna*, 38 M. 1125-27 M.L.J. 285 .26 I.C 179; *Seetharamanna* v *Appiah*, 49 M. 768—1926 M.W.N. 238—50 M L J. 689—1926 M. 457 23 L.W. 285; *Nathuram* v. *Chhagan*, 14 B. 562; *Kundan Lal* v. *Beni Pershad*, 13 L. 399—32 P L.R. 861 1932 L. 293; *Mohamud* v. *Nafur*, 26 C. 820—3 C.W.N. 770; *Arunachela* v. *Chidambara*, 13 M.L.J. 223; *Kaliappa* v. *Deivasigamani*. 1915 M.W.N. 795—18 I.C. 27.

(e) *Tulsidas* v. *Raisingji*, 57 B. 40—1933 B. 15-34 Bom. L.R. 1483 (F.B.); *Purushottama* v. *Brundavana*, 33 M.L.W. 664=1931 M.W.N. 417=1931 M. 597; *Sheo Govind* v. *Ram*, 8 Luck. 182=1933 Oudh. 31

(f) *Seetharamanna* v *Appiah*, 49 M. 768 -1926 M W N 238 50 M.I.J. 689—1926 M. 457—23 L.W. 285; *Adhar* v. *Kirtibash*, 12 C.L.J. 586—6 I C 638; *Kundan Lal* v. *Beni Pershad*, 13 Lah. 399—32 P L R. 861 -1932 L 293, *Nokhe* v. *Rajeshwari*, 17 Pat. L. T 677 165 I.C. 213.

(g) *Pare Lal* v. *Lajjia Ram*, 17 L. 78—37 P L.R. 246 -1935 L. 437.

(h) *Ramasami* v. *Kasivotha*, 108 I.C 529 1928 M. 526 (2) -1927 M.W.N. 358; *Gomathi* v. *Ava*, 56 M. 964—1933 M.W.N. 765—38 L.W. 321—65 M L.J. 365—1933 M. 686; *Nema Nagayya* v. *Narasayya*, 48 L.W. 268, *Bareswar* v. *Ambika* 45 C. 630. See contra in *Tirapayya* v. *Mullidi*, 24 M.L.J. 428- 19 I.C. 362 and *Gita Prasad* v. *Ragho*, 40 I C. 809.

(i) *Alagumperumal* v. *Vinayagathammal*, 29 L.W. 6—55 M.L.J. 861—1929 M. 110; See contra in *Seetharamanna* v. *Appiah*, 49 M. 768 -1926 M. 457—23 L.W. 285—1926 M.W.N. 238—50 M.L.J. 689.

(j) *Narayanan* v. *Ravunni*, 20 L.W. 876 —34 I.C. 973- 1925 M. 260—47 M.L.J. 686 —1924 M.W.N. 792 and *Limbaji* v. *Ravji*, 49 B. 576—1925 B. 499—27 Bom. L.R. 621.

(k) 26 C 820=3 C.W.N. 770.

v. *Mussumut Babooee Munraj Koonweree*(l) that a sale by a *de facto* guardian (it was the grandmother), in case of necessity, was valid. And in *Arunachela Reddi* v. *Chidambara Reddi*,(m) WHITE, C.J., and BENSON, J., held that "it is well settled that an alienation may be validly made by a *de facto* guardian (assuming of course necessity)."

In *Ganjayya* v. *Ramaswami*(n) it was held that the natural mother was a "lawful guardian" for the purpose of section 21 of the Limitation Act, even though there was a testamentary guardian named in the will of the adoptive father who was unwilling to act. In *Nathooram* v. *Shoma Chhagan*(o) a debt contracted by the father's cousin for necessary purposes was held to bind the minor. Although it is no authority in the sense of its being a judicial decision, I may state in *Adhar Chandra Dutta* v. *Kirtibash Bairagee*(p) such an eminent lawyer as Dr. Rash Behari Ghosh conceded that the powers of a *de facto* guardian (of a Hindu) were the same as those of a *de jure* guardian." 49 M. 768 at 778.

202-A. Setting aside guardian's sale and recovery of mesne profits from vendee—Where a sale by a guardian is set aside in a suit therefor on behalf of a minor, on the ground of absence of necessity, the latter is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such an order as is just and equitable, and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed, and the defendant purchaser gets back his purchase money with interest, and in a proper case other moneys to which he may be entitled. But if the plaintiff does not sue to set aside the conveyance as from its date and to restore the parties to their original position, but sues merely for recovery of possession, he is only entitled to mesne profits as from the date of the suit.(q)

203. Limitation for setting aside a transfer by guardian.—Under Art. 44 of the Limitation Act, the period of Limitation for a suit by a ward who has attained majority to set aside a transfer of property by his guardian is three years from the date when the ward attained majority. This article applies not only to setting aside the transfer of property made by a guardian appointed by a Court or by will but also to suits for setting aside a transfer made by a natural guardian. (r) But the article has no application where the transfer is made by a wholly unauthorised person in which case

(l) 6 M.I.A. 393.
(m) 13 M.L.J. 223.
(n) 24 M.L.J. 428=1913 M.W.N. 364=19 I.C 362.
(o) 14 B. 562.
(p) 12 C.L.J. 586=6 I.C. 638.
(q) *Mallappa* v. *Anant*, 1936 B. 386=38 Bom. L.R. 941.
(r) *Ramaswami* v. *Govindammal*, 29 L. W. 169=56 M.L.J. 332=1929 M.W.N. 124=1929 M. 313; *Ankamma* v. *Kameswaramma*, 59 M. 549=43 L.W. 611=1936 M.W.N. 74=70 M.L.J. 352=1936 M. 346 affirming, 1934 M.W.N. 960=40 L.W. 760=68 M.L.J. 87=1935 M. 1; See also *Mahomed* v. *Zahoor*, 52 A. 979=1930 A.L.J. 1416=1930 A. 858.

the proper article applicable is Art. 144 of the Limitation Act. [s] Nor will it apply in the case of transfer by a manager of a joint family. [t] If the ward dies during his minority, Art. 44 will not apply to a suit by his legal representative for recovering the property alienated by the guardian, but if the ward dies after attaining majority, the article will be applicable. [u] It has, however, been held that this article does not apply to cases of alienations by a *de facto* guardian,[v] but the soundness of this position is very doubtful in view of the long catena of judicial decisions to the effect that the powers of alienation of a *de facto* guardian are the same as those of a *de jure* guardian, implying that a *de facto* guardian's alienation is only voidable and not void. [w]

204. Guardian's remedy to recover custody of the ward.— When a guardian is deprived of the custody of his ward he may apply under S. 25 of the Guardians and Wards Act for such custody. On the question whether a suit is maintainable in respect of the same relief, there is a difference of opinion among the High Courts, the Rangoon, Allahabad and Madras High Courts answering the question in the negative and the Bombay High Court answering it in the affirmative. [x] It is submitted that the view taken by the Rangoon, Madras and Allahabad High Courts is the correct one to take, the Guardians and Wards Act being a complete code in respect of the relationship of guardian and ward. Besides, the observations of the Privy Council in *Besant's case* [y] that the suit is not the proper form of procedure leaves little room for doubt on the matter. In addition to this, the guardian can apply for the minor's custody by a writ of *habeas corpus* under S. 491 of the Code of Criminal Procedure even though there is a less ex-

(s) *Dip Chand* v. *Munni Lal*, 1929 A L J 1248=1929 A 879; *Uma Charan* v. *Giaram*, 83 I C 1040=1924 C 1008; *Mata Din* v. *Ahmad*, 34 A 213=39 I A 49=23 M L J 6=14 Bom. L R 192=9 A L J 215=13 I C 976=16 C W N 338=1912 M W N 183 (P. C.)

(t) *Veerasami* v *Sivagurunath*, 21 I W 111=1925 M 793; *Jawahir Singh* v *Udai Parkash*, 48 A 152=53 I A 36=50 M L J 344=24 A L J 97=1926 M W N 197=28 Bom. L R 851=30 C W N 698=1926 P C 16; *Dnyanu* v. *Vishnu*, 87 I C 721=1925 B 372=27 Bom L R 495; *Sundar* v. *Shiaman*, 68 I C 731=1922 L 386; *Hanmantappa*, v. *Dundappa*, 36 Bom. L R 474=1934 B 234.

(u) *Ramaswami* v *Govindammal*, 29 L W 169=1929 M 313=56 M L J 332=1929 M W N 124.

(v) *Mata Din* v. *Ahmad*, 34 A 213=39 I A 49=23 M L J 6=14 Bom. L R 192=9 A L J 215=13 I C 976=16 C W N 338=1912 M W N 183 (P C.); *Ramasami Pillai* v. *Kashnath*, 108 I C 529 at 537=1928 M 226 (2)=1927 M W N 356; *Belappa* v. *Channbasappa*, 33 I C 44; *Thayammal* v. *Kuppanna*, 38 M 1125=27 M L J 285=26 I C 179; *Purushottama* v *Brundavana*, 133 I C 773=1931 M 597=1931 M W N 417=33 L W 664.

(w) See S. 202

(x) *Shahdeo* v. *Maharaj*, 9 R 569=1932 R 4; *Utma Kuar* v. *Bhagwanta Kuar*, 37 A 515=29 I C 418=13 A L J 742; *Sathi* v. *Ramandi*, 42 M 647=9 L W 600=53 I C 399=37 M L J 93=1919 M W N 487 (F B); *Achutlal* v *Chimanlal*, 40 B 600=37 I C 215=18 Bom. L R 582; But see *Noshirwan* v. *Sharoshbanu*, 58 B 724=36 Bom. L R 668=1934 B 311 which holds that a suit is not the proper remedy.

(y) 38 M. 807=41 I A. 314=1 L W. 520 =1914 P C. 41=12 A L J. 1155=16 Bom. L R. 625=18 C W N 1089=27 M L J. 30=1914 M W N. 585.

pensive and less threatening remedy available under the Guardians and Wards Act for the recovery of such custody. (z) But whatever the remedy that is availed of, in considering the question whether the minor's custody should be restored to the applicant, the paramount consideration which is to weigh with the Court is the welfare of the minor. Even the father's right to custody can be defeated if the Court thinks it better in the minor's interests not to disturb the existing custody. In determining the minor's welfare, the question whether the application is *bona fide* or not, as well as the question whether the applicant is a fit person for the minor to be returned to, should also be duly considered. (a)

(z) *Subbuswami* v. *Kamakshi*, 53 M. 72 —30 L.W. 685=1929 M. 834=1929 M.W.N. 689—57 M.L.J. 642; But see *Haidari* v. *Jawad*, 1934 A.L.J. 946=1935 A. 55.

(a) *Chinna Sambayya* v. *Rudrappa*, 68 M.L.J. 662=1935 M.W.N. 482—41 L.W. 789 ::1935 M. 568; *Ponniah* v. *Suppiah*, 68 M. L.J. 213=41 L.W. 400=1935 M.W.N. 214=1935 M. 363.

CHAPTER VII

MAINTENANCE

205. Introduction: The Law of maintenance is the outcome of the theory of an undivided family and is not based on any contract Originally nothing but maintenance could be claimed by any member of a Hindu family With the development in the notions of separate property and partition, and the recognition of an inferior position accorded to a person by reason of sex, or deformity, the law of maintenance came to be confined in its application to only certain classes of persons who could be divided into two groups: (1) those whose claim to maintenance arises by virtue solely of the relationship with, and irrespective of the possession of property by, the person against whom the claim is to be exercised, and (2) those whose claim is dependent upon the possession of property by such person [a] In *Rama Rao v. Rajah of Pittapur*, [b] their Lordships of the Judicial Committee, in noticing these two classes of maintenance claimants, observe as follows:—

"It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members down to three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property; that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of coparcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work:—"Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income." It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the mad man, etc. Such persons are debarred from the rights of coparcenary, but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within

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(a) *Savitribai* v. *Laxmibai*, 2 B. 573. 23 C W N. 173—1918 M.W.N. 922—1918 (b) 41 M. 778=45 I A. 148—35 M.L.J. P.C. 81. 362=16 A.L.J. 833—20 Bom. L.R. 1056=

the allowed degrees and not themselves stigmatised with the personal defects, get by their birth the full status of coparcenary.

There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship, but is limited to the wife, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara law." 41 Mad. 778 at 784-785 (P.C.).

Maintenance includes not only food, clothes and residence[c] but also the things necessary for the comfort and status in which the person entitled to be maintained can reasonably be expected to live.[d]

206. Personal liability.—"*Where may be no property but what has been self-acquired, the only persons whose maintenance out of such property is imperative are aged parents, wife and minor children*"—Mitakshara.

"*The aged parents, a virtuous wife and an infant child must be maintained even by doing a hundred misdeeds*"—Manu cited in the Mitakshara.

Every Hindu, irrespective of his possessing any property, is personally bound to maintain (1) his aged parents, [e] (2) his wife, [f] (3) his minor sons, whether legitimate or illegitimate, [g] and (4) unmarried daughters. [h] The right of this class to maintenance lies in personal relationship, and the corresponding obligation, which is independent of there being ancestral or joint family property, is one attaching to the individual. This right is limited to the wife, the parent and the infant child and does not extend to a grandson [i] or any other relations. [j]

207. Aged Parents.—A son is personally bound to maintain his aged parents independent of his having ancestral assets in his hands, [k] but he is under no such obligation in respect of his step-

(c) *Charandas* v. *Nagubai*, 1929 B. 452 31 Bom. L.R. 1128.

(d) *Srinivasa* v. *Lakshmi*, 28 L.W. 328 1928 M. 216 54 M.L.J. 530.

(e) *Savitribai* v. *Luximibai*, 2 B. 573; *Subbarayana* v. *Subbakka*, 8 M. 236.

(f) *Narbadabai* v. *Mahadeo*, 5 B. 99

(g) *Chanvirgavda* v. *District Magistrate*; 51 B. 120=1927 B. 91=29 Bom. L.R. 52; *Chuoturya* v. *Purhulad*, 7 M.I.A. 18; *Hargobind* v. *Dharam*, 6 A. 329.

(h) See S. 213; *Narinjan* v. *Gurmukh*, 38 P.L.R. 764.

(i) *Rama Rao* v. *Rajah of Pittapur*, 45 I.A 148=41 M 778 at 785...35 M.L.J. 392 1918 P.C. 81 20 Bom. L.R. 1056=1918 M W.N. 922=16 A.L.J. 833=23 C.WN. 173.

(j) *Commissioner of Income-tax, Behar and Orisse* v. *Maharani Lakshmibai*, 14 P. 313=1935 P. 8; *Smriti Chandrika*, xi-1-34; *Kamani Dassee* v. *Chandra*, 17 C. 373; *Ammakannu* v. *Appu*, 11 M. 191.

(k) *Savitribai* v. *Luximibai*, 2 B. 573 at 592; *Subbarayana* v *Subbakka*, 8 M. 236; *Veeranna* v. *Subbamma*, 1927 M. 85=(1926) M.W.N. 921.

mother [l] or grandparent unless he has in his hands ancestral property.[m]

208. Wife.—The obligation of a husband to maintain his wife is one arising out of the status of marriage. It is a liability created by the Hindu Law in respect of the jural relation of husband and wife and is not an obligation arising out of a contract. [n] A wife is entitled to be maintained by her husband irrespective of his possession of any property [o] and her right to maintenance is not lost, though curtailed to the barest necessaries, by her unchastity if she continues to live with the husband. [p] If the wife has to live away from her husband for a just cause, as for instance, husband's virulent leprosy,[q] his habitual cruelty or neglect endangering her health or personal safety, [r] or his keeping a concubine in the house, [s] or his desertion or refusal to maintain her, [t] then she will be entitled even to separate maintenance. In short it may be said that the grounds which would be available to a wife to defeat a suit for restitution of conjugal rights would also entitle her to live apart from her husband and claim separate maintenance. [u] Where the case is not one of the wife leaving the husband and living away from him for no justifiable reasons, but one where the husband, for reasons of his own, chooses to put her away from him, and in view of the unreasonable attitude of her husband which has nothing to do with her character, she has no choice but to live away from him, the case is to be treated as one of abandonment by the husband and she should be awarded separate maintenance. If during the pendency of her suit for separate maintenance, the husband, who in the meantime has married other wives, makes an offer to take her back, the offer has got to be carefully scrutinised by the Court with a view to determine whether it is *bona fide*, and if the Court comes to the conclusion

(l) *Bai Daya* v. *Natha*, 9 B. 279; *Kedarnath* v. *Hemangini*, 13 C. 336.

(m) *Gharaaja* v. *Mt. Tapi*, 29 N L R 103=1933 N 57.

(n) *Lakshmi Devi* v. *Nagenna*, 1935 M. 757 21 L.W. 461; *Unnamalai* v. *Wilson*, 1927 M. 1187; *Bai Appibai* v. *Khimji*, 1936 B. 138=38 Bom. L.R 77=60 Bom 455.

(o) *Shinappaya* v. *Rajamma*, 45 M. 812 = 43 M L.J. 174=1922 M.W.N. 459=1922 M. 399=16 L.W. 139; *Narbadabai* v. *Mahadeo*, 5 B. 99; *Jayanti* v. *Alamelu*, 27 M. 45 =12 M.L.J. 270; *Surampalli* v. *Surampalli*, 31 M. 338=18 M L.J. 254; *Sher Singh* v. *Sham*, 108 I.C. 175=1928 L. 502; *Durgi* v. *Secretary of State*, 10 L. 263=1929 L. 528; *Bai Appibai* v. *Khimji*, 1936 B. 138=38 Bom. L R. 77=60 Bom. 455.

(p) *Parami* v. *Mahadevi*, 34 B. 278=5 I.C. 960=12 Bom. L.R. 196.

(q) *Shinappaya* v. *Rajamma*, 45 M. 812 =1922 M. 399=16 L.W. 139=43 M L.J. 174 = 1922 M.W.N. 459.

(r) *Malangini* v. *Jogendra*, 19 C. 84; *Sidlingapa* v. *Sidava*, 2 B. 634; *Sitabai* v. *Ramchandra*, 12 Bom. L.R. 373=6 I.C. 525.

(s) *Lalla* v. *Doulut*, 6 Beng L.R. 85=14 W.R. 151; *Dular Koeri* v. *Dwarknath*, 32 C. 234=9 C.W.N. 270.

(t) *Bai Appibai* v. *Khimji*, 1936 B. 138 =38 Bom. L.R. 77=60 B. 455; *Uda Singh* v. *Mt. Daulat*, 16 L 892=37 P.L.R. 864 =1935 L. 346.

(u) *Shinappaya* v. *Rajamma*, 45 M. 812 43 M L J. 174=1922 M. 399 =1922 M.W.N. 459=16 M.L.W. 139; *Venkatapathi* v. *Puttamma*, 44 L.W. 590=1936 M. 609= 71 M.L.J. 499=1936 M.W.N. 793; See S. 62.

that the offer is not a *bona fide* one, but is made only with a view to defeat the plaintiff's claim for maintenance, the offer should not be taken seriously so as to deny separate maintenance to the wife.(v)

The claim to maintenance is a legal right and a demand and refusal are not necessary for its creation. The only legal answer to such a claim is either abandonment or waiver. The discretion of the Court is generally exercised in adjusting the rate at which the arrears are to be awarded or by limiting the period by reference to the doctrine of implied abandonment. In the case of a wife living with her father who is in affluent circumstances without making a claim for maintenance for a long time, the Court may take the date of demand as the proper date from which arrears are to be awarded.(w)

Maintenance of an abandoned wife can be made a charge upon the husband's share and there is no distinction in this respect between the position of a widow and that of an abandoned wife.(x) In determining the amount of maintenance, the Court usually takes into consideration, the reasonable wants of the woman, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband, and the fact that she has property of his own, though a relevant consideration in determining the quantum of maintenance, does not preclude her from claiming her right to be maintained.(y) The wife may be given even a third of her husband's property for her separate maintenance in case her husband has forsaken her without any justifying cause.(z) But where there is no evidence that the wife has been forced to live away from her husband for any of the above or similar reasons, she is not entitled to claim separate maintenance.(a) Thus if she deserts the husband in order to live in adultery,(b) or on the ground of his remarriage,(c) or his trivial quarrels,(d) or his unkindness not amounting to cruelty,(e) she will not be entitled to claim separate maintenance.(f) A

(v) *Venkatapathi* v. *Puttamma*, 71 M.L.J. 499=1936 M. 609=44 L.W. 590=1936 M.W.N. 793.

(w) *Sobhanadramma* v. *Narasimhaswami*, 57 M. 1003=67 M.L.J. 712=39 M.L.W. 667=1934 M.W.N. 273=1934 M. 401.

(x) *Gopala* v. *Parvathi*, 1929 M 47.

(y) *Bai Appibai* v. *Khimji*, 1936 B 138=38 Bom. L.R. 77=60 B. 455; *Baisni* v. *Rup*, 12 A. 558; *Devi Pershad* v. *Gunwanti*, 22 C. 410; *Mahesh* v. *Dirgpal*, 21 A. 232.

(z) *Ramabai* v. *Trimbak*, 9 Bom. H.C. 283.

(a) *Saraswati* v. *Sheoratan*, 12 P. 869 =1934 P. 99=15 P.L.T. 372; *Sidlingapa* v. *Sidava*, 2 B. 634.

(b) *Babu Ram* v. *Mt. Kokla*, 46 A. 210 =22 A.L.J. 68=1924 A. 391; *Ilata* v. *Narayana*, 1 M.H.C.R. 372.

(c) *Virasvami* v. *Appaswami*, 1 M.H.C.R. 375; *Ude Singh* v. *Mt. Daulat*, 16 L. 892 37 P.L.R. 864=1935 L. 386.

(d) *Rajlukhy* v. *Bhootnath*, 4 C.W.N. 488.

(e) *Sitanath* v. *Haimabutty*. 24 W.R. 377.

(f) *Surampalli* v. *Surampalli*, 31 M. 338=18 M.L.J. 254; *Seenayya* v. *Mangomma*, 1927 M. 1159; *Sobhanadramma* v. *Narasimhaswami*, 57 M. 1003=1934 M. 401=67 M.L.J. 712=39 L.W. 667=1934 M.W.N. 273.

wife who is voluntarily living apart from her husband for no improper motive, may at any time return to her husband and claim to be maintained by him, (f) but she cannot be held to be entitled to separate maintenance when the husband is willing to keep her in his house and she refuses to accept his offer without sufficient justification. (g) But where the wife offers to live with the husband, but the latter refuses to accept her in view of his having taken another wife, she is entitled to demand separate maintenance from the husband sufficient to enable her to live as far as may be consistently with the position of a wife in something like the same degree of comfort and with the same reasonable luxury of life as she should have in her husband's household. (h) Where the wife has left her husband to live in adultery and continues to lead a vicious life, her claim to maintenance becomes forfeited, (i) though secured by a decree, (j) but if she repents, returns to purity and performs expiatory rites, she becomes entitled to all the conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation she can claim no more than bare maintenance and residence. (k) A wife's right to maintenance is not lost by her being excommunicated, (l) or by the husband's conversion to another religion, (m) and even when the marriage is dissolved under the Native Converts Marriage Dissolution Act of 1866, the husband may be ordered to pay maintenance to the wife for the rest of her life (S. 28 of Act XXI of 1866) provided she does not marry again. When a wife is improperly denied proper maintenance or residence in her husband's house she is entitled to pledge her husband's credit and incur debts for her necessaries as a wife in England is entitled to do. (n)

209. Concubine.—A concubine is to be distinguished from a harlot. The latter solicits to immorality, the former is reserved by one man. A concubine is affected to one man only, although in an irregular union, and occupies a recognised status below that of a wife, but above that of a harlot. (o) In Hindu Law a concubine has no right to be maintained by her paramour, however long might have been the concubinage, (p) and even though she has given

(f) See p. 204, foot note (f).

(g) *Sher Singh* v. *Sham*, 108 I.C. 175—1928 L. 502.

(h) *Sobhanadramma* v. *Narasimhaswami*, 39 L.W. 667=57 M. 1003=1934 M. 401—67 M.L.J. 712=1934 M.W.N. 273.

(i) *Ilata* v. *Narayana*, 1 M.H.C.R. 372; *Debi Saran* v. *Daulata*, 39 A. 234=39 I.C. 10=15 A.L.J. 169.

(j) *Kandasami* v. *Muruyammal*, 19 M. 6; *Nubo Gopal* v. *Amrit*, 24 W.R. 428.

(k) *Parami* v. *Mahadevi*, 34 B. 278=5 I.C. 960=12 Bom. L.R. 196; *Sita* v. *Gopal*, 1928 P. 375; *Mt. Shibbi* v. *Jodh*, 11 L. 759—1933 L. 747; *Sathyabhama* v. *Kesava Charya*, 39 M. 658; *Roma Nath* v. *Rajonimoni*, 17 C 674.

(l) *Queen* v *Marimuttu*, 4 M. 243.

(m) *Mansha* v. *Jiwan*, 6 A. 617.

(n) *Virasvami* v *Appasvami*, 1 M.H.C.R. 375

(o) *Bai Nagubai* v. *Bai Monghibai*, 50 B. 604=24 A.L.J. 729=28 Bom. L.R. 1147—51 M.L.J. 377—1926 M.W.N. 514=31 C.W.N. 128·24 L.W. 309=1926 P.C. 73.

(p) *Ramanarasu* v *Buchamma*, 23 M. 282=10 M.L.J. 62; *Ningareddi* v. *Lakshmawa*, 26 B. 163=3 Bom. L.R. 647.

birth to a son by him, [q] because at any time she may leave him and betake herself to another. But after the paramour's death, the concubine, if she is a Hindu, [r] acquires a right to be maintained out of his estate, provided she had borne for him a child, [s] had been exclusively kept by him till his death, and had throughout remained faithful to him, [t] though she did not reside in his family house, [t] and the relationship was not open and avowed. [u] The incident of the concubine's residence in the family house was not the essential reason for the right to have maintenance from the estate of the deceased paramour, but rather the means of ensuring the qualified chastity of the mistress. Neither the fact that the concubine was in the keeping of another previous to her attaching herself to the paramour against whose estate the claim to maintenance is made, nor the fact that the connection with the deceased was adulterous, would defeat her claim. [v] But if the husband of the concubine is alive, the paramour's death would not give her the right to claim maintenance out of the paramour's estate, because she is not an *Avaruddha Stri* within the meaning of the texts. [w] No claim to maintenance can be made by a concubine who had been discarded by her paramour [x] or who had taken to another after his death. [t]

210. Legitimate Sons.—A father is under a personal obligation to maintain his minor sons, [y] because during the period of minority they would not be able to help themselves, but he is under no such obligation after they attain majority. [z] the reason being that then they are presumed to be able to support themselves. The rule that there is no personal obligation on the part of the father to maintain his adult son applies even though the son is

(q) *Sikki* v *Venkatasam*, 8 M H C R 144.

(r) *Mt. Haidri* v *Narindra*, 1 Luck. 184—1926 Oudh 294.

(s) *Rama Raja* v. *Papamnal*, 48 M 805=1925 M. 1230—22 L.W. 710=49 M L.J. 518; *Khemkor* v. *Umaishankar*, 10 Bom. H C.R. 381.

(t) *Bai Nagubai* v *Bai Monghibai*, 53 I.A 153—50 B. 604=24 A.L.J. 729—28 Bom L R. 1143=51 M.L.J. 577—1926 M.W.N. 514 -31 C.W.N. 128—24 L.W. 309 -1926 P.C. 73; *Dayavati* v. *Kesarbai*, 1934 B. 66 36 Bom. L.R. 61; *Yashvantrav* v *Kashibai*, 12 B. 26; *Anandilal* v. *Chandrabai*, 48 Bom. 203—1924 Bom. 311 —26 Bom. L.R. 63; *Rama Raja* v. *Papammal*, 48 M. 805—1925 M. 1230—23 L.W. 710—49 M.L.J 348; *Panchapagesa* v. *Kanaka*, 6 L.W. 408 =33 M.L.J. 455=42 I C. 344.

(u) *Dayavati* v. *Kesarbai*, 1934 B. 66 —36 Bom. L.R. 61.

(v) *Bai Nagubai* v. *Bai Monghibai*, 53 I A. 153—50 B 604—24 A.L.J. 729—28 Bom L.R. 1143 51 M.L.J. 577—1926 M. W.N 514 -31 C.W.N. 128—24 L.W. 309=1926 P.C. 73

(w) *Anandilal* v. *Chandrabai*, 48 B. 203 1924 B. 211—25 Bom. L.R. 1240.

(x) *Ramanarasu* v *Buchamma*, 23 M. 282-10 M.L.J 62; *Nungareddi* v. *Lakshmawa*, 26 B 163—3 Bom. L R 647.

(y) *Annmakannu* v. *Appu*, 11 M. 91; *Savitribai* v *Luvimibai* 2 B. 573; *Channvirgavda* v. *District Magistrate*, 51 B. 120 —1927 B. 91—29 Bom. L.R. 52; This obligation of the father does not include a duty to get his son married (see *Govindarajulu* v. *Devarobhotla*, 27 M. 206) though the son's marriage is one of the purposes justifying an alienation by the father of family property (*Sundrabai* v. *Shivnarayana*, 32 B. 81; *Kameswara* v. *Veeracharlu*, 34 M. 422).

(z) *Ammakannu* v. *Appu*, 11 M. 91.

unable to help himself by temporary illness or disorder,[a] but if the disability of the son to support himself is of a permanent nature it would be perfectly proper and in consonance with the genius of the Hindu Law to fix the father with the liability to maintain him on the footing that such a son, though an adult, is by reason of his disability, in no better position than a minor. Mere disobedience or refusal to live with his father does not work a forfeiture of the son's right to maintenance, though it may be a ground for reducing the maintenance amount.[b] The adult sons who have no right to be maintained either personally by his father or out of his separate property[c] are, if governed by the Mitakshara School, entitled to maintenance out of the property of the joint family of which they and their father are members[d] and in the property of which they acquire an interest by birth. The position will be different under the Dayabhaga, because there the sons do not acquire any interest in the ancestral property in the father's hands. In the case of a Mitakshara family property which is ancestral and impartible and governed by the law of primogeniture even an adult son is entitled to maintenance, even though for all practical purposes the property partakes of the nature of the absolute property of the holder[e] but if the impartible estate is the self-acquired property of the father and not an ancestral estate, his adult son has no right to claim maintenance against his father.[f]

211. Adopted Son.—A validly adopted son has the same rights to maintenance as an aurasa son, but, if the adoption is invalid, it leaves the adoptee without any right to maintenance against the adoptive father or his property the reason being that his connection in all respects with his original family is not broken by such invalid adoption. See also S. 167.

212. Illegitimate Sons.—An illegitimate son is entitled under the Hindu Law to be maintained by his putative father,[g] even though the son is born of an adulterous[h] or casual intercourse,[i] provided his mother is not a non-Hindu.[j] After the death of the putative father, the illegitimate son, when not entitled

(a) *Bhupati* v. *Basanta*, 1936 C. 556 = C. 1026 = 40 C.W.N. 1320; *Premchand Hooleshchand*, (1869) 12 W.R. 494.
(b) *Sardul Singh* v. *Partab Singh*, 1877 3 46.
(c) *Ammakannu* v. *Appu*, 11 M. 91.
(d) *Savitribai* v. *Luximibai*, 2 B. 573.
(e) *Ramchandra* v. *Sakharam*, 2 B. 3; *Yarlagadda* v. *Yarlagadda*, 27 I.A. 1=2 Bom L.R. 945—24 M. 147=10 M.L.J. 294=5 C.W.N. 74; *Himmat* v. *Ganpat*, 12 Bom. H.C.R. 94.
(f) *Subbayya* v. *Sivagnana*, 71 M.L.J. 568=44 L.W. 433=1936 M.W.N. 1034=1936 M 828.
(g) *Parichat* v. *Zalim*, 3 C. 214 = 159; *Kuppu* v. *Singaravelu*, 8 M. *Ghana* v. *Gereli*, 32 C. 479=2 I.C. (h) *Subramania* v *Valu*, 34 M M.L.J. 350 .5 I.C. 919; *Rahi* v *G* 1 B. 97; *Haroobind* v *Dharam*, 6 A (i) *Muthusamy* v. *Venkateswar* M.I.A. 203
(j) *Lingappa* v *Esudasan*, 27 M *Mt. Haidri* v *Narindra*, 1 Luck 184=1926 Oudh 294. *Addoylo* v. *Woojan*, 4 C.L.R. 154.

to inherit to him, is entitled to be maintained out of the separate property of his putative father, or, if he died joint, then out of the joint family property.[k] So long as the illegitimate child is properly maintained, maintenance granted for the child may be properly spent for the maintenance of the joint home of the child and its mother and no account shall be ordered in respect of the amount awarded.[l] It is wrong to say that the illegitimate son is only entitled to a compassionate maintenance: if he has been accustomed to a certain standard and mode of life, the Court should not be niggardly in determining the quantum of maintenance, subject of course to the condition that the amount awarded should not be hard on the family.[m] In fixing the amount of maintenance, the fact that the illegitimate son has a large family to support is an irrelevant consideration and cannot be relied upon to increase that amount.[n] This right, however, is purely personal and is neither devisable nor heritable.[o] Besides, this right, though it continues until the death of the illegitimate son under the Mitakshara[p] and the Mayukha,[q] terminates under the Dayabhaga school with the attainment of majority by the illegitimate son.[r] Even under the Mitakshara, the continuance of his right till his death is conditional upon his obedience to the head of the family, and the illegitimate son must, as a condition of receiving maintenance from the estate of his putative 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.[s]

213. Legitimate daughters.—A father is under a personal obligation to maintain his unmarried daughters[t] but not his married daughters and after his death the unmarried daughters are entitled to be maintained out of his estate.[u] Even after marriage, a daughter who is not able to get maintenance from the family into which she has been married on account of its poverty can claim to

(k) *Chuoturya* v. *Purhulad*, 7 M.I.A 18; *Vellaiyappa* v. *Natarajan*, 50 M. 340 - 1927 M. 386 25 L.W. 493—52 M.I.J. 229 affirmed in 55 M. 1—58 I.A. 402—34 L.W. 589—1931 M.W.N. 848—35 C.W.N. 1278—61 M.L.J. 522—1931 A.L.J. 1123—33 Bom. L.R. 1526—1931 P.C. 294.

(l) *Bomwetsch* v *Bomwetsch*, 35 C. 381.

(m) *Rathinasabapathy* v. *Gopala*, 1929 M. 545—29 L.W. 696—56 M.L.J. 673; but see *Gopalasami* v. *Arunachalam*, 27 M. 32.

(n) *Chamava* v. *Iraya*, 33 Bom L.R. 1082—1931 B. 492.

(o) *Roshan Singh* v. *Balwant*, 27 I.A. 51—22 A 191—2 Bom. L.R. 529—4 C.W.N. 353.

(p) *Vellaiyappa* v. *Natarajan*, 50 M. 340 - 1927 M 386—25 L.W. 493 52 M.L.J. 229; affirmed in 34 L.W. 589—58 I.A. 402 55 M. 1—1931 M.W.N. 848 35 C.W.N. 1278—61 M.L.J. 522 1931 A.L.J. 1123—1931 P.C. 294—33 Bom L.R 1526; *Hargobind* v *Dharam*, 6 A. 329.

(q) *Motichand* v *Chandrabai*, 1924 B. 421—26 Bom. L.R. 488.

(r) *Nilmoney* v. *Baneshur*, 4 C. 91

(s) *Hargobind* v. *Dharam*, 6 A. 329; Mitak. 1-11-12 See also S. 70

(t) *Narinjan* v. *Gurumukh*, 38 P.L.R. 764.

(u) *Tulsha* v. *Gopal*, 6 A. 632; *Bai Mangal* v. *Bai Rukmini*, 23 B. 291; *Inderun* v. *Ramaswamy*, 13 M.I.A. 141.

be maintained by the heir of her opulent father,[v] but not by his coparceners who have taken his joint interest by survivorship.[w]

214. Illegitimate daughters.—In the case of illegitimate daughters they are entitled to maintenance until their marriage, or in the case where girls earn for themselves by following any particular profession, until they are able to earn their living according to the rules of their caste.[x] But the duty to maintain an illegitimate daughter is purely personal to her putative father and hence her claim cannot after the death of the father be enforced against the joint family estate.[y]

215. Personal obligation to maintain other relations.—In law, a Hindu is under no personal obligation to maintain his grandparents, h grandchildren, h his step-mother,[z] his daughter-in-law[a] or sister-in-law, or even a brother or sister.

216. Liability of coparcenary property.—In an ordinary joint family governed by the Mitakshara, the right to maintenance of the junior members down to three generations from the head of the family out of the joint family property is an inherent quality of their right of coparcenary or common property, and this right to maintenance begins where coparcenary begins and ceases where the coparcenary ceases.[c] Hence the manager of a Mitakshara joint family in possession of joint family property is bound to maintain all its members both male and female, and the widows and children of deceased coparceners out of the income or corpus of the joint family property.[d] This obligation is always commensurate with the possession of family property. Thus though a grandfather is legally under no personal obligation to maintain his grandchildren, yet if he happens to be the manager of the joint family, he is bound

(v) *Gudimella* v *Bollozu*, 16 I.C. 139 –23 M.L. 223 1912 M.W.N. 861; *Mokkada* v *Nundo*, 28 C. 278 5 C.W.N. 297

(w) *Ram Sumran* v *Gobind*, 5 Pat. 646 (705); *Bai Mangal* v *Bai Rukhmini*, 23 B. 291

(x) *Nataraja* v. *Muthia Chetty*, 52 I. W. 650—1926 M. 261 -1926 M.W.N. 73; See contra in *Parvati* v *Ganapirao*, 18 B. 177.

(y) *Vellaiyappa* v *Nataraja*, 50 M. 340 1927 M. 386 –52 M.L.J. 229—25 L.W. 493; affirmed in 58 I.A. 402 –55 M. 1 34 L.W. 589—1931 M.W.N. 848 –35 C.W.N. 1278 61 M.L.J. 522 1931 A.L.J. 1123—33 Bom. L.R. 1526—1931 P.C. 294; *Rahi* v *Govind*, 1 B. 97; *Inderun v. Ramaswamy*, 13 M. I.A. 141; *Nagarathnammal* v. *Chinnu*, 1928 M. 127 –53 M.L.J. 861=1927 M.W.N. 750.

(z) *Kalu* v. *Kashibai*, 7 B. 127; *Manmahini* v. *Balak*, 8 Beng. L.R. 22; *Ram Das* v. *Lachhman*, 1936 L. 853; *Rama Rao* v *Rajah of Pittapur*, 41 M. 778 –45 I.A. 148 1918 M.W.N. 922 35 M.L.J. 392 – 16 A.L.J. 833—20 Bom. L.R. 1056—23 C.W.N. 173—1918 P.C. 81.

(a) *Hemangini* v. *Kedarnath*, 16 C. 758; *Narbadabai* v. *Mahadev*, 5 B. 99.

(b) *Meenakshi* v *Rama Aiyar*, 37 M. 396 –24 M.L.J. 106· 18 I.C. 34

(c) *Rama Rao* v *Rajah of Pittapur*, 41 M. 778 45 I.A. 148.=35 M.L.J. 392· 1918 P.C. 81 16 A.L.J. 833 20 Bom. L.R. 1056—23 C.W.N. 173—1918 M.W.N. 922 (P.C.); See *Vedathani* v *Commissioner of Income-tax*, 59 M. 1 :1932 M.W.N. 1139

36 M.L.W. 536 63 M.I.J. 542 1932 M. 733 for the position that even when the co-parcenary is reduced to a single male member, there can still be a joint family when there are widows of deceased coparceners

(d) *Bhagwan Singh* v. *Mt. Kawal Kuar*, 8 Lah. 360=1927 L. 280.

to maintain them out of the family property. Where a coparcener lives away from the family for a proper cause and is in needy circumstances, the manager is bound to give him separate maintenance, if the income of the family permits of such allowance[e] and the decisions of the Bombay High Court which hold that a coparcener who is not properly maintained must bring a suit for partition and not a suit for maintenance[f] except where he happens to be subject to a disability to inherit[f] or where he cannot bring a suit for partition without the consent of some other coparcener[g] as in Bombay are not, it is submitted, correct because their effect is in substance to force the coparcener out of the joint family merely at the caprice of an autocratic and unjust manager of the family estate.[h]

217. Disqualified heir and his family.—"*An impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blindman, and a person suffering from incurable diseases are not entitled to a share but are to be maintained. But their blameless sons, whether legitimate or Kshetraja, are entitled to inherit. Their daughters should be maintained until they are provided with husbands. Their childless wives, if conducting themselves properly, should also be maintained: but if they are unchaste or perverse, they should be expelled.*" (*Yagnavalkya, ii—140 to 142.*)

Where a person, by reason of a disability he is suffering from, is excluded from inheritance, the property which he would have inherited but for that disability, is liable for the maintenance of both himself and his family.[i] Such are the idiot, the blind from birth, the madman etc. Such persons are debarred from the rights of coparcenary and are given maintenance in lieu. That this is owing not to a denial of their birth status but to a personal disqualification is clear by the fact that their sons get by their birth the full status of coparcenary. But the right to maintenance of the wife of a disqualified heir is not enforceable when she is unchaste.[j] Nor is the disqualified coparcener entitled to claim maintenance when there is no coparcenary property.[k]

218. Widow's maintenance.—The widow of a coparcener is entitled to maintenance from the estate of her deceased husband in the hands of his surviving coparceners, even if she had been deserted

(e) *Ammalu Kutti* v. *Ramunni*, 40 L. W 35 : 67 M.L.J. 470—1934 M. 508 (case of a Malabar tarwad).

(f) *Himmat* v. *Ganpat*, 12 Bom H C.R. 96, note

(g) *Bhupal* v. *Tavanappa*, 46 B 435—1922 B. 292 : 23 Bom. L.R. 1236.

(h) *Naranbhai* v. *Ranchod*, 26 B. 141.

(i) *Savitribai* v. *Laxmibai*, 2 B. 573; *Rama Rao* v. *Rajah of Pittapur*, 45 I.A 148 : 41 M. 778—35 M.L.J. 392 : 1918 P.C. 81 16 A.L.J. 833—20 Bom. L.R. 1056 : 23 C. W N 173 : 1918 M.W.N. 922; *Ram Sahye* v. *Lalla*, 8 C. 149.

(j) *Yashvantrav* v. *Kashibai*, 12 B. 26 at 28.

(k) *Commissioner of Income-tax, Behar and Orissa* v. *Maharani Lakshmibai*, 14 P. 313 : 1935 P. 8.

by her husband,[l] and even if she had been living away from her husband without justifying cause[m] if it was not for immoral purposes. But this right is conditional upon her continuing to be a widow and leading a life of chastity, and is lost when she remarries,[n] or becomes unchaste,[o] even though it has been secured by agreement of parties,[p] or a decree of Court,[q] though an objection on the ground of the widow's unchastity is not entertainable in execution of the maintenance decree by the widow.[r] But if the right to maintenance is unconditionally secured to her under her husband's will, her unchastity does not work its forfeiture.[s] Again, where maintenance was awarded under a compromise in respect of her claim to succeed to certain properties as her husband's, it cannot be withheld on the ground of her unchastity.[t] Where under a deed of arrangement between two brothers constituting a Hindu joint family, they agree that on the death of one of them, his widow should have and enjoy for her life an interest in a moiety of the joint property equivalent to the interest which the widow of a sonless and separated Hindu would have in her deceased husband's estate, and that brother dies and his widow takes the interest mentioned in the deed, such interest does not become forfeited by her subsequent unchastity, where there is no provision in the deed making chastity a condition of the enjoyment by her of the estate bestowed on her. Her position is like that of a widow having inherited a widow's estate so as to make her estate nonforfeitable by her subsequent unchastity, and not like that of a widow having only a right to maintenance which she will lose if she becomes unchaste.[u] Though continued chastity is a condition precedent to the widow's right to claim maintenance, yet if the widow who has been unchaste reforms and leads a moral life, she becomes entitled to what is known as starving maintenance, that is, maintenance which will cover her food and raiment which will be just

(l) *Ramabai* v. *Trimbak*, 9 Bom. H.C R. 283.

(m) *Surampalli* v *Surampalli*, 31 M 338=18 M.L.J. 254.

(n) *Sankala* v. *Badaswari*, 50 C 72; 27 C.W.N. 669=1924 C. 98; *Muruguyi* v. *Viramakali*, 1 M. 226.

(o) *Moniram* v. *Kerry Kolitany*, 7 I.A. 115 5 C. 776; *Srinivasa* v. *Lakshmi*, 28 L.W. 328=1928 M. 216 .54 M.L.J. 530; *Vishnu* v. *Man Jamma*, 9 B. 108.

(p) *Anandi* v. *Lakshmi Chand*, 1932 A.L.J 208=1933 A. 130; *Nagamma* v. *Virabhadra*, 17 M. 392; *Kisanji* v. *Lakshmi*; 33 Bom. L.R. 510=1931 B. 286. But see *Shivlal* v. *Bai Sankli*, 33 Bom. L.R. 490=1931 B. 297; *Satyabhama* v. *Kesavacharya*, 39 M. 658=29 M.L.J. 87.

(q) *Anandi* v. *Lakshmi Chand*, 1932 A. L.J. 208=1933 A. 130, *Vishnu* v. *Manjamma*, 9 B. 108; *Daulta* v. *Meghu*, 15 A. 382; *Lakshmi Chand* v *Mt. Anandi*, 62 I.A. 250 57 A. 672=1935 A L.J. 1163 37 Bom. L.R. 849=39 C.W.N. 1223=69 M. L.J. 380=42 L.W. 461=1935 M.W.N. 1132 =1935 P.C. 180.

(r) *Ranmalsangji* v. *Kundan*, 26 B. 707; *Daulta Kuari* v. *Meghu*, 15 A. 382.

(s) *Parami* v. *Mahadevi*, 34 B. 278=5 I C. 960=12 Bom. L.R. 196.

(t) *Bhup Singh* v. *Lachmun*, 26 A. 321; *Anandi* v. *Lakshmi Chand*. 1932 A. L.J. 208=1933 A. 130.

(u) *Lakshmichand* v. *Mt. Anandi*, C2 I.A. 250=57 A. 672=37 Bom. L.R. 849= 42 M.L.W. 461=1935 A.L.J. 1163=1935 M. W.N. 1132=39 C.W.N. 1223=69 M.L.J. 380=1935 P.C. 180.

enough to support her life.[v] But a widow does not forfeit her right to maintenance by choosing to live away from her husband's relations unless she does so for immoral or improper purposes.[w] It is in the husband's family that a widow, in strict contemplation of law, ought to reside, and if her husband had by his will expressly made her maintenance conditional upon her residing with his family, she will be bound so to reside and hence will not be entitled to separate maintenance.[x] Nor will she be entitled to separate maintenance in case the family property is too small to admit of such separate allotment.[y] If the widow had already agreed during her husband's life-time to receive the income of certain property allotted by her husband for her separate maintenance, she is not entitled to go behind this agreement on her husband's death and sue his executors under his will for enhanced maintenance and for a charge on the properties left by him.[z] Where a widow of a coparcener sues for maintenance after there has been a partition in her husband's family, she cannot enforce her right against the surviving coparceners except those who have taken her husband's share.[a] A Hindu widow is not entitled to interest on the arrears of maintenance decreed prior to suit.[b]

219. Remarriage of widow.—On remarriage of a Hindu widow, her right to maintenance as against the estate of her former husband determines along with her other rights in that estate as if she is dead even though the remarriage is sanctioned by the custom of her caste, the reason being that on remarriage she ceases to be the widow of her former husband.[c] If unchastity can dis-

(v) *Ram Kumar* v. *Mt. Bhagwanta*, 56 A 392—1934 A.L.J. 120—1934 A. 78; *Bhikubai* v. *Haribu*, 49 B. 459—1925 B. 153 —27 Bom L.R. 13; *Roma Nath* v. *Rajonmoni*, 17 C. 674; *Sathyabhama* v. *Kesavacharya*, 39 M. 658 29 I.C. 397—29 M.L.J. 87; *Parami* v. *Mahadevi*, 34 B. 278—12 Bom. L.R. 196.

(w) *Ekradeshwari* v. *Homeshwar*, 8 P. 840—56 I.A. 182 .33 C W N. 637—1929 A.L.J. 695—31 Bom. L.R. 816 .30 L.W. 1 —57 M.L.J. 50—1929 M.W.N. 468; *Pirthee Singh* v. *Raj Kooer*, 12 Beng. L.R. 238 (P.C); *Gokibai* v. *Lakshmidas* 14 B. 490; *Siddessury* v. *Janardan*, 29 C. 557—6 C. W.N. 530; *Srinivasa* v. *Lakshmi*, 28 L.W. 328 —1928 M. 216—54 M.L.J. 530; *Girianna* v. *Honamma*, 15 B. 236; *Parwatibai* v. *Chatru*, 36 B. 131.

(x) *Mulji* v. *Bai*, 13 B. 218; *Girianna* v. *Honamma*, 15 B. 236; *Ekradeshwari* v. *Homeshwar*, 8 P. 840—56 I.A. 182—33 C.W. N. 637—1929 A.L.J. 695—31 Bom. L.R. 816—30 L.W. 1—57 M.L.J. 50—1929 M.W. N. 468 P.C.; *Tincouri* v. *Krishna*, 20 C. 15.

(y) *Godavaribai* v *Saiyanabai*, 22 B. 52; *Kasturbai* v. *Shivajiram*, 3 B. 372.

(z) *Purushottamdas* v. *Rukshamani*, 39 Com. L.R. 458 . 1937 B. 358. But see *Mt. Sham Devi* v. *Mohan*, 15 Lah. 591—36 P. L.R. 333 1934 Lah. 167.

(a) *Hemangini* v. *Kedarnath*, 16 C. 758 .16 I.A. 115; *Narasinhma* v. *Venkatasubbamma*, 55 M. 752 35 L.W. 513—1932 M. 351—62 M.L.J. 438 1932 M.W. N. 286; See also *Subburayalu* v. *Thayarammal*, 35 M. 147, a case of a partition suit subsequent to widow's suit for maintenance.

(b) *Saraswati* v. *Sheoratan*, 12 P. 869 1934 P. 99.

(c) *Santala* v. *Badaswari*, 50 C. 727—27 C.W.N. 669—1924 C. 98; *Vithu* v. *Govind*, 22 B. 321; *Murugayi* v. *Viramakali*, 1 M. 226; *Suraj* v. *Attar*, 1 P. 706 1922 P 378. But see *Gajadhar* v. *Kaunsilla*, 31 A. 161—6 A.L.J. 107; *Mangat* v. *Bharto*, 49 A. 203—1927 A. 523—25 A.L. J. 151 and *Gajadhar* v. *Sukdei*, 5 Luck. 689—1931 O. 107 in cases where remarriage is sanctioned by custom.

entitle a widow to claim maintenance out of her husband's estate or out of the property of the joint family of which her deceased husband was a member, it follows *a fortiori* that her remarriage by which she becomes permanently wedded to another man should extinguish her right to maintenance.

220. Widow's right of residence.—The widow has a right of residence in the family dwelling house of her husband[a] and this right cannot be defeated by her husband's co-parceners selling the house to another with notice of her right.[c] Even if the house is transferred to one without notice of her right, the transferee cannot eject her from her residence without making an arrangement providing her with some other suitable place of residence.[j] But she cannot claim this right where the transfer is brought about by her husband himself,[g] or for a debt of her husband [h] or for a debt which is binding upon her for family necessity.[i] Thus a transferee for value from a husband[j] or a purchaser in execution of a decree against the husband or his estate after his death[k] or a purchaser for a purpose binding upon her husband's family[l] is entitled to eject the widow even if he had notice of the widow's right. But if the debt for which the sale of the family residence is effected is not binding on the widow on any of the grounds abovementioned, the sale is always subject to her right of residence and cannot defeat that right.[m] This right of the widow to residence and maintenance in the family property does not, however, entitle her to sell the property for her maintenance even in a case of necessity.[n] *See* also S. 225.

221. Quantum of widow's maintenance.—The amount which a widow is entitled to recover for maintenance includes not only

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(a) *Annoda Prashad* v. *Ambica Prashad*, 53 I.A. 201—53 C. 948—24 L.W. 448—1926 P.C. 96—1926 M.W.N. 689—28 Bom. L.R. 1299 (3 C.W.N. 150. 51 M.L.J. 785, *Mt. Sham Devi* v. *Mohan Lal*, 15 I. 591—36 P.L.R. 333—1934 L. 167. See *Janaki* v. *Perumalswami*, 48 L.W. 408 for the position that where a fair partition demands it, the Court has got power in effecting it to compel the widow to accept some other residence.

(c) *Dalsukhram* v. *Lallubhai*, 7 B. 283, *Venkatammal*, v. *Andyappa*, 6 M. 130; *Talemand* v. *Rukmina*, 3 A. 353.

(f) *Mangola* v. *Dinanath*, 4 Beng. L.R. 72, *Bai Devkore* v. *Sammukhram*, 13 B. 101; *Dalsukhram* v. *Lallubhai*, 7 B. 282; *Gauri* v. *Chandramani*, 1 A. 262.

(g) *Manilal* v. *Bai Tara*, 17 B. 398.

(h) *Ramanadan* v. *Rangammal*, 12 M. 260; *Manilal* v. *Bai Tara*, 17 B. 398; *Jayanti* v. *Alamelu*, 27 M. 45—12 M.L.J. 270

(i) *Jayanti* v. *Alamelu*, 27 M 45—12 M.L.J 270; *Ramanadan* v *Rangammal*, 12 M. 260, *Manilal* v. *Bai Tara*, 17 B. 398; *Mt Manohari* v. *Sarab*, 1937 Pesh. 46

(j) *Ganpabai* v. *Jankibai*, 45 B 337—1921 B. 380—22 Bom. L.R. 1309; *Jamiat Rai* v. *Mt. Malan*, 13 Lah. 41—33 P.L.R 311—1931 Lah. 718.

(k) *Jayanti* v. *Alamelu*, 27 M 45—12 M. L.J. 270.

(l) *Mt. Mallan* v. *Parmatma Das*, 17 Lah. 588—1936 L. 358.

(m) *Venkatammal* v. *Andayappa*, 6 M. 130, *Shambu* v. *Mt. Munni*, 1933 L. 496, *Dalsukhram* v. *Lallubhai*, 7 B. 282, *Bayyapparaju* v. *Lakshmamma*, 45 M.L.W. 536—1937 M. 193; *Ramkunwar* v. *Amar Nath*, 54 A. 472—1932 A.L.J. 267—1932 A 361, *Jamiat Rai* v. *Mt. Malan*, 13 Lah. 41—33 P.L.R. 311—1931 Lah. 718.

(n) *Tarachand* v. *Sundar*, 1937 Lah. 871—39 P.L.R. 642.

that which is sufficient for her food, clothing and residence, but also an amount necessary for the comfort and maintenance of her position as her husband's surviving half.[o] The rate of maintenance awardable to a Hindu widow depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of members on a reasonable view of the change of circumstances possibly required in the future, regard being had to the scale and mode of living, and to the age, habit, wants and class of life of the parties. It is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of law in arriving at any fixed sum. The test in determining the allowance is whether the scale is suited to her husband's position in life. No doubt there may be circumstances in which the past mode of life of the widow may have been demonstrably on a penurious or miserly scale, or on the other hand, on a quite extravagant scale, having regard to the total income of her husband, but the general principle that can be applied is that the sum awarded must enable the lady to live 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,[p] provided that the sum awarded does not exceed the annual profits on the share to which the husband would have been entitled on partition if living.[q] The standard of comfort must necessarily vary with the means of the family, due regard being also paid to the wants of the other members of the family who also have to be maintained out of the income of the family properties. Each case has to be decided upon its own facts. The coparceners of her deceased husband who have taken his properties by survivorship have no right to prescribe any arbitrary standard as regards the comforts the widow is entitled to have or the style in which she should live. It is not open to them to say that even though they are getting a large income from the family properties, as they are living frugally, the widow also must be content with the barest necessaries of life.[r] The value of her husband's family estate and its income, the rea-

(o) *Srinivasa* v. *Lakshmi*, 28 L.W. 328 =1928 M. 216=54 M.L.J. 530.

(p) *Ekradeshwari* v. *Homeshwar*, 56 I.A. 182=8 P. 840 30 L.W. 1=1929 P.C. 128=33 C.W.N. 637=1929 A.L.J. 695 =10 P.L.T. 345=31 Bom. L.R. 816=57 M.L.J. 50=1929 M.W.N. 468; *Rajani Kanta* v. *Sajani Sundari*, 61 I.A. 29=61 C. 221=39 L.W. 177=1934 P.C. 29=66 M. L. J. 148=1934 A.L.J. 166=38 C.W.N. 262 =36 Bom. L.R. 230=1934 M.W.N. 172; *Sajanisundari* v. *Jogendrachandra*, 58 C. 745=1931 C. 591 affirmed in *Rajani Kanta* v. *Sajani Sundari*, 61 I.A. 29=61 C. 221= 39 L.W. 177=1934 P.C. 29=66 M.L.J. 148 =1934 A.L.J. 166=38 C.W.N. 262=36 Bom. L.R. 230=1934 M.W.N. 172.

(q) *Partab Singh* v. *Raghuraj Kuar*, 1933 O. 550.

(r) *Srinivasa* v. *Lakshmi*, 28 L.W. 328 =1928 M. 216=54 M.L.J. 530.

sonable wants of the widow including her religious expenses, and the position and status of the deceased husband, should all be taken into consideration in arriving at the amount to be awarded.(s) The sastraic injunction that the widow's life should be one of austerity and semi-starvation is not a legal injunction and ought not to be considered at all.(t) A Hindu widow in no case would be entitled to an amount in excess of the income of her husband's share on partition,(u) but the amount should not be far less than one third of such income.(v) In assessing this amount any stridhanam possessed by the widow should also be taken into consideration,(w) unless it happens to be of an unproductive character like clothes or jewels,(x) which she ordinarily wears or uses and which she is not likely to convert into money.(y) A voluntary payment to the widow made by a brother periodically and which may be stopped at any time should not be taken into consideration in assessing her means in the computation of the rate of maintenance awardable to her.(z) Even if the stridhana property is enough for her maintenance, the widow is still entitled to some maintenance, though not the same amount of maintenance to which she will be entitled if she had no stridhana property at all,(a) and she cannot be entirely deprived of maintenance.(b) Where the family possesses properties, the income from which is not only enough but more than enough for the purpose of paying maintenance to all the members depending upon the same, the fact that the widow is in possession of private funds which also yield an income should not be taken into account for the purpose of determining the maintenance payable to her.(c) A Hindu widow is not bound to reside with the relatives of her husband, the relatives of her husband have no right to compel her to live with them, and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family or leaving her husband's residence from any other

(s) *Nittokissoree* v. *Jogendronath*, 5 I.A. 55 P.C.

(t) *Hurry Mohun Roy* v *Nyanitara*, 25 W.R 474; *Venkatachala* v. *Velayudha*, 1935 M.W.N 871=1935 M. 701

(u) *Achibai* v *Cursandas*, 11 B. 199; *Panchakshara* v. *Pattammal*, 39 M.L.T. 32 1927 M. 865; *Jayanti* v *Alamelu*, 27 M. 45 12 M.L.J. 270; *Madhavarao* v. *Gangabai*, 2 B 639; *Ramarayudu* v. *Sitalakshmamma*, 1937 M. 915=1937 M.W.N. 1014= 46 L.W. 550, (holding that in giving the widow a charge for maintenance it should ordinarily be confined to her husband's share).

(v) *Ramabai* v *Trimbak*, 9 Bom. H.C. R. 283.

(w) *Gokibai* v. *Lakhmidas*, 14 B. 490.

(x) *Shyama* v. *Purushothama*, 1925 M. 645=21 L.W. 551; *Shib Dayee* v. *Doorga Pershad*, 4 N.W.P.H.C R. 63.

(y) *Gurushiddappa* v. *Parvatewwa*, 38 Bom L.R. 1293=1937 B. 135.

(z) *Saraswati* v. *Sheo Ratan* 12 P. 869=1934 P 99=15 Pat. L.T. 372

(a) *Lingayya* v. *Kanakamma*, 38 M. 153=28 I.C. 200=28 M.L.J. 260. See contra in *Ramavati* v *Manjhari*, 4 C.L.J. 74

(b) See also *Savitribai* v. *Luximbai*, 2 B. 573 at 584 and *Dattatraya* v. *Rukhmabai*, 33 B 50=1 I.C. 466=10 Bom. L.R 770.

(c) *Kodandarami Reddi* v. *Chenchamma*, 1930 M. 479=32 L.W. 729=59 M.L.J. 531.

cause than unchaste and improper purposes. As a general rule a widow cannot claim arrears of maintenance for the period she was living in her husband's family unless she was kept there under circumstances of extreme penury and oppression. She, however, is entitled to arrears from the time she changes her residence, and under no circumstances can the right be post-dated from the institution of the suit for maintenance.[d] In awarding arrears of maintenance, it is open to the Court to award the same at a lower rate than that fixed for future maintenance,[e] but it cannot award interest on the arrears except from the date of suit.[f] Unless there is any waiver or abandonment of her right to maintenance by the widow, she is entitled to maintenance from the death of her husband.[g] Such a waiver cannot necessarily be inferred either from the fact that no formal demand was made[h] or from the circumstance that she is living in her parental house,[i] or has set up an adoption by her which has been subsequently set aside in a suit instituted by the person liable to maintain her.[j] The non-payment of maintenance even in the absence of a demand, is *prima facie* proof of wrongful withholding and the claim for past maintenance which is a legal right cannot be rejected unless adequate grounds are shown for inferring that the widow has waived or abandoned the claim.[k] If the widow has received assets from the joint family in lieu of her maintenance which would have been sufficient for her proper maintenance in future, the fact that she has dissipated the assets does not entitle her to claim maintenance again.[l] Besides, if the property is too small to admit of any separate maintenance to the widow, the Court may refuse to grant it[m] and direct her to live with the rest of her husband's family. The question of the right to, and the quantum of, maintenance of a widow living away from her husband's family has been well discussed by the Privy Council in the following passages in *Ekradeshwari's* case[d]:—

(d) *Ekradeshwari* v. *Homeshwar*, 56 I.A. 182—8 P. 840—30 L.W. 1—1929 P.C. 128. 33 C.W.N. 637—1929 A.I.J. 695—10 P.L.T. 345—31 Bom. L.R. 816—57 M.L.J. 59—1929 M.W.N. 468.

(e) *Venkataratnamma* v. *Seetharatnam*, 35 L.W. 611—1932 M. 408.

(f) *Bahuria Saraswati* v. *Sheoratan*, 12 P. 869—1934 P. 99.

(g) *Krishnamachari* v. *Chellammal*, 1928 M. 561.

(h) *Rathinasabapathy* v. *Gopala*, 1929 M. 515—29 L.W. 696—56 M.L.J. 673; *Ramarayudu* v. *Sitalakshmamma*, 1937 M. 915—46 L.W. 550—1937 M.W.N. 1014.

(i) *Srinivasa* v. *Lakshmi*, 28 L.W. 328—1928 M. 216—54 M.L.J. 530.

(j) *Gurushiddappa* v. *Parvatewwa*, 38 Bom. L.R. 1293—1937 B. 135.

(k) *Panchakshara* v. *Pattammal*, 1927 M. 865—39 M.L.T. 32; *Mallikarjuna* v. *Durga*, 24 M. 147—27 I.A. 151—10 M.L.J. 294 (P.C.); But see *Jamonti* v. *Maharani*, 1930 A.L.J. 1433—1931 A. 227.

(l) *Savitribai* v. *Laxmibai*, 2 B. 573; *Srinivasa* v. *Ammani*, 61 M.L.J. 381—34 L.W. 489—1931 M. 668. See also *Purushottamdas* v. *Rukshamani*, 39 Bom. L.R. 458—1937 B. 358.

(m) *Godavaribai* v. *Sagunabai*, 22 B. 52; *Yegamma*, v. *Kalyamlamma*, 41 Mys. H.C.R. 90.

"The Courts below fixed the maintenance allowance of the appellant at Rs. 4,200 per annum, and the learned Subordinate Judge in doing so, says this:—

"This sum, I think, would enable the lady to live as f. 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."

That is as near to principle as can be got in such cases, and, with the addition to be presently noted their Lordships entirely approve of that view. The addition is this that there may be circumstances in which the past mode of life of the widow has been demonstrably on a penurious and miserly scale, or on the other hand, on a quite extravagant scale, having regard to the total income of the husband But if, as may be readily assumed, in such a case as the present, the scale was suited to his own position in life, that is a sound point from which to start the estimate In the view of the Board the estimate made as applicable to present circumstances in this family should not be interfered with.

Up to this point in the discussion the appeal fails.

There is, however, a further point in the case, namely, arrears, in other words, the date from which a maintenance allowance should start. There are four possible periods, namely, first from the death of the deceased husband (21st October, 1916), that is to say, even during the residence on the alleged limited style of life in his former establishment; second, from the date of the change of the appellant to her father's residence, a period which is variously stated as from the end of 1920 to the end of 1921. To this variation subsequent reference will be made Third, from the date of suit, namely, 23rd April, 1922 and fourth, from the date of decree, namely, 10th March, 1924.

Their Lordships are clearly of opinion that to start the maintenance at the last-mentioned date as has been done in the Court below, would be an inadequate recognition of the widow's right to maintenance. It is indeed an inversion of the correct procedure in the case of a continuing right. In any view the right could not be post-dated from the institution of the suit onwards. This, besides being erroneous in law, would be a daily temptation to delay in litigation by postponing the date of liability to that of final decree

Payment from the date of suit being thus granted the question is whether arrears prior to that date are exigible. In the Board's opinion such arrears if they truly exist, fall within the range of the widow's right to maintenance. When a widow's receipt of maintenance in residence in her husband's establishment ceases contemporaneously with her institution of a suit for maintenance the point almost settles itself. When, however, as is the case here, there is no such exact concurrence of dates, it is the duty of the Court to consider the whole circumstances of the situation in pronouncing a decree for arrears.

In the present case the Court is met by a demand by the appellant of a somewhat peculiar kind. It is to the effect that a decree should include arrears of maintenance not only from the date when she left her late husband's house to reside with her father as she has since done, but should date from her husband's death and include the time she resided in her husband's establishment. The result of conceding this would be a kind of cross account; on the one side maintenance quantified in money as from the husband's death; on the other side a credit being given for maintenance

as actually received with its incidental costs. In the opinion of the Board there is no legal justification for such a treatment of the case and the argument of the appellant fails. While their Lordships do not exclude an extreme case, say, of a widow being kept under circumstances of extreme penury and oppression, such a case must be treated as most exceptional, and would require unimpeachable proof. It is sufficient to say that nothing like that has been established in the present case.

On the other hand, the argument presented for the respondents and, indeed, the decision of the Appellate Court, seem to be based upon the assertion that it is the law of India that a Hindu widow has in the ordinary case no right of maintenance if she chooses to change from her husband's residence and choose another for herself. With much respect to the learned Judges the Board is unable to accept this view.

On the authorities it is, of course, true that if that change of residence is made for unchaste purposes it is a sufficient answer to the demand to offer her the shelter of the old home. But this is in no respect any such case. It is a simple case of a Hindu widow from motives which cannot be impeached on the ground stated, leaving her old residence and preferring the shelter and protection of her father's home. In the opinion of the Board such action was within her legal rights. She was only 24 years of age, and one cannot peruse the authorities or have a knowledge of Indian life, without understanding that such a change might be made from a sense of propriety and from the best of motives. But even so the point is not one of motives but of right.

It is now necessary to see what is the foundation of the judgment of the Court below. It is contained in a single sentence in the judgment of the High Court as follows: –

"In regard to her claim for arrears of maintenance we think that there is no ground for allowing that claim. It is not suggested that she has incurred any debts in maintaining herself and we can find no excuse for her leaving her sons and going to reside with her father."

With much respect to the High Court their Lordships think that a judment in these terms contravenes the long and well settled law of India. It makes this case one of widespread importance, and the Board thinks it accordingly right to note the outstanding case-law on the subject.

This is not an instance in which there was any direction in the husband's will that she was to be maintained in the family home. In such circumstances, that is to say in the ordinary case, it is no part of the duty of a widow choosing her own residence to furnish excuses which will satisfy a Court of law that she has made a judicious choice. The authorities on that subject are clear for at least three quarters of a century, but only one or two need be cited.

In 1854 Peel C.J., of Bengal, delivered an important and leading judgment, reported in the *Vyavastha-Darpana*, page 362. That very learned Judge states that the Court has examined closely into the state of the authorities and the law on the subject. He quotes from the case of *Ujjal-mani Dasi* v. *Joygopal Pal Choudhuri and others* (1st June, 1848), as follows:—"It was not pretended that she had withdrawn herself for unchaste purposes. She was only 14 at the death of her husband; his brothers were young men, and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death; therefore,

it appears quite clear from the answers given by the pandits that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them in order to put herself under her mother's protection".

He thereafter states the proposition thus, in the language of the pandits adopted by the Privy Council,—"If a widow from any other cause but unchaste purposes ceased to reside in the husband's family and took up her abode in her parents' family her rights would not be forfeited".

In a later passage in the same judgment he says:—"We have examined the texts of the ancient law, and we think they bear out the opinions of the pandits in the case before the Privy Council. The texts say as to maintenance, forfeiture is incurred by unchaste life but they do not say that it is incurred otherwise. There are many duties enjoined to women in the text of a moral or religious nature the violation of which would never have involved any forfeiture. Forfeitures are not to be extended by construction. The duty to reside with the family of the deceased husband is not enjoined for the sake of thrift".

The decision was highly approved by this Board in *Rajah Parthee Singh* v. *Ranee Raj Kower* (*n*). In that case Sir Barnes Peacock again reviewed the authorities up to date, and concludes as follows: "It, therefore, appears that a Hindu widow is not bound to reside with the relatives of her husband: that the relatives of her husband have *no* right to compel her to live with *them*; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes".

These principles have never been gone back upon or modified. They are still the law of India.

It remains accordingly only to fix the date from which the maintenance allowance should run. The appellant having remained in her late husband's home, and having, as she had a right to do, during that period accepted maintenance in fact and in kind, and she having thereafter, as was also within her legal right, changed her residence and gone to live with her father, what was the date of that change? The evidence upon that subject is far from clear. It appears to be established that she left by the family car on a visit to her father to attend the sradh ceremonies of her deceased mother. When there she made up her mind to stay on, and she has done so ever since. The Board is of opinion that this happened in the end of 1921, and that accordingly maintenance on the scale fixed by the Court below should run not from the date of decree, as found by the High Court, nor from the date of suit in April, 1922, but from 1st January, 1922". 8 P. 840 at 846-851.

222. Maintenance liable to variation.—Even where the amount of maintenance is fixed by agreement of parties[o] or by a decree of Court[p] it is liable to be increased with the increase in the value of the estate or the cost of living,[q] or decreased with the reduction in

(*n*) (1873) L R.I.A. Supp. 203.

(*o*) *Sheo Mangal* v. *Bodhi*, 1936 Oudh. 60—11 Luck. 607; *Rajendra* v. *Puttoo*, 5 C.L.R. 18; *Mt. Bhagwanti* v. *Mani Ram*, 37 P.L.R. 278—1935 L. 543; *Mukandi* v. *Jagannath*, 1936 A.L.J. 1259; *Maheshwari* v. *Sahdei*. 1936 Oudh W.N. 902:

(*p*) *Raka Bai* v. *Ganda*, 1 A. 594; *Gopikabai* v. *Dattatraya*, 24 B. 386=2 Bom. L. R. 191.

(*q*) *Bangaru* v. *Vijayamachi*, 22 M. 175.

the value of the estate or its income due to causes beyond the holder's control,[r] but cannot be stopped or reduced on her acquiring large properties which would be more than sufficient to cover her maintenance.[s] It is not necessary that in order to get a variation of the amount fixed by a decree or agreement, there should be a clause therein permitting either party to bring a suit for varying the amount. Such a condition is always implied,[t] though a widow can bind herself by an express agreement not to claim any future enhancement in the amount.[u] If the decree fixing the amount itself provides for variation thereof, then an application in the suit to alter the rate is maintainable.[v] But if there is no such provision in the decree, then the proper remedy for getting a variation of the amount is by a separate suit.[w] It may at the same time be pointed out that it is inexpedient to insert in the maintenance decree a provision reserving liberty to either party to apply for revision of the rate of maintenance in the execution department itself in the event of change of circumstances justifying such alteration in the rate, because such a provision, apart from the question of its doubtful legality, will merely be a standing invitation to the parties to avail themselves of that liberty by ingenious inventions of circumstances which have no existence apart from the domain of mischievous imagination and perjured evidence.[x] Again if the widow has been allotted a sufficient amount for her maintenance once and for all, she is precluded from claiming any further amounts by way of maintenance even if she has dissipated the amount allotted to her.[y]

223. Conversion of moral duty into legal liability to maintain.—An heir is legally bound to maintain out of the estate inherited all the persons whom the late proprietor was morally or legally

(r) *Vijaya* v *Sripathi*, 8 M. 94; *Greeschand* v. *Shumboo*, 5 W.R. 98 (P.C.); *Copikabai* v. *Dattatraya*, 24 B. 386=2 Bom. L.R. 191; *Bangaru* v. *Vijayamachi*, 22 M. 175; *Mohieswara* v *Durgamba*, 47 M. 308=19 L.W. 165—1924 M. 687—46 M.L.J. 189—1924 M.W.N. 266; *Sheo Mangal* v. *Bodhi*, 1936 Oudh 60—11 Luck. 607; *Rajendra* v. *Puttoo*, 5 C.L.R 18; *Raka Bai* v. *Ganda*, 1 A. 594.

(s) *Sundari* v. *Venkatrama*, 39 L.W. 676=66 M.L.J. 680—1934 M. 384, *Lingayya* v. *Kanakamma*, 38 M. 153—28 M.L.J. 260=28 I.C. 200, contra *Ramawati* v. *Manjhari*, 4 C.L.J. 74. See also *Jai Ram* v. *Mt. Shiv Devi*, 1938 Lah. 344 holding that her income from personal exertions is no ground for reducing the amount decreed.

(t) *Vijaya* v. *Sripathi*, 8 M. 94; *Mooti* v. *Bai Kashi*, 17 B. 45; *Ravi Sangji* v. *Kundan*, 26 B. 707 4 Bom. L.R. 531, *Sidlingapa* v. *Sidava*, 2 B. 624.

(u) *Mohieswara* v. *Durgamba*, 47 M. 308—19 L.W. 165—1924 M. 687 46 M.L.J. 189—1924 M.W.N. 266, *Nanjamma* v. *Viswanathiah*, 16 Mys. L.J. 63 42 Mys. H.C.R. 699.

(v) *Ekradeshwari* v. *Homeshwar*, 8 P. 810—56 I.A. 182—30 L.W. 1—1929 P.C. 128—33 C.W.N. 637—1929 A.I.J. 695—10 P. L.T. 345—31 Bom. L.R. 816=57 M.L.J. 50=1929 M.W.N. 468.

(w) *Ruka Bai* v. *Ganda Bai*, 1 A. 594; *Rammalsangji* v. *Kundan*, 26 B. 707—4 Bom. L.R. 531.

(x) *Venkatapathi* v. *Puttamma*, 44 M. L.W. 590=71 M.L.J. 499=1936 M. 609.

(y) *Savitribai* v. *Luximibai*, 2 B. 573; *Srinivasa* v. *Ammani*, 61 M.L.J. 381=34 L.W. 489=1931 M. 668.

bound to maintain, the reason being that the estate is inherited only subject to the obligation to provide for such maintenance.[a] Such a moral obligation exists towards an indigent daughter,[a] daughter of a predeceased son, [b] grandparents, daughter-in-law,[c] sister and other persons who can be reasonably considered to have a claim by virtue of close relationship to a person's affection and kindness, and when he dies and his estate is under the law taken by another, that person is legally bound to maintain all those whom the late proprietor was morally bound to maintain. There is no distinction in this respect whether the person succeeding to the property is a male or a female,[d] or if it be the King taking by escheat.[e] Thus though a father-in-law having only separate properties is only under a moral obligation to maintain the widow of a predeceased son who has left no estate or has left an estate which is insufficient to meet her maintenance,[f] this moral obligation becomes a legal obligation in the hands of his sons or other heirs who inherit his separate property, the measure of that liability being restricted to the extent of the estate to which they have succeeded.[g] This principle is applicable both under the Mitakshara and the Dayabhaga,[h] and even when the father-in-law has made a testamentary disposition of all his property or has during his lifetime made a gift thereof,[i] but not when he has conveyed his property for consideration.[j]

224. Married daughter.—A father is not legally bound to maintain his daughter after her marriage, and her right is only

(a) *Rajani Kanta* v. *Sajani Sundari*, 61 I.A. 29=61 C. 221=39 I.W. 177=1934 P.C. 29=1934 M.W.N. 172=36 Bom. L.R. 230=66 M.L.J. 148=38 C.W.N. 262, *Mt Bhoti Bai* v. *Dwarka Das*, 5 Lah. 375=1925 L. 32, *Kamini* v. *Chandra*, 17 C. 373.

(a) *Mokhada* v. *Nundo Lall*, 28 C. 278=5 C.W.N. 297.

(b) *Ram Labhaya* v. *Mt. Nihal*, 1931 L. 121.

(c) *Mt Laxmibai* v. *Sambha*, 1932 N. 11.

(d) *Gunga* v. *Jeevee*, 1 Bor. 384.

(e) *Golab Koonwar* v. *Collector of Benares*, 4 M.I.A. 246.

(f) *Meenakshi* v. *Rama Aiyar*, 37 M. 396=18 I.C. 34=1913 M.W.N. 40=24 M.L.J. 106.

(g) *Rajani Kanta* v. *Sajani Sundari*, 61 I.A. 29=61 C. 221=1934 P.C. 29=39 L.W. 177=1934 M.W.N. 172=36 Bom. L.R. 230=66 M.L.J. 148=38 C.W.N. 262; *Jeot Ram* v. *Lanji*, 119 I.C. 253=1929 A. 751; *Jai Nand* v. *Paran Dei*, 4 L. 491=118 I.C. 419=1929 Oudh. 251; *Gopalchandra* v. *Kadambini Dasi*, 73 I.C. 235=1924 C. 364; *Ammakannu* v. *Appu*, 11 M. 91; *Yamunabai* v. *Manubai*, 23 B. 608=1 Bom. L.R. 95, *Siddessur* v. *Jawardan*, 23 C. 557=6 C.W.N. 530, *Janki* v. *Nandram*, 11 A. 191, *Kannu Dassee* v. *Chandra*, 17 C. 373; *Surampalli* v. *Surampalli*, 31 M. 338; *Devi Persad* v. *Gauri*, 22 C. 410, *Adibai* v. *Cursondas*, 11 B. 199.

(h) *Rajani Kanta* v. *Sajani Sundari*, 61 I.A. 29=61 C. 221=1934 P.C. 29=39 L.W. 177=1934 M.W.N. 172=36 Bom. L.R. 230=66 M.L.J. 148=38 C.W.N. 262.

(i) *Gopal Chandra* v. *Kadambini Dasi*, 73 I.C. 235=1924 C. 364; *Jeot Ram* v. *Lanji*, 119 I.C. 253=1929 A. 751; *Rangammal* v. *Echammal*, 22 M. 305=9 M.L.J. 14, *Gobinda Chandra*, In re, 17 C.W.N. 1141; See contra in *Perouti* v. *Tarwadi*, 25 B. 263=2 Bom. L.R. 894, *Bhagirath Bai* v. *Dwarkabai*, 35 Bom. L.R. 44=1933 B. 135 and *Mt. Babo* v. *Mt. Bolo*, 113 I.C. 657=1933 Pesh. 61; *Sankaramurthi* v. *Subbamma*, 48 L.W. 411; *Yamunabai* v. *Manubai*, 23 B. 608.

(j) *Punna Bibee* v. *Radha Kissen*, 31 C. 476.

against the husband, or after his death, his estate, if any. But there is still a moral duty upon him to see that his daughter though married does not suffer for want of maintenance from her husband's indigent family and this duty ripens into a legal obligation to maintain her when the property is inherited by her father's heirs;[k] but even then she cannot claim separate maintenance.[l]

225. Right of residence of wife and unmarried daughter.— Neither the wife nor a daughter of a sole owner is entitled to have her right of residence in the family dwelling house maintained against one who has purchased it either under a private sale from the husband or father,[m] or in execution of a decree against him or against his estate after his death.[n] The fact that such purchaser had notice of the wife's or the daughter's right of residence at the time of the sale, or the circumstance that the sale itself is without necessity does not affect the question.[o] But in the case of an unmarried daughter of a deceased coparcener her right to residence in the family house till her marriage, cannot be dislodged by a purchaser from a surviving coparcener unless that sale is binding on the family,[p] even though the purchaser has taken the sale *bona fide* without notice of the maintenance claim.[q] In *Suryanarayana* v. *Balasubramania*,[p] the judgment which dealt with this point ran as follows :—

"The plaintiff is the appellant. He purchased in Court auction sale the plaint house in execution of a decree passed against the defendants Nos. 2, 3 and 4. The defendants Nos. 3 and 4 had no rights in the property and we may take it that the plaintiff purchased the right, title and interest of the second defendant in the house. The house belonged to the second defendant's husband Ekambara Mudali and then Ekambara Mudali's only son who died a minor. On her minor son's death the second defendant as his heir became the qualified female owner of the house. The minor left his two sisters, defendants Nos. 6 and 7 unmarried. The money-decree against the second defendant was passed for a personal debt of the second defendant, the mother and next heir of the last male owner. The plaintiff, purchaser in Court auction, obtained delivery of the downstairs portion, but the upstair portion of the house now in dispute was occupied by the defendants Nos. 6 and 7, the two unmarried sisters of the last male owner, and they refused to vacate as they claimed a right under the Hindu Law to reside in the house which belonged to their father and their brother till

(k) *Mokhada* v. *Nundo Lall*, 28 C. 278 5 C.W.N. 297.

(l) *Mokhada* v. *Nundo Lall*, 28 C. 278 at p. 288 .5 C.W.N. 297.

(m) *Gangabai* v. *Jankibai*, 45 B. 337=1921 B. 380—22 Bom. L.R. 1309; *Suryanarayana* v. *Balasubramania*, 43 M. 635 =11 L.W. 409 .. 56 I.C. 524—38 M.L.J. 433 .. 1920 M.W.N. 267.

(n) *Manilal* v. *Bai Tara*, 17 B. 398; *Jayanti* v. *Alamelu*, 27 M. 45=12 M.L.J. 270.

(o) *Gangabai* v. *Jankibai*, 45 B. 337=1921 B. 380—22 Bom. L.R. 1309.

(p) *Suryanarayana* v. *Balasubramania*, 43 M. 635—11 L.W. 409—56 I.C. 524—38 M.L.J. 433 .. 1920 M.W.N. 267.

(q) *Mungala* v. *Dinonath*, 4 Beng. L. R. 72.

their (the said defendants') respective marriages. Hence the suit brought to eject them on the ground that they had no such rights under the Hindu Law.

The learned City Civil Judge decided this interesting question of Hindu Law against the plaintiff and in favour of the defendants Nos. 6 and 7 and dismissed the suit: hence this appeal.

So far as the widows of undivided coparceners are concerned (including a widowed mother), the authorities are very clear that a private sale by the surviving male coparcener which was not for family necessity or in execution sale held for a decree debt which did not arise out of family necessity would not entitle the purchaser to oust such widows as the latter were entitled to reside in the ancestral family house till at any rate, other adequate provision is made for their residence. The question of unmarried girls who were not related to the surviving male coparcener as direct descendants from him but as sisters or cousins (that is as daughters of deceased undivided coparceners) seems not to have received the direct subject of any reported decision. In the case of the wife or widow of the surviving coparcener, it has been held in *Jayanti Subbiah* v. *Manchu Mangamma* (r) that the wife cannot set up any right of residence against the purchaser in execution for her husband's debts. I shall presently consider the ratio of that decision. But before leaving this part of the subject, I would finally remark that the general question was elaborately considered by Sir BARNES PEACOCK, C. J. (with whose judgment MITTER J., concurred) in *Mungala Dabee* v. *Dinonath Bose*. (s) The very general language of the learned Chief Justice's dictum is to the effect that the father's widow and

"the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence and in which he left the females of his family at his death cannot be turned out of that residence at least until some other place has been provided for them".

If this general dictum applies, the unmarried daughters of the father being also "females of the family entitled to maintenance" and residence can resist being turned out of the dwelling selected by their father for his own and their residence. No doubt there is a distinction between the widows of coparceners and the father's widow on the one side and unmarried females on the other side because the former are entitled to maintenance and residence till death or remarriage, whereas unmarried females are entitled to maintenance and residence only until their marriage. But as the learned City Civil Judge points out, the difference in the length of the period and in the circumstances when the right of maintenance and residence ceases, cannot affect, on principle, the right to resist the eviction from the family dwelling house so long as the right of maintenance and residence subsists.

Mr. Radhakrishna Ayya for the appellant argued that if every female entitled to maintenance and residence can exercise the right of obstruction to ejectment, it would be very unfair on purchasers from the surviving member of a Hindu family and on purchasers in execution of debts due by such member, and even the wife of the debtor and the unmarried daughters of the debtor might claim to resist the purchaser. I might here remark that even as regards the mother and the coparcener's widow of the debtor the right of residence is curtailed (a) by restricting it to cases where the debt

(r) 27 M. 45—12 M.L.J 270. (s) 12 W.R.O.J. 35.

for which the property is sold is not contracted for necessity and (b) by the rule that the females cannot claim a right of residence in the whole of the premises if a portion of the house could be set apart for them and would afford reasonably sufficient accommodation and (c) that if other reasonable accommodation even outside the family dwelling house is offered, they may be bound to accept such a substitute, at least in certain circumstances.

As regards the wife, I shall now return to *Jayanti Subbiah* v. *Alamelu Mangamma*(t) where BASHYAM AYYANGAR, J., delivered the judgment which was concurred in by BENSON, J. While affirming the general principle which had been laid down in *Venkatammal* v. *Andyappa Chetti* (u) and *Ramanadan* v. *Rangammal*, (v) the learned Judge distinguished the case of the wife of the debtor for whose debt the property was sold on the following grounds: (so far as I am able to follow his reasoning) (a) the debt contracted by the husband himself is necessarily binding upon the wife absolutely; (b) on his death without male issue, his estate devolves on her by right of inheritance and so no right of maintenance or residence apart from ownership as heir can be invoked in her favour as in the case of a coparcener's widow; (c) the mother's right may be traced to the father's coparcenary right just as in the case of the other coparceners: and is not derived from the debtor directly; (d) the wife's right of maintenance during her husband's lifetime

"is only a matter of personal obligation on the part of the husband quite independent of the possession of the ancestral property by him".

The learned Judge also fortified himself by the dictum of KERNAN, J., in *Venkatammal* v. *Andyappa Chetti* (u) that if the debt in respect of which the sale took place was a debt due by the husband of the woman who claims the right of residence,

"no doubt could be entertained that she had no such right".

After making the above distinctions, he disallowed the right of the widow of the debtor to resist possession by the purchaser in Court auction. In doing so, he dissented from the decision in *Manilal* v. *Bai Tara*. (w) (J. C. Ghose in his very learned work on Hindu Law seems to be inclined in favour of the Bombay decision and against BASHYAM AYYANGAR. J's opinion).

I shall not lengthen this judgment by elaborately considering whether all the four distinctions (*a*) to (*d*) relied on by the learned Judge are tenable. It is sufficient to state that the wife and unmarried daughters of the debtors stand on a different footing from the widows of deceased coparceners (including the mother) and from unmarried sisters. If even the undivided sons of the debtor cannot attack the sale in execution of the father's debt (not illegal or immoral). I do not see how unmarried daughters can be allowed to attack it or put forward a right of residence against the purchaser. As regards the wife, she is under even a greater obligation (under the Hindu Law) than the sons, not to question the validity of her husband's debts. The mother and the widows of coparceners and the unmarried sisters are under no such obligation with respect to the debt of the surviving male owner which was not incurred for family necessity. I need hardly say that if the sale for their brother's debt itself would not deprive defendants Nos. 6 and 7 of their right of residence, a sale for the debt of the brother's next female heir and legal representative (which is the present case) cannot be held to

(t) 27 M. 45—12 M.L.J. 270.
(u) 6 M. 130.
(v) 12 M. 260.
(w) 17 B. 398.

deprive them of such right. The question whether a private sale of a person's ancestral family dwelling house without necessity (apart from the question of its being sold in execution of a decree for his debt) or without the purchase money being required to discharge his own antecedent debts can deprive even his wife and unmarried daughters of their right of residence is a somewhat more difficult question on which it is unnecessary to express a final opinion in this case.

In the result, I would dismiss the appeal with costs". 43 *M.* 635 *at* 636-640.

226. Maintenance, : personal right, not a charge on property.—The right to maintenance is purely a personal right and can neither be transferred,[x] nor attached in execution of a decree,[y] but arrears of maintenance can be so transferred and attached and sold as soon as they are ascertained and fixed.[z] Even in the case of maintenance of a Hindu widow, it is of an indefinite character and not a charge on the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement.[a] The debts contracted by a Hindu or those by which he is bound, just as the non-Avyavaharika debts of his father,[b] take precedence over the right of maintenance of his wife or minor children.[c] A widow's maintenance, when not charged on any property, cannot be enforced against a *bona fide* transferee thereof for value without notice of the widow's right. But if the purchaser for value had notice of her claim for maintenance, the widow can follow the property. The position would be the same in the case of a gratuitous transfer, even though the transferee had no notice of the widow's claim (*See* S. 39 of the Transfer of Property Act). In other respects her right to receive maintenance is one of an indefinite character which, unless made a charge upon the property by will,[d] agreement or by a decree of Court,[e] is only enforceable like any other liability in respect of which no charge exists,[f] and a creditor who has advanced moneys to the widow for purposes of her maintenance cannot be placed in any better position.[g] The texts which prohibit the transfer of property so as to deprive those per-

(x) *Annapurni v Swaminatha*, 34 M 7 6 T C. 439 1910 M.W.N. 505 20 M.L.J 785; *Subrmn* v *Krishna*, 46 M. 659 -45 M L J 533 19 L.W 6—1924 M. 22 (F B.); *Narbadabai* v *Mahadeo*, 5 B. 99.

(z) *Endoori* v *Venkata*, 33 M. 80 =3 I.C. 444; *Haridas* v. *Baroda*, 27 C. 38 -4 C W N 87. *Rajeran* v. *Nanarao*, 11 B. 528.

(a) *Mohini* v *Purna*, 1932 C. 451—36 C W.N. 153

(b) *Mt. Mallan* v. *Parmatma Das*, 1936 L. 558- 17 L 588.

(c) *Javahar* v. *Parduman*, 14 L. 399—1933 L. 116- *Lakshman* v. *Satyabhama*, 2

(d) *Prosonno* v *Barbosa*, 6 Suth. 253.

(e) *Kuloda* v *Jageshar*, 27 C 194; *Subbanna* v *Subbanna*, 30 M. 324=17 M L.J. 180.

(f) *Bharatpur State* v. *Gopal Dei*, 24 A. 160; *Shamlal* v. *Banna*, 4 A. 296 (F.B.); *Ram Kunwar* v. *Ram Dei*, 22 A. 326; *Lakshman* v. *Satyabhama*, 2 B. 494; *Jayanti* v *Alamelu*, 27 M. 45=12 M.L.J. 270; *Soorja Koer* v. *Nath Buksh*, 11 C. 102.

(g) *Mt. Nandrani* v. *Krishna*, 57 A. 997 1935 A.L.J. 715—1935 A. 698.

sons whom the transferor is under a duty to maintain of the means of subsistence[h] are merely moral precepts and not legal prohibitions and the enforceability or otherwise of the transfer as against a claim to maintenance is to be judged in the light of the foregoing principles. Merely a personal decree for maintenance against the holder of the property does not create a charge on it.[i]

227. Right to maintenance defeated by transfer of property for binding debts.—In the administration of a Hindu's estate, binding debts would take precedence over mere claims for maintenance[j] or residence on the part of the female members of the family.[k] A transfer of property for a debt incurred by the husband[l] or by his father[j] or by the manager of his family for purposes binding upon the family[m] prevails over the claimant's right to maintenance even if the transferee had notice of the claim[m] provided the claim had not already been made a charge on the property transferred.[n] Besides, under S. 39 of the Transfer of Property Act, if a person has a right to receive maintenance from the profits of immoveable property, and such property is transferred, the right cannot be enforced against a transferee for consideration and without notice of the right, nor against such property in his hands.[o]

228. Right to maintenance not defeated by gift or will.—Where a person is entitled to maintenance, his or her right cannot be defeated by a gift or devise of the entire property by the person liable to maintain. If a man cannot resist another's claim to maintenance, it is contrary to principle to hold that he can defeat it by gift or devise to another. In the case of such a gift or devise, though the gift or devise is not invalid in its entirety, the right to maintenance can be enforced against the property in the hands of those to whom it has been given.[p] Even where the husband has left some property under a will to his widow, if there is no indica-

(h) Dayabhaga, i- 45; ii -23, 24.

(i) *Bhagirathi* v. *Ananthacharla*, 17 M. 268; *Saminatha* v. *Rangathammal*, 12 M. 295

(j) *Mt. Mallan* v. *Parmatma Das*, 1936 L. 558- 17 L. 588; *Jawahar* v. *Parduman*, 14 L. 399-34 P L R 291-1933 L. 116.

(k) *Somasundaram* v. *Unnamalai*, 43 M. 800--39 M L J 179=1920 M W.N. 458—12 L.W. 163—59 I.C. 398.

(l) *Jayanti* v. *Alamelu*, 27 M. 45 -12 M L J. 270; *Gur Dayal* v. *Kaunsila*, 5 A. 267; *Sunder Singh* v. *Ram Nath*, 7 L 12 —1926 L. 167; *Brij Raj* v *Ram Dayal*, 7 Luck. 411- 1932 Oudh 40; *Jamiat Rai* v. *Mt. Malan*, 13 L. 41-.1931 L. 718-33 P.L.R. 311.

(m) *Ramanadan* v. *Rangammal*, 12 M. 260; *Lakshman* v. *Satyabhamabai*, 2 B. 491- *Jamiat Rai* v *Mt. Malan*, 13 L 41 -33 P L R 311—1931 L. 718.

(n) *Somasundaram* v. *Unnamalai*, 43 M 800—39 M.L.J 179- 1920 M W.N 458 —12 L.W. 163 -59 I C 398; *Ram Kunwar* v *Amar Nath*, 54 A. 472 1932 A L.J. 267 —1932 A. 361; *Mt. Champa* v. *Official Receiver, Karachi*, 15 L. 9—36 P L R. 450 -1933 L. 901.

(o) *Kaveri Ammal* v. *Subba*, 1934 M. W N. 1311 -40 L.W. 678—1934 M. 734

(p) *Becha* v. *Mothina*, 23, A. 86; *Jamna* v. *Machul*, 2 A. 315; *Narbadabai* v *Mahadeo*, 5 B. 99; *Joytara* v. *Ramhari*, 16 C 638; *Promotha* v. *Nagendra*, 12 C.W.N. 808; See the discussion in *Sabitri* v. *Mrs. F. A. Savi*, 12 P. 359=1933 P. 306.

tion in the will that the gift to the widow was made in lieu of her maintenance, and if the property given to her is insufficient to provide for her reasonable maintenance, the other devisees under that will should be compelled to contribute any additional amount that may be necessary for such reasonable maintenance.(q)

229. Lis Pendens.—The doctrine of *lis pendens* applies to a suit for maintenance when the plaintiff claims to have maintenance specifically charged on specific items of immoveable property(r) and when properties are made subject to a charge for maintenance, the *lis* is not terminated by the decree but continues until the decree is satisfied, and it is immaterial in such a case that a purchaser had no notice of the charge and the consequent sale proceedings.(s) A partition effected after the institution of such a suit for maintenance would be equally affected by *lis pendens* in respect of the plaintiff's right to maintenance.(t) Even if the transfer during the maintenance suit has been effected for paying off a debt which is binding on the family, the transferee cannot hold the property free from the charge created by the decree in the maintenance suit.(u) Besides, a maintenance suit by a widow will not operate as *lis pendens* in respect of properties mentioned in the suit, if they are mentioned merely for ascertaining the quantum of maintenance to which she would be entitled and no prayer is made for making the maintenance a charge on those properties.(v)

230. Rate of future and past maintenance.—A widow is entitled to claim arrears of maintenance(w) on proof of maintenance having been withheld. To establish such withholding an infraction of the claimant's right must be proved, and though it is not necessary to prove an express demand and refusal,(x) still there must be enough to show that there was something more than mere absence of claim on one side and consequent absence of payment on the other side.(x) The Court has a discretion in the matter of

(q) *Kamakshi* v. *Krishnammal*, 47 L. W. 146 1938 M.W.N. 64 (1938) 1 M.L.J. 252.

(r) *Seetharamanujacharyulu* v. *Venkatasubbamma*, 32 L.W. 416=54 M. 132 =1930 M. 824=1930 M.W.N. 625=59 M.L.J. 485. See *Jogendra* v. *Fulkumari*, 27 C. 77=4 C.W.N 254 for the case of such a claim by the defendant.

(s) *Abdul Muhamad Rowther* v. *Seethalakshmi*, 33 L.W. 109=1931 M. 120=1930 M.W.N. 1059; *Rajya Lakshmidevamma* v. *Subba Rao*, 1936 M.W.N. 216=43 L.W. 201=1936 M. 84; *Ramaswami* v. *T.C.C. Bank*, 59 M. 101=1935 M.W.N. 983=69 M.L.J. 447 42 L.W. 550 =1935 M. 867. The fact that in the maintenance suit a charge is claimed over all the family properties which are sufficiently designated in the plaint does not affect the applicability of the doctrine.

(t) *Rambhabai* v. *Doongersi*, 116 I.C. 165=1929 S. 102.

(u) *Seetharamanujacharyulu* v. *Venkatasubbamma*, 54 M. 132=1930 M. 824=32 L.W. 416=1930 M.W.N. 625=59 M.L.J. 485; But see *Thimmanna* v. *Krishna*, 29 M. 508 16 M.L.J. 413.

(v) *Manika Gramani* v. *Ellappa*, 19 M. 271.

(w) *Ekradeshwari* v. *Homeshwar*, 8 P. 810=56 I.A. 182=30 L.W. 1=1929 P.C. 128 =33 C.W.N. 637=1929 A.L.J. 695 =10 P. L.T. 345=31 Bom. L.R. 816=57 M.L.J. 50 =1929 M.W.N. 468.

(x) *Narayanrao* v. *Ramabai*, 6 I.A. 114

awarding and fixing the rate of arrears of maintenance(y) and may award arrears at a rate lower than that fixed for future maintenance,(z) though ordinarily the rate of both past and future maintenance should be the same.(a) *See* also S. 221.

231. Limitation.—Under the Articles 129 and 128 of the Limitation Act, the period of limitation for a suit to declare the plaintiff's right to maintenance is 12 years from the date when the right is denied and for a suit for arrears of maintenance the period of limitation is also the same period of 12 years from the date when the arrears were payable. Mere non-payment of maintenance is not a denial of the right to maintenance.(b) Art. 129 is intended to apply to cases where the status of a person on the basis of which maintenance is claimed is denied and that person wants, *inter alia*, to establish that status. But when such status is not denied, the Article applicable is Art. 128 and not Art. 129.(c) Besides, neither of these Articles is applicable where the maintenance is claimed not on the basis of the plaintiff's status under the Hindu Law but on the footing of a contract, in which case the proper Article applicable would be Article 115 or Article 116 according as the contract is registered or unregistered.(d)

=3 B. 415 (P.C.); *Sobhanadramma* v. *Varaha*, 39 L.W. 667=1934 M.W.N. 273=57 M. 1003=67 M.L.J. 712=1934 M. 401.

(y) *Rangu* v. *Subaji*, 36 B. 383=14 I. C. 821=14 Bom. L.R. 267; see *Sobhanadramma* v. *Varaha*, 39 L.W. 667=1934 M. 401=1934 M.W.N. 273=57 M. 1003=67 M. L. J. 712.

(z) *Karbasappa* v. *Kallava*, 43 B. 66=20 Bom. L.R. 823=47 I.C. 623; *Rango* v. *Yamunabai*, 3 B. 44; *Venkoba* v. *Kavari*, 2 M.H.C.R. 36; *Raghubans* v. *Bhagwant*, 21 A. 183; *Venkataratnamma* v. *Seetharatnam*, 35 L.W. 611=1932 M. 408; *Gurushiddappa* v. *Parwatewwa*, 38 Bom. L.R. 1293=1937 B. 135.

(a) *Karbasappa* v. *Kallavu*, 43 B. 66—26 Bom. L.R. 823=47 I.C 623; Sec also S. 221.

(b) *Yarlagadda* v. *Yarlagadda*, 27 I.A. 151—24 M. 147—10 M.L.J. 294 (P.C.); See *Sobhanadramma* v. *Varaha*, 39 L.W. 667=1934 M.W.N. 273=57 M. 1003=67 M. L. J. 712=1934 M. 401.

(c) *Mt. Shibbi* v. *Jodh Singh*, 14 Lah. 758=34 P.L.R. 1082=1933 Lah. 747.

(d) *Baburia Saraswati* v. *Sheoratan*, 12 Pat. 869=15 Pat. L.T. 372=1934 Pat. 99; *Rimji* v. *Mahamaya*, 16 Pat. L.T. 789=1936 Pat. 158.

CHAPTER VIII.

JOINT FAMILY

232. Source and history of joint family.—The modern Hindu joint family system which with its restrictive and joint ownership is one of the most cherished and striking features of Hindu institutions has really sprung from the ancient patriarchal family which can be said to be the earliest unit of human society. The patriarchal family has been defined as "a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grandfather, or great-grandfather. Whatever be the formal prescription of the law, the head of such a group is always in practice despotic and he is the object of respect, if not always of an affection, which is probably seated deeper than any positive institution "(a) There are several indications in the writings of the Smritikars that the Hindu father at one time was also the repository of such authority, and wives, sons, slaves and cattle were all considered to be equally his property. He was invested even with the powers of life and death over his dependants, and the fruits of their labours went to augment his worldly wealth For Manu says "three persons, a wife a son, and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they earn is regularly acquired for the man to whom they belong."(b) But such a state of affairs was not long to be. In the next stage, the despotic position of the patriarch was reduced to that of the representative of the family and there was a definite improvement in the status of its members in relationship to their head. But this transition from the patriarchal to the joint family must have been very gradual and was brought about by an improvement in the conception of individual rights and the repercussions of the happenings in the general society upon the members of the family. The growth in the idea of individual property worked up the individual members of the family, especially after the death of the father, to demand, with better logic and more success, a recognition of a growing improvement in their legal rights and a corresponding diminution in the powers of their leader. For instance, after the death of a father, the other members who had been acquiescing in his autocratic powers might not be willing to pay the same homage and obedience to their eldest brother, who succeeded him as the family head after having been moving with them freely with as little right as they under the parental autocracy. Thus the authority of the manager differed fundamentally from that of the

(a) *Maine's Early Institutions*, 116. (b) *Manu*, viii—416.

father, for the authority of the latter was natural while that of the former was rather delegated. The eldest brother can in a sense be said to be the head of the family by choice and not by right, and could be supplanted by a junior brother better suited for the post. When the members of the family had thus secured a recognition of their improved status by a family head who is not the father, they could not be expected to revert to their position of social cyphers when a father took up the reigns of management. Hence was the revolt against the autocratic paternal mastery and the consequent diminution in the absolute powers of the father. The final stage was reached when the son's co-ownership with the father in the ancestral property was recognised and his right to demand partition even against the father's wish was conceded. But the sacerdotal authority of the father advocated by the Brahmin writers retarded greatly the growth of individualism and helped in the preservation to the father of some of the powers which, in ancient times, he had the privilege to enjoy.

233. Constitution of a joint Hindu family.—A joint Hindu family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. This body is purely a creature of law and cannot be created by act of parties,[c] save in so far that by adoption or marriage a stranger may be affiliated as a member thereof. An undivided family which is the normal condition of Hindu society is ordinarily joint not only in estate but in food and worship, and, therefore, not only the concerns of the joint family, but whatever relates to their commensality and their religious duties and observances are regulated by the members or by the manager to whom they have expressly or by implication delegated the task of regulation.[d] The joint family status being the result of birth, possession of joint property is only an adjunct of the joint family and is not necessary for its constitution.[e] Nor is it that all the members possess equal rights or status even though the property of the family is called joint family property. For instance the female members of the family like the daughters have no share in the property, nor have the male descendants remoter than the great-grandson. Besides, the daughter cannot remain the member of her father's family after her marriage,[f] and the sisters, though they were once entitled to a share in the property, have now lost that right and are

(c) *Sudarsanam* v. *Narasimhulu*, 25 M. 149=11 M.L.J. 353; *Abraham* v. *Abraham*, 9 M.I.A. 195.

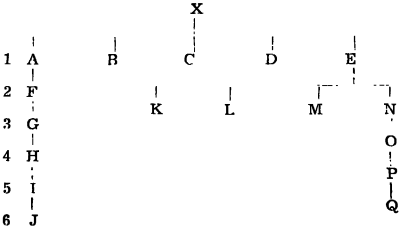
(d) *Raghunada* v. *Brozo Kishore*, 1 M. 69=3 I.A. 154 (P.C.).

(e) *Haridas* v. *Devkuvarbai*, 50 B. 443 at 447=1926 B. 408=28 Bom. L.R. 637; *Laldas* v. *Motibai*, 10 Bom L.R 175; *Janakiram* v. *Nagamony*, 49 M. 98=1926 M. 273=22 L.W. 801=50 M.L.J. 413.

(f) *Kartick Chunder* v. *Saroda Sunduri*, 18 C. 642.

now entitled only to maintenance until their marriage and their marriage expenses.(g)

234. Formation of Mitakshara coparcenary.—Coparcenary is a narrower body than the joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus while a son, grandson, or a great-grandson is a coparcener with the holder of the property, the great great-grandson cannot be a coparcener with him, because he is removed by more than three degrees from the holder. Besides only males can be coparceners, and all females are excluded from the coparcenary,(h) because the test of coparcenership is the right to enforce a partition and no female has that right, though females like wives and mothers may be allotted shares when a partition takes place. Though a common ancestor is necessary for the origination of a coparcenary, it may yet continue without him, consisting of collaterals and their descendants, some of them being removed more than three degrees from the deceased common ancestor.(i)



Here X is the common ancestor holding joint estate. During X's lifetime, his sons A, B, C, D and E, his grandsons F, K, L, M and N and his great-grandsons G and O will be his coparceners because they are all within three degrees from him. His great-great-grandsons H and P and their descendants I, J and Q cannot be his coparceners because they are removed from him by more than three degrees. But if X dies, in addition to the persons mentioned above as coparceners, H and P step into the coparcenary as

(g) *Subbayya* v. *Ananta Ramayya*, 53 M 84 1929 M 586-30 L.W. 923-57 M. L.J. 826 (F.B.).

(h) *Hira Singh* v. *Mt. Manglan*, 9 Lah. 324=1928 L. 122; *Punna Bibi* v. *Radha Kissen*, 31 C 476

(i) *Yennmala* v. *Ramandora*, 6 M.H.C.R. 93; *Girwardharee* v. *Kulahul*, 4 S.D. 9; *Moro Vishvanath* v. *Ganesh*, 10 Bom H.C. R. 444.

they are brought within three degrees from the respective last holders in their lines, namely A and E. But I, J and Q are still outside that coparcenary. Here it is seen that the coparcenary consists of collaterals and their descendants though their common ancestor X is dead and though some of them H and P are removed by more than three degrees from the common ancestor. If A also then dies I will automatically be brought into the coparcenary, but J and Q will still remain outside it. Supposing that E, G, H and I then die, then the coparcenary will draw in Q who is within three degrees from N who along with his brother M is the last holder in E's line, but J will still remain outside it, being removed more than three degrees from F who is the last holder living in A's line. If subsequently F, N, O, P and D die, the coparcenary will consist of two sons of the common ancestor X, namely, B & C, three grandsons K, L and M and one great-great-grandson Q, but J who is 6 degrees removed from the common ancestor is still outside the coparcenary as he had never had the opportunity of being within three degrees from the last holder in his own line.

"Suppose the property to have all descended from one ancestor, who is still alive, with five generations of descendants. It by no means follows that on a partition every one of these five generations will be entitled to a share. And if the common ancestor dies, so that the property descends a step, it by no means follows that it will go by survivorship to all these generations. It may go to the representatives of one or more branches, or even by inheritance to the heirs of the survivor of several branches, to the total exclusion of the representatives of other branches. The question in each case will be, who are the persons who have taken an interest in the property by birth. The answer will be, that they are the three generations next to the owner in unbroken male descent Therefore, if a man has living, sons, grandsons, and great-grandsons, all of these constitute a single coparcenary with himself. Every one of these descendants is entitled to offer the funeral cake to him, and therefore every one of them obtains by birth an interest in his property. But the son of one of the great-grandsons would not offer the cake to him, and therefore is out of the coparcenary, so long as the common ancestor is alive. But while fresh links are continually being added to the chain of descendants by birth, so earlier links are being constantly removed from the upper end of the chain by death. As each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. So the coparcenary may go on widening and extending, until its members may include persons who are removed by indefinite distances from the common ancestor. But this is always subject to the condition that no person who claims to take a share is more than three steps removed from a direct ascendant who has taken a share. Whenever a break of more than three degrees occurs between any holder of property and the person who claims to take next after that holder, the line ceases in that direction, and the survivorship enures only to those collaterals and descendants who are within the limit of three degrees." *Mayne's Hindu Law, 10th Edition*, 341.

Coparcenary of illegitimate sons. Though illegitimate sons living together with their Sudra putative father do not constitute a coparcenary with him with all its legal implications and consequences[j] and though the father has no power to admit them as his coparceners, yet, on his death, the illegitimate sons inherit the property as coparceners with rights of survivorship and the legal disabilities to which a coparcener is subject under the Hindu Law,[k] with this restriction that in any partition between them and the legitimate sons of their father or his widow or daughter or daughter's son, the share to which they would be entitled would be half of what they would take if they were legitimate.[l]

235. Coparcenary within a coparcenary.—There can be a coparcenary within a larger coparcenary and it can be illustrated from the foregoing illustration. Supposing E in that illustration makes separate acquisition and dies and the same is inherited by his sons M and N; now if O is subsequently born to N, he gets a right by birth in it and the property can be held by E's descendants with all the incidents of coparcenary property separate from and independent of the coparcenary property belonging to the larger coparcenary consisting also of the collateral relations of E. But if a coparcenary consists of a father and sons by more than one wife, the sons of one wife who hold the property which they obtain by inheritance from their maternal grandfather with the incident of survivorship, without any rights therein to the father or his sons by his other wives,[m] do not constitute a separate coparcenary in the strict sense of that term as their own sons do not acquire a right by birth in that property.[m-a]

236. Incidents of coparcenary right.—There is a community of interest and unity of possession between all the members of a coparcenary, and upon the death of any one of them the others take by survivorship, that in which, during the deceased's lifetime, they had a common interest and common possession.[n] No individual member while the family remains undivided can predicate of the joint and undivided property that he, that particular member, has a certain definite share, either in the corpus or in the income.[o] Till a partition takes place his interest remains a fluctuating interest enlarged by deaths and diminished by births in the family.[p]

(j) *Packiriswamy* v *Doreswamy*, 9 B 266 1931 B 216, *Shamu* v *Babu* 52 B 300 30 Bom L R 438 1928 B. 153

(k) *Sukharam* v *Shamrao*, 34 Bom L R. 191 1932 B 231.

(l) See S 72.

(m) *Venkayamma* v *Venkataramanayyamma*, 25 M 678 -29 I A 156-4 Bom. L.R. 657 - 7 C.W.N. 1-12 M L J. 299.

(m-a) See S 245

(n) *Lalla Mohabeer Pershad* v *Mt. Kundun* 8 W.R. 116. *Katama Natchiar* v *Rajah of Shivagunga*, 9 M I A. 539

(o) *Girdharee Lall* v *Kantoo Lall*, 1 I A 321 (P C), *Appavier* v *Rama Subba Aiyan*, 11 M I.A. 75; *Pirthi Pal* v *Jonahiri Singh*, 14 I A. 37- 14 C. 493 (P.C.)

(p) *Sudarsanam* v. *Narasimhulu* 25 M. 149 11 M.L.J. 353

In every coparcenary, the son, grandson or great-grandson obtains an interest by birth in the coparcenary property so as to be able to control and restrain improper dealings with the property by another coparcener.[q] He is entitled to reside and be maintained in the family house along with his wife and children and to have joint possession and enjoyment of coparcenary property. He enjoys certain powers of alienation and can enforce a partition of his share in the common property. This coparcenership relation is a creature of law and cannot be created by act of parties except that a member may be introduced into the coparcenary by adoption.[r]

237. Mitakshara coparcenary not a corporation.—A Mitakshara coparcenary, though sometimes spoken of as a corporation,[s] differs in several respects from a corporation. A coparcenary is a creature of law and can be dissolved at will by any member demanding a partition. But a corporation is a creature of statute and is not liable to be dissolved at the sweet will of any of its members. Besides, coparcenary signifies a natural relationship constituted by persons within the family, and a stranger cannot become its member except by adoption. But a corporation is an artificial body comprising even strangers and liable to fluctuations for causes other than those which operate in the case of a Hindu coparcenary.

238. Hindu coparcenary different from English coparcenary.—The thing called coparcenary in Hindu Law is not identical with coparcenary as understood under the English law. Thus in the ordinary case of the death of a member of a coparcenary under the Mitakshara law, his right accresces to the other members by survivorship, while under the English law if one of the co-heirs jointly inheriting property dies, his or her right goes to his or her own relations without accresing to the surviving coparceners.[t]

239. Hindu coparcenary different from joint tenancy under English law.—There are no doubt many points of resemblance between a Hindu coparcenary and the English joint tenancy, but there are equally striking differences between them. They resemble each other in that (1) there is the right of survivorship in both, (2) in both each member is entitled to possession over the whole of the joint property and (3) the acts of one member enure to the benefit of others in both the cases. But they differ fundamentally in the modes of their creation and the extent and nature of the interests. (1) Coparcenary is a creature of law and comes into

(q) *Suraj Bunsi Koer* v. *Sheo Proshad*. 5 C 148—6 I A. 88 (P.C.).

(r) *Sudarsanam* v *Narasimhulu*, 25 M. 149—11 M.L.J. 353; *Abraham* v. *Abraham*. 9 M.I.A. 199; *Packiriswamy* v. *Dorniswamy*, 9 R 266=1931 R. 216.

(s) *Sokkanadha* v. *Sokkanadha*, 28 M. 344; *Chuckun Lall* v. *Poran Chunder*, 9 W R. 483.

(t) *Baijnath Prashad* v. *Tej Bali*, 43 A. 228—48 I.A. 195—1921 P.C 62—19 A.L.J. 317—23 Bom. L.R. 654—25 C W N. 564—40 M.L.J. 387—1921 M W N. 300—2 P.L. T. 257.

existence by birth while a joint tenancy is created by a deed or will and not by descent. (2) A coparcenary consists of only relations,[u] while a joint tenancy may be created in favour of strangers. (3) A coparcener's power of alienation in respect of his share is a restricted one, while that of an English joint tenant is absolute, though he too cannot transfer it by will. (4) The quantity of a coparcener's interest is ever fluctuating with births or deaths in the family while that of the joint tenant's interest is fixed and ascertained. (5) The wife and children of a coparcener have a right to be maintained out of the joint property which is denied to those of a joint tenant. (6) On the death of the last surviving coparcener, the whole property passes to his own heirs while on the death of the last surviving joint tenant, the property descends in equal shares to the heirs of all the joint tenants.

240. Kinds of property. -Property under Hindu Law can be classified under two heads: (1) coparcenary property, (2) separate property. Coparcenary property is again divisible into (i) ancestral property and (ii) joint family property which is not ancestral. This latter kind of property consists of property acquired with the aid of ancestral property and property acquired by the individual coparceners without such aid but treated by them as property of the whole family.

241. Difference between joint property, joint family property, and joint ancestral family property --The three notions, (1) joint property, (2) joint family property and (3) joint ancestral family property are not the same. In all the three things, there is no doubt a common subject, property, but this is qualified in three different ways. The joint property of the English law is property held by two or more persons jointly, its characteristic being survivorship. Analogies drawn from it to joint family property are false or likely to be false for various reasons. The essential qualification of the second class mentioned above is not jointness merely, but a good deal more. Two complete strangers may be joint tenants according to English law; but in no conceivable circumstances except by adoption could they constitute a joint Hindu family, or in that capacity, hold property. In the third case, property is qualified in a two-fold manner, that it must be joint family property and it must also be ancestral. It is obvious that there must have been a nucleus of joint family property before an ancestral joint family property can come into existence; because the word ancestral connotes descent and hence pre-existence. But because it is true that there can be no joint ancestral family property without previous nucleus of joint family

(u) *Karsondas* v. *Gangabai*, 10 Bom. L.R. 184-32 B. 479.

property, it is not correct to say that there cannot be joint family property without a pre-existing nucleus, for that would be identifying joint family property with ancestral joint family property. Where there is ancestral joint family property, every member of the family acquires in it a right by birth which cannot be defeated by individual alienation or disposition of any kind except under certain peculiar circumstances. This is equally true of joint family property. Where a sufficient nucleus of the property in the possession of the members of a joint family has come to them from a paternal ancestor, the presumption is that the whole property is ancestral and any member alleging that it is not, will have to prove his self-acquisition. Where property is admitted or proved to have been joint family property, it is subject to exactly the same legal incidents as the ancestral joint family property, but differs radically in origin and essential characteristics from the joint property of the English law. The fundamental principle of the Hindu joint family is the tie of sapindaship without which it is impossible to have a joint Hindu family, while such a relationship is unnecessary in the case of a joint tenancy in English law.(v)

242. Obstructed and unobstructed heritage.—Owing to the distinction between property in which a person acquires a right by birth and that in which he does not get such right, Daya or heritage is classified by the Mitakshara into *apratibandha* or unobstructed heritage and *saprotibandha* or obstructed heritage. They are explained in the Mitakshara as follows: "Heritage is of two sorts; unobstructed (*Apratibandha*), or liable to obstruction (*Saprotibandha*). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in the right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of the 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."(w) In other words unobstructed heritage is property in which a person gets a right by birth, while obstructed heritage denotes property in which a person gets a right not by birth but on the death of the last holder. Thus property inherited from the paternal ancestors in the male line up to the third degree, i.e., father, father's father and father's father's father, is unobstructed heritage as regards the inheritor's lineal male descendants upto the third degree because they

(v) *Karsondas* v. *Gangabai*, 32 B. 479 —10 Bom. L.R. 184; *Nanilal* v. *Nutbehari* 38 C.W.N. 861; *Baijnath* v. *Maharaj Bahadur*, 8 Luck. 28=1932 Oudh 158; See S. 263 regarding presumptions in the case of joint family.

(w) *Mitak* I—1-3.

take a right in the property by birth. But property inherited by brothers, nephews, uncles, daughters, parents etc., are obstructed heritage because they did not take any interest by birth in the property when it remained in the hands of the last owner, and their contingent right was liable to be defeated by the birth of a nearer heir like a son to the last owner.(x) Thus *Apratibandha* and *Sapratibandha daya* may also be translated as unobstructible heritage and obstructible heritage, unobstructible in the one case because the right by birth once acquired cannot be defeated by the birth of other relations, obstructible in the other, because an emergence of a nearer heir to the last holder would have defeated the inheritor's right. In other words, *Apratibandha daya* can be said to denote a vested right while *Sapratibandha daya* only a contingent right, contingent on the death of the last holder without leaving nearer heirs. Again it may be noticed that *Sapratibandha daya* when taken by several heirs comes to them with an ascertained and definite share to each heir which is not liable to subsequent fluctuations. But *Apratibandha* is not such a partitioned succession and the interests of the co-heirs is indefinite and liable to fluctuation by deaths or births in the family till their shares are fixed by a partition among the co-heirs. As a corollary to the existence of the right by birth in the *Apratibandha daya* and its absence in the *Sapratibandha daya*, the former property devolves by survivorship, while the latter devolves by succession except when the co-heirs are daughters, daughter's sons, co-widows, or, in the case of a self-acquired property of the last holder, his lineal male descendants upto the third degree. According to the Dayabhaga, however, *daya* or heritage is always obstructed and this division between *Apratibandha* and *Sapratibandha daya* is not recognised by Jimutavahana

243. Coparcenary property.—Coparcenary property means and includes (1) ancestral property, (2) acquisitions made by the coparceners with the help of ancestral property, (3) joint acquisitions of the coparceners even without such help provided there was no proof of intention on their part that the property should not be treated as joint family property, and (4) separate property of the coparceners thrown into the common stock.

244. Ancestral property.—The term "ancestral property," which is a technical term having a special meaning, does not mean property inherited from any ancestor, male or female, paternal or maternal, near or remote, but only such property as is inherited by a male from father, father's father and father's father's father.(y)

(x) *Bai Parson* v. *Bai Somli*, 36 B. 424 =15 I.C. 774=14 Bom. L.R. 400; *Official Receiver* v. *Shridhar*, 1938 N. 7.

(y) *Atar* v. *Thakar*, 35 I.A. 206=35 C. 1039=6 I.C 721 (18 M.L.J. 379=10 Bom. L.R. 790=12 C.W.N. 1049 (P.C.); *Mahomed Husain* v. *Babu Kishwa Nandan*, 46 L.W. 1=1937 M.W.N. 683 (1937) 2 M.L.J. 151.

Such inheritor's son, son's son and son's son's son get an interest in it by birth and can interdict improper alienations by the inheritor, whose position in respect of that property, though it will otherwise be absolute, is reduced, in the presence of such descendants, to that of an owner with restricted rights.(z) The circumstance that the property has been inherited from one of such three immediate paternal ancestors after the interposition of a life tenure created by that ancestor in his wife's favour does not take away the character of the property as ancestral and the inheritor's lineal male descendants up to the third degree will get an interest in it by birth.(a) Nor does the circumstance that the property, when it was with the ancestor from whom it was inherited, was his self-acquired or separate property affect the question.(b) Besides, it is absolutely immaterial whether the sons were born to the inheritor before or after the inheritance fell in. But if the property is inherited from a paternal ancestor beyond the third degree then the property is not ancestral as against the inheritor's sons, and the inheritor has absolute powers of disposal over it. So also, if the inheritor has neither a son, son's son, nor son's son's son, the property is absolute in the inheritor's hands even though he may have other relations, for instance, a great great-grandson or a paternal uncle, in the case of inheritance from father.(c) But property which comes to an inheritor from one of his three immediate paternal ancestors as absolute property owing to the absence of sons, grandsons or great-grandsons, becomes ancestral property with the birth of any of them, though an alienation made by the inheritor before such birth cannot be impeached. The character of ancestral property is not taken away by there being a partition of the property in the family of the inheritor, and though a share of ancestral property allotted to a coparcener on partition will be his separate property as regards others,(d) it will be ancestral property as against the allottee's sons, grandsons and great-grandsons whether born before or after the partition.(e) Where ancestral property is given to a widow for maintenance and it reverts to the family after her death, it retains its character as ancestral property,(f) and the result will be the same even where that property is allotted to her for her share in a partition in her huband's

(z) *Chuttan Lal* v. *Kallu*, 33 A. 283=8 A.L.J 15=8 I.C. 719; *Jugmohandas* v. *Mangaldas*, 10 B. 528; *Mahomed Husain* v. *Babu Kishva Nandan*, 46 L.W. 1=1937 M.W.N. 683=(1937) 2 M.L.J. 151.

(a) *Beni Parshad* v. *Puran Chand*, 23 C. 262; *Nanabhai* v. *Achratbai*, 12 B. 122.

(b) *Ram Narain* v. *Pertum Singh*, 11 Beng. L.R. 397; *Madivalappa* v. *Subbappa*, 39 Bom. L.R. 895=1937 B. 458.

(c) *Janki* v. *Nand Ram*, 11 A. 194.

(d) *Bejai Bahadur* v. *Bhupindar*, 17 A. 156 22 I.A. 139 (P.C).

(e) *Chaturbhooj* v. *Dharamsi*, 9 B. 438; *Lal Bahadur* v. *Kanhaia Lal*, 34 I.A. 65 29 A. 244=4 A.L.J. 227=9 Bom. L.R. 597=11 C.W.N. 417=17 M.L.J. 228; *Visalatchi* v. *Annasamy*, 5 M.H.C.R. 150; *Aiurmoni* v. *Chowdhry*, 3 C. 1.

(f) *Beni Parshad* v. *Puran Chand*, 23 C. 262.

family.[g] Again where ancestral property has been reduced to the sole ownership of a person by his adverse possession against his coparceners, that property still retains its ancestral character so as to let in the right by birth in that property to his own sons.[g-1]

245. Property inherited from maternal ancestor.—There was a difference of opinion among judicial decisions on the question whether property inherited from a maternal grandfather was ancestral property or separate property of the inheritor. There is an observation of the Privy Council in *Atar* v. *Thakar*,[h] that "unless the lands came by descent from a lineal male ancestor in the male line, they are not deemed ancestral in Hindu Law." If this was taken as the final word of the Privy Council on the matter, there would be absolutely no difficulty in answering the question. But in *Venkatramma* v. *Venkatarenamayamma*,[i] the Privy Council while deciding that a daughter's sons living as members of a joint family took their maternal grandfather's property by inheritance as joint property with the incident of survivorship observed that the property was "ancestral" in the hands of the daughter's sons. The use of the word "ancestral" by the Privy Council led the Madras High Court to hold that where a daughter's son inherited property from his maternal grandfather, it became ancestral property in his hands, so that his own sons were joint tenants with reference to that property and were entitled to enforce partition in respect thereof.[j] But the Allahabad High Court took the view that the property inherited from a maternal grandfather was the separate property of the inheritor without the accrual of any interest to his son by birth and that the Privy Council had used the expression "ancestral" loosely to denote the incident of survivorship that appertained to a joint tenancy and not in its technical sense as including a right by birth in the inheritor's sons.[k] In this view the Allahabad High Court was followed by the Bombay and the Patna High Courts[l] relying on the observation of the Privy Council, already quoted, in *Atar* v. *Thakar*,[h] though a later decision of the Patna High Court[m] arrived at the conclusion at which the

(g) *Debi Mangal Prasad* v *Mahadeo Prasad*, 34 A. 234 39 I.A. 121—9 A.L.J 263—16 C.W.N. 409—1912 M.W.N. 324—14 Bom. L.R. 220 22 M.L.J 462; *Bhagwantrao* v *Punjaram*, 1938 N. 1. 1938 B. 206.

(h) 35 I.A 206—35 C. 1039—6 I.C. 721 —18 M.L.J 379 10 Bom. L.R. 790—12 C. W.N. 1049 (P.C.).

(i) 25 M. 678 29 I.A. 156—4 Bom. L. R. 657—7 C.W.N. 1 —12 M.L.J 299 (P.C.).

(j) *Vythinatha* v. *Yengia*, 27 M. 382; *Venkataseshamma* v *Appa Rao*, 1925 M. *ranayanan*, 27 M. 300 13 M.L.J. 398; *ramayya* v *Jagannadhan*, 39 M. 930—2 M.W. 874—1915 M.W.N 838

(k) *Jamna Prasad* v *Ram Partab*, 29

rate discussion of this question in the recent case of *Official Receiver* v. *Shridhar*, 1938 N 1.

(l) *Bishwanath* v. *Gajadhar*, 3 Pat. L. J 168 13 I.C 370; *Bai Parson* v. *Bai Somli*, 36 Bom 424—14 Bom. L.R. 400.

(m) *Rao Bahadur Mansing* v *Maharani Nawalakhbati*, 2 P. 607—1923 P. 492,

Madras High Court had arrived, but on a different reasoning, namely, the inheritance from the maternal grandfather was an accretion to the ancestral property. While the case-law on this point was thus in a state of flux, the recent decision of the Privy Council in *Muhammad Husain Khan* v. *Babu Kishwa Nandan Sahai*,(n) came to set at rest the conflict in favour of the Allahabad view. The question in that case was whether the property inherited by one Ganesh Prasad from his maternal grandfather, Jadu Ram, was ancestral in the hands of Ganesh Prasad in the sense that his son, Bindeshri Prasad, acquired in it an interest by birth, so as to detract from the absoluteness of Ganesh Prasad's power of disposal of the property inherited by him from his maternal grandfather. Their Lordships of the Privy Council answer this question in the negative and hold that "ancestral property" is confined to property inherited from the three immediate paternal ancestors and that the property inherited from a maternal grandfather is the absolute property of the inheritor in which his son does not acquire any interest by birth. The following portion of their Lordships' judgment deals with this question :—

"The learned Counsel for the appellants argues that the property inherited by a daughter's son from his maternal grandfather is ancestral property, and he relies, in support of his argument, upon the expression "ancestral property" as used in the Judgment of this Board in *Venkayyamma* v. *Venkataramanayyamma*, 29 I.A. 156—25 M. 678, in describing the property which had descended from the maternal grandfather to his two grandsons. It is to be observed that the grandsons referred to in that case were the sons of a daughter of the propositus, and constituted a coparcenary with right of survivorship On the death of their mother they succeeded to the estate of their maternal grandfather, and continued to be joint in estate until one of the brothers died Thereupon, the widow of the deceased brother claimed to recover a moiety of the estate from the surviving brother. The question formulated by the Board for decision was, whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship. This was the only point of law which was argued before their Lordships, and it does not appear that it was contended that the estate was ancestral in the restricted sense in which the term is used in the Hindu Law. Their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. The brothers took the estate of their maternal grandfather at the same time and by the same title, and there was apparently no reason why they should not hold that estate in the same manner as they held their other joint property. The rule of survivorship, which admittedly governed their other property, was held to apply also to the estate which had come to them from their maternal grandfather. In these circumstances it was unnecessary to express any opinion upon the abstract question of whether the property, which a daughter's son inherits from his maternal grandfather, is ancestral property in the technical

(n) 46 M.L.W 1 1937 M.W.N. 683 979 1937 A.L.J 1032 18 Pat L.T. 495 (1937) 2 M.L.J. 151 64 I.A 205 I.L.R. 1937 P.C. 233. 1937 A. 655 41 C.W.N 1029 39 Bom. L.R.

sense that his son acquires therein by birth an interest jointly with him. This question was neither raised by the parties nor determined by the Board. It appears that the phrase "ancestral property" upon which reliance is placed on behalf of the appellants, was used in its ordinary meaning, namely, property which devolves upon a person from his ancestor, and not in the restricted sense of the Hindu Law which imports the idea of the acquisition of interest on birth by a son jointly with his father.

There are, on the other hand, observations in a later judgment of the Board in *Atar Singh* v. *Thakur Singh*, 35 I.A. 206 : 35 C. 1039 which are pertinent here. It was stated in that judgment that unless the lands came "by descent from a lineal male ancestor to the male line they are not deemed ancestral in Hindu Law". This case, however, related to the property which came from male collaterals, and not from maternal grandfather, and it was governed "by the custom of the Punjab" but it was not suggested that the custom differed from the Hindu Law on the issue before their Lordships.

The rule of Hindu Law is well-settled that the property which a man inherits from any of his three immediate paternal ancestors, namely his father, father's father and father's father's father, is ancestral property as regards his male issue, and his son acquires jointly with him an interest in it by birth. Such property is held by him in coparcenary with his male issue, and the doctrine of survivorship applies to it. But the question raised by this appeal is, whether the son acquires by birth an interest jointly with his father in the estate which the latter inherits from his maternal grandfather. Now, Vijnaneswara, the author of the Mitakshara, expressly limits such right by birth to an estate which is paternal or grand-paternal. It is true that Colebrooke's translation of the 27th *sloka* of the first section of the first chapter of the Mitakshara, which deals with inheritance, is as follows: "It is a settled point that property in the paternal or ancestral estate is by birth." But Colebrooke apparently uses the word "ancestral" to denote grand-paternal, and did not intend to mean that in the estate, which devolves upon a person from his male ancestor in the maternal line, his son acquires an interest by birth. The original text of the Mitakshara shows that the word used by Vijnaneswara, which has been translated by Colebrooke as "ancestral", is *paitamaha* which means belonging to *pitamaha*. Now, *pitamaha* ordinarily means father's father, and, though it is sometimes used to include any paternal male ancestor of the father, it does not mean a maternal male ancestor.

Indeed, there are other passages in the Mitakshara which show that it is the property of the paternal grandfather in which the son acquires by birth an interest jointly with, and equal to that of, his father. For instance, in the 5th *sloka* of the fifth section of the first chapter, it is laid down that in the property "which was acquired by the paternal grandfather . . . the ownership of father and son is notorious; and, therefore, partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share". Now, this is the translation of the *sloka* by Colebrooke himself, and it is significant that the Sanskrit word, which is translated by him as 'paternal grandfather", is *pitamaha*. There can, therefore, be no doubt that the expression 'ancestral estate" used by Colebrooke in translating the 27th *sloka* of the first section of the first chapter was intended to mean grandpaternal estate. The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate, in which, under the Hindu Law, a son acquires jointly with his father an interest by birth, must

be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding.

The estate, which was inherited by Ganesh Prasad from his maternal grandfather, cannot, in their Lordships' opinion, be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person. On the death of her husband, the devise in her favour came into operation and she became the absolute owner of the village Kalinjar Tirhati, as of the remaining estate; and the sale of that village in execution proceedings against her husband could not adversely affect her title".

246. Property inherited from other relations.—Property inherited from any person other than the father, father's father, or father's father's father, is not ancestral property in the hands of the inheritor so as to enable the inheritor's son, grandson or great-grandson to get a right in it by birth or to demand a partition thereof. Thus property inherited from the father's father's father's father or from the mother,[o] or from a collateral relation,[p] or from a maternal uncle,[q] will not be "ancestral" property in the inheritor's hands.

247. Acquisitions with the aid of ancestral assets.—All properties acquired either with the income of ancestral property,[r] or the proceeds of sale of such property,[s] or with the aid of ancestral property,[t] or which are accretions thereto[u] or augmentation thereof,[v] will become joint family property in the hands of the acquirer. This is so even when the property is purchased by a sole owner out of the income of ancestral estate before a son is born to him.[w] But this is subject to an exception in the case of an ancestral impartible estate, and its holder has absolute powers over the acqui-

(o) *Bai Parson* v. *Bai Somli*, 36 B. 424 =15 I.C. 774=14 Bom. L.R. 400.

(p) *Gurumurthi* v. *Gurammal*, 32 M. 88=1 I.C. 750; *Nund Coomar* v. *Razeeooddeen*, 10 Beng. L.R. 183; *Karuppai* v. *Sankaranarayana*, 27 M. 300=13 M.L.J. 398; *Nallatambi* v. *Mukunda*, 3 M.H.C.R. 455; *Pitam* v. *Ujagar*, 1 A. 651, *Muhammad Hussain* v. *Babu Kishva Nandan*, 46 L.W. 1=1937 M.W.N 683=(1937) 2 M.L.J. 151 (P.C.); *Raj Kishore* v. *Madan Gopal*, 13 L. 491=1932 L. 636=33 P.L.R. 829.

(q) *Karuppai* v. *Sankaranarayana*, 27 M. 300=13 M.L.J. 398.

(r) *Jugmohandas* v. *Mangaldas*, 10 B. 528; *Ramanna* v. *Venkata*, 11 M. 246; *Umrithnath* v. *Goureenath*, 13 M.I.A. 542; *Lal Bahadur* v. *Kanhaia Lal*, 29 A. 244—34 I A. 65=4 A L J. 227 .9 Bom. L R. 597 11 C.W.N. 417 17 M.L J. 228.

(s) *Krishnasami* v. *Rajagopala*, 18 M. 73=4 M.L.J. 212.

(t) *Mitak*, 1-4-1 to 6; *Lal Bahadur* v. *Kanhaia Lal*, 29 A 244—31 I A 65 4 A.L.J. 227—9 Bom. L.R. 597 11 C.W.N. 417=17 M.L.J 228; *Umrithnath* v *Goureenath*, 13 M.I A 542; *Deorao* v. *Asaram*, 1936 N. 203.

(u) *Ram Prasad* v. *Radha Prasad*, 7 A. 402

(v) *Jai Lal* v. *Ram Sarup*, 1938 Lah. 113 a case of extension of ancestral business.

(w) *Ramanna* v. *Venkata*, 11 M. 246; *Jugmohandas* v. *Mangaldas*, 10 B. 528; See contra in *Ganga Prosad* v. *Ajudhia Pershad*, 8 C. 131.

sitions made out of the savings of its income[x] as he has over the estate itself.[y] Again, if an acquisition is made by an act detrimental to the interests of the joint family, it becomes the joint family property.[z] Transfer of a boy by adoption is to the detriment of the natural family, and hence sums paid to a Nattukottai Chetty in whose class males are specially prized for earning capacity, in consideration of his giving his son in adoption, are not his self-acquisitions, but property of the joint family of the natural father.[a]

248. Joint acquisitions without the help of ancestral property—Property acquired by the joint exertions of the coparceners though without the aid of ancestral assets, must be presumed to be joint family property.[b] But this presumption does not arise where the acquisitions are only some of the members of the coparcenary,[c] and can be rebutted even when the acquisition is made by all the members by proof of intention on their part to treat the acquisition merely (1) as a partnership property governed by the Contract Act in which case the share of one of the acquirers will on his death, devolve on his own heirs and not by survivorship,[d] or (2) as joint property with the incident of survivorship as between the acquirers, but without the right by birth accruing to their sons.[e] Where some of the collaterals in a coparcenary acquire property without the aid of ancestral assets, they cannot set up a sub-coparcenary as between themselves and to the exclusion of the other coparceners, because a coparcenary cannot be created by an act of parties.[f]

(x) *Ravi Jagadamba* v. *Wazir Narain*, P. 319–50 I A 1 1923 P C 59 18 L W 555—44 M L J 503 4 P L T 319 –25 Bom L R 676 925 M W N 460–26 C W N. 98; *Gurusami* v *Pandiyan*, 44 M. 1 1921 M. 340 39 M L J 529 1920 M W N 660

(y) See S 631

(z) *Mitak* 1-4-1

(a) *Ramaswamy Chetty* v. *Palaniappa Chetty*, 18 L W 656–1924 M. 351 1923 M W N. 841

(b) *Motilal* v. *Hajimal*, 87 I C. 309 1926 N. 146; *Haridas* v *Devkuvarbai*, 50 B. 443–28 Bom L R. 637–1926 B 408; *Korsondas* v *Ganugbai*, 32 B. 479—10 Bom. L R 184 dissenting from contra in *Chatturbhooj* v. *Dharmsi*, 9 B. 438; *Gopalasami* v *Arunachelam*, 27 M. 32; *Muniswami Chetti* v *Maruthammal*, 34 M. 211 7 I.C 176–20 M.L.J. 687–1910 M W N. 233; *Karuppai* v. *Sankaranarayanan*, 27 M 300 13 M L J 398 (F.B.); *Lal Das* v *Motibai*, 10 Bom. L.R 175; *Sudarsanam* v *Narasimhulu*, 25 M. 149—11 M.L.J 353; *Jamna Prasad* v. *Mt. Durga*, 1933 A 138 1933 A L J. 91; *Amirdhan* v *Vallianmal*, 43 M L W. 215 1936 M 19 1936 M W N 567; But see *Magan* v. *Krishna*, 1935 A. 303 1935 A.L.J 729 and *Gauri Shankar* v *Gopal*, 3 A W R. 763—1934 A 701; *Rajagopala* v. *Seshayya* 1935 M W N. 565–41 L W. 545 1935 M. 368

(c) *Sudarsanam* v *Narasimhulu*, 25 M 149 11 M L J 353; *Nathu* v *Babu*, 43 M L W 464 1936 P C 103 40 C.W.N. 441 63 I A. 155—17 P.L.T. 321 38 Bom L R 462 1936 M W N 499—1936 A.L.J 686 This case holds that it is open to the acquirers to get divided from the rest of the coparceners and hold their acquisition with the incidents of coparcenary property

(d) *Rampershad* v. *Sheobarn*, 10 M I A 490; *Gaupat* v *Annaji*, 23 B. 144; *Gopalasami* v. *Arunachelam*, 27 M. 32 Such a sub-coparcenary may, however, be possible where the acquirers happen to be all the members of a branch of the joint family; See S. 235.

249. Separate property thrown into common stock.—If a coparcener having separate property, voluntarily throws it into the joint stock with the intention of abandoning all separate claims upon it, then it becomes joint family property with all its usual incidents,[e] and no registered document is necessary for such blending.[f] But from the mere fact that a father having self-acquired property allows his adult son to live with him or used its income for the son's support,[g] an inference of intention on the part of the father to treat his self-acquired property as joint family property cannot be drawn.[h] An intention to throw the separate property into the common stock and to waive all separate rights in respect thereof, must be clearly established and will not be inferred from the owner allowing joint use of the property to the other coparceners merely from kindness or affection.[i] Nor will such an intention be inferred where the coparcener allows joint possession and enjoyment of his separate property, not knowing, owing to the uncertainty of judicial opinion on the matter, that the property in question is one in which the other members cannot claim any interest.[j] Whether a person having control of the joint family property brings it into his separate account or he brings his separate estate into the joint family account, the effect is the same and the properties become blended so as to invest the separate property with all the incidents of joint family property. The real question for determination is what is the true conclusion to be drawn when people united by bonds of close relationship and living as members of a joint family draw for the joint family expenses out of a fund enriched by other contributions. If they confuse the incomes of the joint properties with the separate ones, their intention presumably is that the separate properties are

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(e) *Hurpurshad* v *Sheo Dyal*, 3 I A. 259; *Shankar Baksh* v *Hardeo Baksh*, 16 I A 71 16 Cal 377; *Rahaan* v *Parwa*, 50 B 815 1927 B 68 28 Bom L R 1446; *Radhakant* v *Na.ma*, 45 C 737 1917 P C. 128 16 A L J 537 20 Bom. L R 724 22 C W N 649 35 M L J 99 1918 M W N 366; *Gopalasami* v *Chinnasami*, 7 M 458; *Lal Bahadur* v. *Kanhaiya Lal*, 29 A 244 34 I A 65 4 A L J 227 9 Bom L R 597 11 C W N 417 17 M L J 228; *Rampershad* v. *Sheochurn*, 10 M I A. 490, *Periakaruppan* v. *Arunachelam*, 50 M. 582 1927 M. 676 52 M L J 571 25 L W. 688 1927 M W N. 287; *Suraj Narain* v. *Ratan Lal*, 40 A. 159 44 I.A 201 15 A L J 684 19 Bom. L.R. 737 21 C W N. 1065 33 M L J. 180 6 L.W. 509 1917 M.W.N. 477 1917 P.C. 12; *Muddun Gopal* v. *Khikhinda Koer*, 18 C. 341 18 I A. 9

(f) *Ramaswami* v. *Raju*, 51 M L J. 167 1926 M. 963 1926 M.W N. 635

(g) *Gopal Trimbak* v *Keshcosu*. 1936 N 185.

(h) *Periakaruppan* v *Arunachelam*, 50 M. 582 1927 M 676 52 M L J. 571=25 L W. 688 1927 M.W.N. 287.

(i) *Asutosh* v *Tarapada*, 58 C.L.J. 372 =1934 C. 308; *Janki* v *Janki*, 2 A.L.J 225, *Muddun Gopal* v *Khikhinda Koer*, 18 C. 341=18 I.A. 9; *Magan Lal* v. *Krishna*, 1935 A.L.J. 729 1935 A 303

(j) *Naina Pillai* v. *Dawanni*, 43 M.L.W. 302 1936 M W N 256 1936 M 177 (the case of a Karnam service inam enfranchised in the name of a coparcener, but allowed by him to be treated as joint family property in ignorance of his exclusive right therein).

to be treated as joint family ones.[k] This rule applies even in the case of brothers living together as members of a joint family governed by the Dayabhaga.[l] The onus of proving such blending or throwing the separate property into the joint stock is, however, on the person alleging it[m] and cannot be held to be established merely from the fact that he associated with himself his sons and his grandson in the execution of a mortgage deed in respect of that property,[n] where for instance such association is due to the insistence thereon by the mortgagee for his better security and by way of abundant caution.

250. Gift from paternal ancestor and others.—On the question whether the self-acquired property of a father gifted or devised to his son is ancestral or separate property in the son's hands, there is a good deal of conflict among the High Courts. The Allahabad High Court takes the view that the property is self-acquired,[o] while the Calcutta High Court's view is that it is ancestral.[p] In Bombay,[q] Madras,[r] and Oudh[s] the question has been considered to be one of intention of the donor, though when the intention is not clear, the Madras High Court holds that the property must be deemed to be ancestral while Bombay and Oudh Courts take the view that it should be taken as self-acquired. In *Lal Ram Singh* v. *Deputy Commissioner of Partebgarh*,[t] the Privy Council simply

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(k) *Rajani Kanta Pal* v *Jaga Mohan Pal*, 50 I A 172=50 C 439=38 L W 387=11 M L J 851=23 Bom. L R 683=1923 M W N. 438=27 C W N 997—1923 P C 57, *Bahana* v *Parawa*, 50 B 815=1927 B 68=28 Bom L R 1446, *Harparshad* v *Sheo Dyal*, 3 I A 285

(l) *Ator* v *Thakar*, 35 C 1079—35 I A 206=18 M L J 379=10 Bom L.R 790=12 C W N. 1049=6 I.C 721; *Venkayamma* v. *Gangayya*, 38 L W 779=1934 M. 16=1933 M W N. 1319=65 M L J 703, *Vythinatha* v *Varadaraja*, 1938 M W N. 138. (1938) 1 M L J. 216, *Narayanaswamy* v *Ratnasabapathy*, 46 L W 576=1938 M. 136=1937 M W N 835=(1937) 2 M L J. 906.

(m) *Nut Behari* v *Nanilal*, 41 C.W.N. 613=45 M.L.W. 408=1937 P C 61=39 Bom. L.R. 748=1937 M W.N 641=(1937) 2 M L J. 114 (P C)

(n) *Govind Prasad* v *Shanti*, 1935 A.L.J 797=1935 A 778; But see *Viswasundara* v *Pallamaraju*, 1933 M. 565.

(o) *Parsotam* v *Janki Bai*, 29 A. 354=4 A L J 257, *Jai Prakash* v *Bhagwan*, 1937 A L J 356. This is also the view of the Lahore High Court, *Keshenchand* v *Punjab Sindh Bank*, 35 P L R 476 1934 L. 534.

(p) *Muddun Gopal* v. *Ram Baksh*, 6 W R 71; *Hazari Mall* v *Abaninath*, 17 C W N 280=18 I C 625.

(q) *Jugmohandas* v *Mangaldas*, 10 B 528, *Nanabhai* v. *Achyuthai*, 12 B 122.

(r) *Nagalingam* v *Ramachandra* 21 M. 429=11 M L J 210, *Tara Chand* v *Reeb Ram*, 3 M H C R. 50; See the discussion in *Ulagalum Perumal* v. *Subbulakshmi* 44 L W 168=1936 M 721=71 M L J. 1; *Viswesara* v *Varahanarayanmam*, 1937 M.W N. 296=1937 M 631

(s) *Rameshar* v *Rukmin*, 11 O C 241=12 I C 770 The Lahore High Court takes this view *Gobind* v *Gopi*, 1934 Lah 397.

(t) 45 A 596=50 I A 265=1923 P.C. 160=1923 M W N 591=21 A.L.J. 777=47 M L J 260=29 C W N 86

noted the existence of these conflicting views on the question but did not choose to express an opinion upon it beyond intimating that if they had to decide this question, they would be disposed to decide it on the original texts of the Mitakshara. There are two texts of the Mitakshara having a bearing on the question and they are as follows :—

"Whatever else is acquired by the coparcener himself without detriment to his father's estate, does not appertain to the co-heirs".—Mit. i-4-1.

"What is obtained through the father's favour will be subsequently declared exempt from partition".—Mit i-4-28.

It is submitted that the view taken by the Allahabad High Court is the correct view to take and that there is no warrant in the texts for the Calcutta view. The first of those texts, grammatically construed, means that if the property acquired by a coparcener should be treated as joint family property, the detriment to the father's estate must be the result of the coparcener's own action and not the result of an act of the ancestor. The proper construction of this text, it is submitted, is, that it refers to a coparcener's acquisitions of property other than the ancestral property without the help of the father's estate, and not to his acquisition of the father's estate. Besides, even if the first text above quoted is ambiguous, the second text makes the matter perfectly plain. It is clear and categorical and declares that what is given by the father's favour is the separate property of the donee in respect of which others cannot claim any right to partition. Added to this, the reason of the thing allows of only one answer. Why should the father give the property to his son by a gift or will, if he does not want him to be in a better position than he would be if the property comes to him by descent ? If, on the other hand, he does not desire that his son should be in a different position than when he inherits the property, then it is absolutely unnecessary for him to make a will, and, even if he makes a will, it will be perfectly open to him to say in explicit terms that his son should not have larger powers in respect of the property given. On the whole, the correct answer to the question is that, if the deed of gift or will does not say anything as regards the quantum or the nature of the rights and powers of the son in respect of the property given, the donee or devisee takes the property as his absolute separate property in which his sons do not get a right by birth, at any rate where the gift is only to one or some of the sons or where the gift is to all the sons but in unequal shares, as in such a case an intention of the donor that the donees should take not in the same way as on intestacy can be reasonably inferred. The same principle must be held applicable where the gift or devise is by the father's father or father's father's father, and cases which hold that property given

under a will to a daughter's son by his maternal grandfather,[u] or given by a putative father to his illegitimate son in lieu of maintenance,[v] is the absolute property of the person to whom it is given only support this principle. A gift to members of a joint family by a stranger or by one who is not a paterna' ancestor within three degrees is taken by them as tenants-in-common and not as joint tenants.[w]

251. Government grant.--Where the Government grants an estate in the exercise of its Sovereign power, the estate becomes the self-acquired property of the grantee, whether it is a new grant or the restoration of an estate previously confiscated by the Government,[x] unless the grant is intended to be for the benefit of the family, or a contrary intention appears from the grant,[y] or it was treated as joint family property by the donee and the members of his family,[z] either by a family arrangement or a family custom.[a] Thus where a grant was made as a reward for loyalty and for support and assistance rendered to the Government out of family funds the grant, though made to the head of the family, really enures for the benefit of the whole family as joint family property.[b] Whether a Government grant enured to the grantee as his separate property or as his joint family property is one of construction of the grant with reference to its terms and the surrounding circumstances.[c] Mere confirmation followed by the annulment of the confiscation does not affect the interests in the estate of the persons who were originally entitled to them before such confiscation.[d] But *prima facie*, a gift to a member of a joint family is his separate property and will only become joint family property either when it descends to his sons, or he himself has thrown it into the com-

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(u) *Subramania Ayyar* v. *Nalla Kayandan*, 1926 M W N 291 1926 M. 631

(v) *Krishnaswami* v *Seethalakshmi*, 39 M. 1029 3 L W 317-31 I C. 803.

(w) *Venkayamma* v *Gangayya*. 38 L.W. 779 1934 M. 16 1933 M.W.N 1310 =65 M L.J 703 ; *Janakiram* v *Nagamony*. 49 M. 98 22 L W 801 50 M.L.J. 413= 1926 M. 273

(x) *Kalama Natchiar* v. *Raja of Shivagunga*, 9 M.I.A 539; *Beer Pertab* v. *Rajender Pertab*, 12 M.I.A. 1 ; *Thakurain Sookraj* v *Government*, 14 M.I.A. 112 ; *Pirthi Pal* v *Jewakir*, 14 I.A. 37. 14 C. 193 ; *Gunnaiyan* v. *Kamakchi*, 26 M. 339.

(y) *Mahant Govind Rao* v *Sita Ram*, 24 I.A. 195=21 A. 53-2 C.W.N. 681 ; *Kedar Nath* v. *Roten Singh*, 37 I.A. 161 =32 A. 415-12 Bom.L.R. 656-20 M.L.J. 900—14 C.W.N. 985-1910 M.W.N. 311 ; *Hurpurshad* v. *Sheo Dyal*, 3 I.A. 259.

(z) *Baijnath* v. *Tej Bali*, 38 A. 590= 38 I C 891 14 A L J 913 , *Kedar Nath* v *Ratan Singh*, 37 I A 161 32 A. 415 12 Bom. L.R 656 20 M L J 900 14 C W N. 985- 1910 M.W N 311 , *Bahu Rani* v. *Rajendra*, 1933 P C 72 60 I A 95 =8 Luck. 121 37 L.W. 396 1933 M W.N. 286 -37 C.W.N. 464 -35 Bom. L.R. 490 -1933 A L J. 445-64 M L J. 555 ; *Dattatraya* v. *Snankar*, 40 Bom L R. 118

(a) *Ramanand* v *Raghunath*, 9 I.A. 11 8 C 769 (P.C.); *Periasami* v *Perusami*, 6 I.A. 61 1 M 312 (P C). *Madhavrao* v *Atmaram*, 15 B. 519.

(b) *Hurpurshad* v *Sheo Dyal*, 3 I.A 259

(c) *Baijnath* v. *Tej Bali*, 38 A. 590--38 I.C. 894--14 A.L.J. 913

(d) *Mirza Jehan* v. *Badshoo Bahoo*, 12 C 1--12 I.A. 124 ; *Hargovind* v. *Collector of Etah*, 1937 A. 377—I.L.R. 1937 A. 292 —1937 A.L.J. 610.

mon stock. Thus when there was nothing in the terms of a maintenance grant to two brothers to suggest that the Government intended to make a grant to their family, it was held that each of the brothers took an estate of inheritance in the grant as a tenant-in-common.[e]

252. Impartible estates.—An impartible estate cannot strictly be said to be coparcenary property as, by the very nature of the estate, two of the chief incidents of coparcenary, namely, right to joint enjoyment and right to call for partition, cannot exist, though the right of survivorship, which is not inconsistent with the nature of the thing, may still remain.[f] In the absence of a custom to the contrary the holder of an ancestral impartible estate has absolute powers of disposal over the property by gift or will.[g] And as regards the income of the estate it is the absolute and exclusive property of the Zamindar and devolves not by survivorship like the parent estate but by inheritance to the holder's heirs.[h]

253. Separate property.—Property may be held by a coparcener absolutely and free of all claims from the rest of the coparceners and is known as his separate or self-acquired property. Yagnyavalkya lays down the doctrine of self-acquisition as follows: "Whatever is acquired by the coparcener himself without detriment to the father's estate, as a present from a friend or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property which has been taken away give it up to the coparceners; nor what has been gained by science."[i] This text is enlarged by the Mitakshara by defining self-acquisition as an acquisition without detriment to the estate of either the father or

(e) *Bahu Rani* v *Rajendra* 60 I A. 95 : 37 L.W. 396 : 8 Luck 121 1933 P C. 72 1933 M W N 286 35 Bom L R 490 1933 A L J 445 37 C W N 461 64 M L J 555

(f) *Shiba Prasad* v *Rani Prayag*, 36 L.W. 266—59 I A 331 59 C 1399 63 M L J 196—36 C W N 1046 1932 M W.N 925 1932 A.L J. 919—34 Bom L R 1567 1932 P C 216, *Rama Rao* v *Raja of Pittapur* 45 I A 148 41 M 778—35 M.L.J 392 1918 P C 81 16 A L J 833—20 Bom L R 1055 23 C W N. 173 1918 M W.N 922, *Sartaj Kuari* v *Deoraj Kuari*, 10 A 272 15 I A 51 : *Naraganti* v *Venkatachalapati*, 4 M. 250, *Jogendra* v. *Nityanund*, 17 I A 128—18 C 151 (P C) See also Ss 628 and 631.

(g) *Sartaj Kuari* v *Deoraj Kuari*, 10 A 272—15 I A. 51 ; *Sivasubramania* v *Krishnammal*, 18 M 287—5 M.L J 168; *Protap Chandra* v. *Jagadish Chandra*, 54 I A. 289—54 C. 955—1927 P.C. 159—53 M L J 30 25 A L J. 638 29 Bom L.R 1136 31 C W N 943 1927 M W N. 513 8 P L T 623, See S 631

(h) *Aparna* v *Sree Shiba Prashad*, 3 P 367 1921 P 151, *Rani Jagadamba* v. *Wazir Narain Singh*, 50 I A 1 2 P 319 18 L.W 555 1923 P C. 59 44 M.L J 503

4 P L T 319 25 Bom L R 676 1923 M W N 460 28 C.W N 98, *Murtaza Husain Khan* v *Mahomed Yasin Ali Khan*, 43 I A 269 38 A. 552 4 L.W. 538 1916 P.C. 89—14 A L J 1083 18 Bom I R 884 21 C W N 410 31 M.L J 804—(1916) 2 M.W.N 555, *Kotta Ramasami* v *Bangaru*, 3 M 145; *Parbati Kumari* v. *Jagadis Chunder*, 29 I.A. 82—29 C. 433—6 C W.N 490 4 Bom L.R. 365; *Janki Pershad* v *Dwarka Pershad*, 40 I A. 170—35 A 391 20 I.C 73—15 Bom L R. 853—11 A L J 818 1913 M.W.N 630 25 M.L.J. 34 17 C.W N 1029.

(i) *Yagnyavalkya*, ii-119, 120.

the mother and by adding that the words " without detriment to the father's estate" must be read along with each mode of acquisition mentioned in the text. Under this modified definition property inherited from maternal grandfather is not the inheritor's self-acquired property,[j] as also "what is obtained from a friend as the return of an obligation conferred at the charge of the patrimony, what is received at a marriage concluded in the Asura form or the like,[k] what is recovered of the hereditary estate by the expenditure of the father's goods, and what is earned by science acquired at the expense of ancestral wealth."[l] Separate property of a person is one over which he has absolute powers of disposal[m] and in respect of which his coparceners can claim no right,[n] passing, on the death of the owner not by survivorship, but by inheritance.[o] What constitutes separate property may be considered under the following heads: (1) Obstructed heritage, (2) Property acquired by gift or devise, (3) Recovery of property lost to the family, (4) Acquisition of property without detriment to the joint family estate, (5) Gains of learning, (6) Property obtained on partition, (7) Property which is incapable of joint ownership, and (8) Property of the sole surviving coparcener.

254. Obstructed heritage.—Property inherited from persons other than the father, father's father and father's father's father, is the separate property of the inheritor, whether the same is inherited from a paternal ancestor more than three degrees removed or from a collateral[p] or from or through a female like the mother[q] or any other relation, maternal or paternal.[r]

255. Property acquired by gift or devise.—The question whether property obtained by gift or devise from a father is the taker's separate property or not has already been considered.[s] The same rule will apply even if the property is obtained by either of those

(j) *Muttayan* v. *Zamindar of Sivagiri*, 6 M. 1 9 I A. 128; but see S 245.

(k) *Sheo Govind* v *Sham Narain*, 7 N W P H.C.R 75

(l) *Mitakshara*, 1—4—6

(m) *Balwant Singh* v *Rani Kishori*, 20 A. 267 25 I A. 54—2 C.W N 273, P.C.; *Beer Pertab* v *Rajender*, 12 M.I.A. 1. *Somasundara* v *Ganga*, 28 M. 386

(n) *Yamunabai* v. *Manubai*, 23 B. 608 —1 Bom L.R. 95.

(o) *Katama Natchiar* v *Raja of Shivaganga*, 9 M I A 539 at 543

(p) *Radhakant Lal* v. *Nazma Begum* 15 C. 733—16 A L.J. 537. 20 Bom.L.R. 724 —22 C.W.N. 649=35 M.L.J. 99=1918 M.W N. 386—1917 P.C. 128; *Gurumurthi* v. *Gurammal*, 32 M. 88=1 I.C. 750; *Pitam* v *Ujagar*, 1 A. 651, *Nallatambi* v. *Mukunda*, 3 M H C R 455, *Harihar Pershad* v *Bhoti Pershad*, 6 C L J 383; *Timannacharya* v *Balacharya*, 4 Bom. L R. 257, *Karuppai* v *Sankaranarayanan*, 27 M. 300 13 M L J. 398, *Sita Ram* v. *Balak Ram*, 11 Oudh W. N 1951 1935 Oudh 13

(q) *Nund Coomar* v *Razeeooddeen*, 10 Bom I.R 183, *Muttayan* v *Zamindar of Sivagiri*, 6 M. 1. 9 I A 128; *Bai Parson* v *Bai Somli*, 36 B 421—15 I.C. 774—14 Bom.L.R. 400.

(r) *Muhammad Husain* v. *Babu Kishna Nandan*, 46 I.W 1 1937 M.W.N. 683 = (1937) 2 M L J 151 (P C)

(s) S. 250

modes from a father's father or father's father's father. Even if a gift by a father to his son of the father's separate immoveable property should be generally considered to be ancestral property in the son's hands as regards his own issue, yet a gift of affection made to the son by a father of a portion of ancestral moveables will enure to the donee as his separate property,[t] provided the gift is of a small portion of the said moveables and is within reasonable limits.[u] Thus nuptial gifts made out of the joint family fund to a member of the family become his self-acquisitions.[v] Marriage gifts and other friendly offerings made by others such as the father-in-law[w] and gifts or devises made by persons who are strangers to the family[x] also become the donee's self-acquired property. The presumption of ancestral property cannot arise where the gift or devise is by a person other than the father, father's father or father's father's father of the donees.[y] Even a gift or devise by maternal grandfather to the several sons of his daughter living as members of a joint family is taken by them as tenants in common as their separate property and the principle of the ruling in *Venkayamma* v. *Venkataramanayyamma*, 25 M. 678 — 29 I.A. 156 = 4 Bom.L.R. 657 = 7 C.W.N. 1 = 12 M.L.J. 299 does not apply to a case of gift or devise.[y]

256. Recovery of property lost to the family.—Where property which originally belonged to the family had been seized and held adversely to the family by strangers, and the family either was not able to recover it or had no intention of recovering the same, any member of the family can recover the property unaided by the family funds and take one-fourth of the property recovered as a reward for himself in addition to his share in the remainder of the property when it comes to be distributed among all the co-parceners. But if the recoverer is the father the above rule does not apply and the whole property enures solely to the benefit of the recoverer.[z] Merely obtaining a decree for possession does not amount to recovering the property which means actually recovering possession of the property, and the recovery must be made *bona fide* and not in fraud of the title of the co-heirs or by anticipating them in their

(t) *Mitakshara*, i—1—27.

(u) *Nand Ram* v. *Mangal*, 31 A. 359=6 A.L.J. 415=1 I.C. 797.

(v) *Sheo Gobind* v. *Sham Narain*, 7 N.W.P.H.C.R. 75.

(w) *Adhar Chandra* v. *Nobin Chandra*, 12 C.W.N. 103; *Beharee* v. *Lall Chand*, 25 W.R. 307.

(x) *Venkayamma*, v. *Gangayya*, 38 L.W. 779=1934 M. 16=65 M.L.J. 703=1933 M.W.N. 1310.

(y) *Thambireddi* v. *Mallareddi*, 42 M.L.W. 422=1935 M. 852=1935 M.W.N. 1111; *Krishnaswami* v. *Avayambal*, 1933 M. 204.

(z) *Mitakshara*, i—5-3; *Manu*, ix—209; *Dayabhaga*, vi—31-37; *Naraganti* v. *Venkatachalapati*, 4 M. 250; *Visalatchi* v. *Annasamy*, 5 M.H.C.R. 150; *Bajaba* v. *Trimbak*, 34 B. 106—11 Bom L.R. 1122=4 I.C. 255; *Sham Narain* v. *Rughoobardyal*, 3 C. 508.

intention of recovering the lost property.[a] Though these principles are deducible from the original texts dealing with this question, it may be submitted that there is no conceivable reason why a coparcener who out of his own moneys recovers property lost to the family should be placed in a worse position than in respect of any other property which he may acquire out of his private means. To apply the textual injunctions literally or rigorously would in effect be preventing and penalising what may be laudable from the point of view of sentiment, namely, reducing the property into possession of one of the coparceners instead of allowing it to remain in the hands of a stranger[b] The following useful observations occur on this matter in *Bajaba* v. *Trimbak*[c] :—

"The question is whether certain land forms part of the joint family property of all the members of the Oke family who are the parties to the suit, or whether it is the separate property of the defendants.

According to the findings of the lower appellate Court the land was originally ancestral and was the subject of a suit brought on behalf of one Hari Krishna Oke against the branch of the Oke family to which the parties to this suit belong. The litigation ended in a compromise in 1867 whereby the father of the parties to the suit was to remain in possession of land claimed for seven years, and then to convey it to the other branch. The representative of the other branch on the 24th September 1873 sold his interest which was to come into his possession under the terms of the compromise in the following year to the defendant 1 by a sale-deed for the sum of Rs. 500. It is found as a fact that Rs. 500 was not part of the joint family money but was provided by the defendant 1 on his own responsibility. The learned Judge also found that the defendant 1 did not intend by the purchase to merge this land in joint family property and excluded his brother from it.

It is contended on this state of facts that the defendant 1 is not entitled to the benefit of his purchase, but that he must partition the land with the other members of his family subject to a right under Hindu Law of retaining an additional quarter share for himself. In support of this contention reliance is placed upon certain texts: Mitakshara, chapter I, section 5, paragraph 3; Mayukha, chapter IV, section 7, paragraph 3. If these texts involve the conclusion contended for by the defendants the result would be anything but equitable.

We however think that the comment upon the texts which is to be found in West and Buhler's Hindu Law (3rd Edn.), page 719, must be accepted as correct. The learned authors say: "It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words 'hrita' (i.e., that which has been taken or seized) and 'nashta' (i.e., that which has been lost) and 'uddhare' (i.e., if he rescue

(a) *Visalatchi* v. *Annasamy*, 5 M.H.C.R. 150 ; *Bajaba* v. *Trimbak*, 34 B. 106=11 Bom. L.R. 1122=4 I.C. 255 ; *Jugmohandas* v. *Mangaldas*, 10 B. 528.

(b) See *Balwant Singh* v. *Rani Kishori*, 20 A. 267=25 I.A. 54=2 C.W.N. 273.

(c) 34 B. 106 11 Bom.L.R. 1122=4 I.C. 255.

or win back). Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claim to partition by his coparceners yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy* v. *Debee Pershad Tewaree*".(d)

This view receives support from the Judges of the Madras High Court, who in *Visalatchi* v. *Annasamy* (e) said:—"The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time:—'Property unjustly detained which could not be recovered before' is the import of the ordinance of Manu, chapter IX, sl. 209."

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs." 34 Bom. 106 at 109-111.

257. Acquisition of property without detriment to the joint family estate.—Where a coparcener acquires property without detriment to the joint family estate and unaided by its funds, it becomes his separate property together with its income and purchases from such income.(f) Thus property acquired with money borrowed upon the sole credit of the acquiring coparcener,(g) an amount paid on the death of a coparcener under Sec. 1 of the Fatal Accidents Act,(h) a life policy for which premia were paid out of the salary of the coparcener assured,(i) and the Provident Fund amount paid to a coparcener on his father's death,(j) will all be deemed the coparcener's separate property. In a recent case before the Madras High Court it was further held that where money, given to a member of a joint family by its manager from the family funds to be spent by him for his own personal use, was utilised by that member for effecting an insurance on his life, the policy money could not be regarded as an acquisition for the joint family, but must be held to be his separate property.(k)

258. Gains of Science.—The texts of Hindu Law which lay down the divisibility among the co-heirs of the gains of science which has been imparted at the family expense contemplate the special branch of science which is the immediate source of

(d) (1866) 6 W.R. 58 (Civ. Rul.)

(e) (1870) 5 Mad. H.C.R. 150 at p. 157.

(f) *Krishnaji* v. *Moro Mahadev*, 15 B. 32; *Narasingh Dass* v. *Rai Narain Dass*, 3 N.W.P.H.C.R. 217. See also S. 256

(g) *Narasingh Dass* v. *Rai Narain Dass*, 3 N.W.P.H.C.R. 217.

(h) *Shi Gopal* v. *Amba Devi*, 22 I.C. 846.

(i) *Rajamma* v. *Ramakrishnayya*, 29 M. 121; *Mahadeva* v *Rama*, 13 M.L.J. 75.

(j) *Thaj Mahomed* v. *Balaji*, 39 L.W. 186=57 M. 440=1934 M. 173=1933 M.W.N. 1472=66 M.L.J. 207.

(k) *Bengal Insurance and R.P. Co* v. *Velayammal*, 1937 M.W.N. 303=45 L.W. 616=I.L.R. 1937 M. 990=1937 M. 571.

the gains and not any elementary education which is the necessary stepping stone to the acquisition of all science.[l] Thus earnings of a coparcener due to the special education given him at the cost of the joint family will become joint family property,[m] as, when a person makes his earnings as an Indian Civil Servant after having been given, at the cost of the family, a special education, which qualified him for the post.[n] In considering whether the gains are partible there is no valid distinction between a direct use of the joint family funds and the use which qualifies the member to make the gains by his own efforts.[o] But the gains made as a Sub Judge,[p] or as an astrologer,[q] or as a clerk, as a broker or a money-lender, personally and without the aid of the joint family funds, by a member of a joint family who had received only an ordinary education suitable to his position as a member of his family, should be regarded only as his self-acquired property and not as the joint property of the family.[r] Gains which are the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education can never become the property of the joint family.[s] Thus property acquired by a Dancing Girl from the income derived by prostitution, and without detriment to the family estate and with all any scientific acquirements imparted with the aid of family funds, is the self-acquired and absolute property in the acquirer's hands.[t] Besides, when the special education or science has been imparted at the expense of persons who are not members of the student's family, has gains resulting from such special education cannot be the joint family property.[u] In *Gokal Chand* v. *Hukam Chand*,[v] the Privy Council reviewed the earlier decisions on the question and observed as follows :—

(l) *Lakshman* v *Jamnabai*, 6 B. 225 ; *Krishnaji* v *Moro Mahadev*, 15 B 32 ; *Inchman Kuar* v *Debi Prasad*, 20 A 435 ; *Metharam* v. *Rewachand*, 45 C. 666 45 I A 41 7 L.W. 361 16 A L J 281 20 Bom L R 566 22 C.W.N 377 34 M L J 327 1918 M W N 587 1917 P C. 105 ; *Gokal Chand* v *Hukam Chand*, 2 Lah 40 48 I.A. 162—14 L W. 435 19 A L J 249 —22 Bom. L.R. 534—25 C W N 534 40 M L J. 327 1921 M W N. 175 2 P L T. 201 1921 P C. 35.

(m) *Gokal Chand* v. *Hukam Chand*, 2 Lah. 40 48 I A 162 14 L.W. 435—19 A.L.J. 249—23 Bom L R 534 25 C W.N 534—40 M.L.J 327—1921 M.W N. 175—2 P L.T. 201 1921 P.C. 35.

(n) *Lakshman* v *Jamnabai*, 6 B. 225

(o) *Durga Dat* v *Ganesh Dat*, 32 A. 305 —5 I.C. 400—7 A.L.J 216

(p) *Metharam* v. *Rewachand*, 45 C. 666 45 I A 41 7 L W 361 16 A L J 281 20 Bom L R 566 22 C W N 377 34 M L J 327 1918 M W N 587 1917 P C 105

(q) *Metharam* v *Rewachand*, 45 C. 666 45 I A 41 7 L W 361 16 A L J 281 20 Bom L R 566 22 C W N 377 34 M L J 327 1918 M W N 587 1917 P C 105 ; *Valoo* v *Sourvah*, I M 252 4 I.A. 109 ; *Boologum* v *Swarnam*, 4 M. 330 (Dancing girl). *Lakshman*. v *Jamnabai*, 6 B 225 (Sub-Judge)

(r) *Boologum* v *Swarnam*, 4 M. 330 ; See *Chalakonda* v *Chalakonda*, 2 M H C R. 56

(s) *Lakshman* v *Jamnabai*, 6 B 225 at p. 242.

(t) 2 Lah 40 48 I A 162 14 L W. 435 —19 A L J 249 23 Bom. L.R. 534—25 C W.N. 534 40 M L J. 327 1921 M.W.N. 175—2 P L T 201—1921 P.C. 35.

"Whatever doubt might once have existed, when the Hindu Law was to be gathered from text-writers only, has been removed by a series of decisions, and it is now clear that personal earnings and acquisitions may remain partible throughout the undivided member's life unless he separates from the rest of the family, if he was originally equipped for the calling or career, in which the gains were made, by a special training at the expense of the patrimony." "The question what is 'science' in this connexion must be intrinsically one of fact, though the area of discussion has been steadily narrowed by typical decisions conclusive of numerous cases. The whole doctrine is not without anomalies. If the test is the returns obtained from the family investments, how far are those emoluments the result of the science the specialising in education at the expense of the family funds—and how far are they the rewards of the learner's brains and industry and good fortune Many a learned man makes nothing, and many a specialist gets on in his profession by pertinacity and mother wit. Again, if the specialised education is deemed to be the stock from which success- and income accrue, this is true of success and income to the end of the learner's life; yet it is unquestioned that the individual can sever from the family at will on the footing of bringing his accumulations into hotchpot as part of the family property and without capitalising future earnings or being under future liability as to what he may make thereafter". (u)

259. Hindu Gains of Learning Act XXX of 1930.—The whole matter has now been set at rest by the Hindu Gains of Learning Act (XXX of 1930) which by S. 3 enacts "Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of (a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof, or (b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part by the joint funds of the family, or by the funds of any members thereof." Sect. 2 (c) defines learning as "education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life." But this Act which came into force on the 25th July 1930 does not affect "(a) any terms or incidents of any transfer of property made or effected before the commencement of the Act, (b) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act, (c) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the commencement of this Act or (d) any remedy, or proceeding, in respect of such right or liability or to render invalid or in any way affect any-

(u) *Gokal Chand v. Hukam Chand*, 2 Lah. 40=48 I A. 162=14 L.W. 435=1921 P C 35=19 A L J 249 23 Bom. L.R. 534 25 C W N 534=40 M.L.J. 327=1921 M W N 175=2 P.L T 201.

thing done before the commencement of this Act in any proceeding pending in a Civil Court at such commencement and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed." Sect. 4.

260. Property obtained on partition.—The share in the ancestral estate which a coparcener gets on partition with his co-sharers is his separate property as against the coparceners from whom he separates,[w] though as against his own male issue who are born after partition or who were born before but who do not get themselves separated from him the property has still the character of ancestral property in which they take an interest by birth.[x] The ancestral character of the property as against the sons of a coparcener who obtains it on partition does not become altered so as to make the property the coparcener's self-acquired property as against them simply because the coparcener subsequent to the partition cleared out of his own self-acquisitions a mortgage which subsisted on the property at the time of the partition,[y] provided it has not then been foreclosed and the coparcener purchased the property out of his own self-acquisitions.[z]

261. Property of the sole surviving coparcener -Coparcenary property held by the sole surviving coparcener is his absolute property which he may dispose of by gift or will so long as he has no son, grandson or great-grandson[a] except that, in the case of a will by him, if subsequent to his making the will and prior to his death he adopts a son[a] or a son is born to him or to a deceased coparcener of his and is alive at the time of his death, the will becomes inoperative in respect of the coparcenary property though if that son dies during the testator's lifetime the will takes effect as if no son was ever born.[b] Besides, a will by a sole surviving coparcener is inoperative on the birth of a posthumous son either to him or to a predeceased coparcener.[c] But any alienation made

(w) *Beja Bahadur* v. *Bhupindar*, 17 A. 156=22 I A. 139

(x) *Hari Baksh* v. *Babu*, 5 Lah. 92=51 I A 163=20 L.W. 406=22 A L.J. 254=28 C W N. 953=1924 M.W.N. 650=26 Bom. L R. 1108=47 M.L.J. 938=1924 P.C. 126; *Adurmoni* v. *Chowdhry*, 3 C. 1; *Chattrabhooj* v. *Dharamsi*, 9 B. 438; *Lal Bahadur* v. *Kanhaia Lal*, 29 A. 244=34 I.A. 65=4 A.L.J. 227=9 Bom. L.R. 597=11 C.W.N. 417—17 M.L.J. 228.

(y) *Balwant singh* v. *Rani Kishori*, 20 A. 267=25 I A. 54=2 C W N 273

(z) *Nagalutchmee* v *Nadaraja* 6 M I A. 309.

(a) *Venkatanarayana* v *Subbammal*, 39 M. 107=43 I A 20=3 L W 177 1915 P.C. 37=14 A L J 178. 18 Bom L R 372 =20 C W N 234 29 M L J 851 (1916) 1 M.W.N. 97

(b) *Bodi* v *Venkataswami*, 38 M. 369 21 I.C 73 1913 M W N. 779—25 M.L.J. 363.

(c) *Minakshi* v. *Virappa*, 8 M. 89; *Hanmant* v. *Bhimacharya*, 12 B. 105.

by him either by way of sale or mortgage will be binding upon new entrants into the family either by birth or adoption, and any debt incurred by him while he was the sole surviving coparcener for purposes recognised by Hindu Law as proper is binding upon such subsequent entrants into the family, whether they are in the position of descendants or collaterals.[d]

262. Father's self-acquisitions.—The question whether the son takes an interest by birth in the self-acquisitions of his father has been answered in the negative by the Madras High Court[e] overruling an earlier decision taking the contrary view.[f] The observations of the Privy Council in *Sartaj Kuari's* case[g] that the property in the paternal or ancestral estate acquired by birth under the *Mitakshara* law is so connected with the right to partition that it does not exist where there is no right to it really answers the question in favour of the later view taken by the Madras High Court, since according to the ancient texts a son cannot question his father's acts or claim partition in respect of the latter's self-acquired property.[h]

263. Presumptions in respect of joint family and self-acquired property.—Where a certain property is claimed by a coparcener as his own self-acquired property and the other coparceners of his family claim it as the joint family property the question arises as to the burden of proof in respect of these rival allegations. The joint family is the normal condition of Hindu Society and every such family is ordinarily joint not only in estate, but in food and worship. Hence a Hindu family must be presumed to remain joint and the burden of proving separation is upon the person alleging it.[i] But where it is shown that the property in question has been possessed by one of the lines of a family for several generations, there is a presumption that that line has become separated from the other lines which subsequently lay claim to the property.[j] But there is no presumption that because a family is joint, it possesses any

(d) *Ramanathan* v. *S.R.M.M.C.M. Firm*, 1937 M. 345—(1937) 1 M.L.J. 16 : 45 L.W. 30 : 1937 M.W.N. 78.

(e) *Vairavan Chettiar* v *Srinivasacharlar*, 41 M. 499—13 L.W. 475—1921 M.W.N. 168 : 40 M.L.J. 481 : 1921 M.W.N. 299 (F.B.)

(f) *Nana Tawker* v *Ramachandra Tawker*, 32 M. 377—2 I.C. 519

(g) *Sartaj Kuari* v. *Deoraj Kuari*, 15 I.A. 51—10 A. 272 (P.C.).

(h) *Mit*, 1. 5. 9. 10, 11 ; *Smriti Chandrika*, viii—22 to 28.

(i) *Raghunada* v. *Brozo*, I M. 69—3 I.A. 154 *Beer Narain Sircar* v *Tara Coorce Nundee*, I W.R. 316 ; *Neelkisto* v *Beercaunder*, 12 M.I.A. 523 ; *Mt. Cheetha* v *Baboo Mihen Lall*, 11 M.I.A. 369 ; *Naraganty* v *Venganna*, 9 M.I.A. 66, *Nageshar Bakesh Singh* v *Ganesha*, 42 A. 368—47 I.A. 57—13 L.W. 622 : 18 A.L.J. 532—22 Bom.L.R. 596—38 M.L.J. 521 : 1920 P.C. 46

(j) *Yellappa Ramappa* v *Tippanna*, 53 B. 213—56 I.A. 13—29 L.W. 231—33 C.W.N. 238 : 56 M.L.J. 287 : 1929 A.L.J. 4 : 31 Bom.L.R. 249 : 1929 P.C. 8.

joint property.[k] Where a Hindu family was shown to have been once joint, the presumption is that it continues to be joint even afterwards, and hence where property is shown to have been once the property of the joint family, it must be presumed to continue joint till the contrary is shown.[l] Where however it is shown that a partition has already taken place the burden of showing that a certain family property continues to be held in coparcenary is upon the person alleging it.[m] But if a suit for partition is shown to have been dismissed as one for partial partition, there is a presumption that the family is still joint.[n] But proof of separation in respect of some of the members of a coparcenary does not give rise to any presumption for or against the joint status of the others and the onus is upon the plaintiff to make good his allegation.[o] The mere fact that each of the members has some small transactions of his own does not show that they were separate.[p] Mere cesser in commensality, though a piece of evidence, is not conclusive on the question of there having been a partition.[q] In deciding the question whether property purchased by a member of a joint family in his own name is joint family property or the separate property of that member, the criterion is to consider from what source the purchase money was paid, whether it came from the joint family chest or from the separate funds of the member purchasing it.[r] The fact that there are receipts in the name of the purchasing member in respect of that property is not in itself inconsistent with the notion of its being joint property,[s] and the presumption in the absence of evidence to the contrary is that it was purchased with joint family funds and it was therefore the joint family property.[t] The presumption of Hindu law is that

(k) *Ram Kishan* v. *Tunda Mal*, 33 A. 677—10 I C 543—8 A L J 723 ; *Rai Shadi lal* v. *Lal Bahadur*, 35 Bom. L R. 308 1933 A L J 339 37 C W N 120 64 M L J. 298 1933 M W N. 171 —37 L.W. 480—1933 P C 85 ; *Dwarakaprasad* v. *Jamnadas*, 13 Bom. L.R. 133 9 I C 948; *Dhara* v. *Bharat*, 1936 A. 613—1936 A L J 323—1936 A W R. 377 ; *Mrs. Johnstone* v. *Gopal*, 12 L 546 32 P.L.R. 840 —1931 L 419

(l) *Shiv Golam Sing* v. *Baran Sing*, 10 W. R. 198 ; *Neelkisto* v. *Beerchunder* 12 M I.A. 523; *Mt Cheetha* v *Baboo Mihen Lall*, 11 M I A 369 ; *Shushee Mohun* v. *Aukhil Chunder*, 25 W.R. 232; *Inder Coomar* v. *Doolal Chunder*, 18 W R. 258 ; *Prit Koer* v *Mahadeo*, 21 I A. 134—22 C. 85.

(m) *Vinayak* v. *Datto*, 25 B. 367—2 Bom.L.R. 1134.

(n) *Hazari Lal* v. *Ram Lal*, 47 A. 746 —1925 A. 813—23 A.L.J. 621.

(o) *Palani Ammal* v *Muthuvenkatachela*, 52 I.A 83—48 M 251—21 L W 439 —48 M.L J 83 6 P L T. 133 1925 M W.N. 330—27 Bom. L R. 735—23 A.L J 716—29 C W.N. 846—1925 P.C 49 ; See Ss 362 and 271

(p) *Raj Kishore* v. *Madan Gopal*, 13 Lah 491 1932 L. 636.

(q) *Ranganatha* v *Narayanasami*, 31 M. 482 ; *Nageshar* v. *Ganesha*, 47 I A 57 —42 A. 368 —13 L.W. 622—18 A L J. 532—22 Bom.L.R 596—38 M L.J. 521 —1920 P C. 46.

(r) *Bodh Sing Doodhooria* v *Ganeshchunder*, 19 W.R 356 P.C.; *Dhurm Das* v. *Mt. Shama Soondri* 3 M I A 229.

(s) *Dhurm Das* v. *Mt. Shama Soondri*, 3 M.I A 229

(t) *Ramalakshmamma* v *Addanki Ramanna*, 13 I A 147—9 M. 482 ; *Bissessur Lall Sahoo* v *Luchmessur Singh*, 6 I.A. 233.

an acquisition made in the name of an individual son of a joint family was made by the head of the family and as part of the family estate.(u) But before the property in the possession of any one coparcener can be presumed to be joint family property, it is necessary to establish the existence of a nucleus of joint property,(v) a nucleus out of which the property in the hands of the coparcener may be fairly said to have grown.(w) But if the nucleus proved is not sufficient to help the acquisition, the acquisition cannot be said to be joint property.(x) Where such nucleus is admitted or proved in the case of a member claiming certain properties as his self-acquired properties, the onus is upon him to prove that they are his self-acquisitions and this presumption is not rebutted merely by showing that they were purchased in his name and there are also receipts standing in his name.(y) But if the other members also have acquired properties in their own names and dealt with them as their own properties allowing him to appear to be absolutely entitled to the properties in his own name then the burden becomes shifted and the onus of establishing that the properties are the joint family properties is on those who allege it.(z) The whole position has been clearly and correctly summarised in the judgment of Beaumont C.J. in the recent case of *Babubhai v Ujamlal*(a) as follows:—

"The law, I think, is clearly established that from the existence of a joint family, it is not to be presumed that there is any joint family property. There is no presumption that property which belongs to a member of a

(u) *Mt. Ananda Koonwar* v. *Khedoo Lal*, 14 M I.A. 412; *Parvatamma* v. *Subbayya*, 55 M. 202—34 L.W. 704=1932 M. 144.

(v) *Ram Kishan* v. *Tunda Mal*, 8 A.I.J. 723=33 A. 677=10 I.C. 543; *Rajangam* v. *Rajangam*, 46 M. 373=50 I.A. 134=16 L.W 615—21 A.L.J 460—27 C.W.N. 561—44 M.L.J. 745—1922 P.C 268; *Ashutosh* v. *Tarapada*, 58 C.L.J. 372—1934 C. 308; *Sivarath Dhobi* v. *Ghurki*, 53 A. 603=1931 A.L.J 332=1931 A. 313; *Kamalakant* v. *Madhavji*, 59 B 573=37 Bom.L.R. 405=1935 B. 343.

(w) *Ramiah* v. *Mahalakshmamma* 35 L.W. 30=138 I.C. 205; *Vadamalai* v. *Subramania*, 1923 M. 262=16 L.W. 936=1923 M.W.N. 57; *Dwarkaprasad* v. *Jamnadas* 13 Bom.L.R. 133=9 I.C. 948; *Deno Nath* v. *Hurry Narain*, 12 Bom. L.R. 349; *Kanshi* v. *Shankar*, 1928 L 397; *Tottempudi* v. *Seshamma*, 27 M. 228; *Sandanam* v. *Somasundaram*, (1937) 1 M.L.J. 364; *Sher Mohamad* v. *Ramratan*, 1938 Nag. 87; *Suraj Kumar* v. *Chandra*, 4 A.W.R. 699—1935 A. 67; *Hari Singh* v. *Gurbaksh*, 32 P.L.R 450—1931 L. 593; *Malak Chand* v. *Hira Lal*, 1935 Oudh W.N 1005—1935 Oudh 510; *Haraouri* v *Ashutosh*, 1937 C. 418—65 C.L.J. 27

(x) *Sankaranarayana* v *Tangaratna*, 1930 M. 662; *Gooroochurn* v *Golluckmoney*, Fulton, 165, 181; *Venkataranayya* v. *Seshamma*, 1937 M.W.N. 309—45 L.W. 422=I.L.R. 1937 M. 1012—1937 M. 538; *Vythinatha* v *Varadaraja*, 1938 M W N. 138.

(y) *Rajangam* v. *Rajangam*, 50 I.A. 134=46 M. 373=16 L.W. 615=21 A.L.J. 460—27 C.W.N. 561—44 M.L.J. 745=1922 P C. 266; *Anandrao Gumpatrao* v. *Vasantrao*, 11 C.W.N. 478; *Dhurm Das* v. *Mt. Shama Soondri*, 3 M I.A. 229; *Kunja Behary* v. *Nemai Chand*, 2 I C 525; *Umrith Nath* v. *Goureenath*, 13 M.I.A. 542; *Rampershad* v. *Sheochurn*, 10 M.I.A. 490.

(z) *Yanumala* v. *Boochia*, 13 M.I.A. 333; *Dhurm Das* v. *Mt. Shama Soondri*, 3 M.I.A. 229; *Prankishen* v. *Mothooramohun*, 10 M.I.A. 403.

(a) 1937 B. 446—39 Bom L R 846—I.L.R. 1937 B. 708.

joint family is joint family property The plaintiff in setting out to prove that property "B" is joint family property must in the first instance discharge the burden of proving that fact. But it is also established that if there is a joint family, which possesses a nucleus of joint family property, then property acquired by a member of that family is presumed to be joint family property. But the question arises what is meant by a nucleus. In my opinion the nucleus of joint family property necessary to give rise to the presumption must be family property from which the purchase money for the property in suit might have been derived wholly, or, at any rate, in considerable part . . . It would, I think, be unfortunate if the Court was bound to presume that something had occurred, which on the evidence could not possibly have occurred, and if it be shown that the only joint family property existing at the date of the acquisition of the property in suit was of such a nature that it could not possibly have been the means of acquiring the property in suit, then in my opinion the presumption that the property in suit is joint family property does not arise".

Again if the property was admitted to be originally the self-acquisition of a coparcener but it was stated to have been thrown into the common stock, the onus of proving it is heavily on the party asserting it. The presumption that property in the name of a coparcener is joint family property is inapplicable where it stands in the name of a non-coparcener, such as a female member of a joint family[b] or a son-in-law of the family.[c] But where it is shown that a Hindu has purchased property in the name of his wife, the same, when unexplained by other proved or admitted facts, is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife, and the rule in England that such a purchase is to be assumed to be for the advancement of the wife does not apply in India.[d] This rule applies equally to a mistress,[e] though circumstances may exist to rebut this presumption in favour of the benami nature of the transaction. But where there is nothing to show whence the purchase money came, the purchase in the name of a woman does not raise the presumption that it was made benami for the husband and the property will be held to belong to the woman absolutely since there is nothing to prevent Hindu women from purchasing or holding property in their own right.[f]

(b) *Bhuban* v. *Kumud*, 1924 C. 467=28 C.W.N. 131 : *Baijnath* v. *Bishan*, 43 A. 711=1921 A. 185=19 A.L.J. 787 . *Narayana* v. *Krishna*, 8 M. 214 ; *Protap* v. *Sarat*, 1921 C 101=25 C.W.N. 544.

(c) *Dossee Monee* v. *Ram Chand*, 7 W R. 249.

(d) *Lakshmiah* v. *Kothandarama*, 48 M. 605=52 I.A. 286=23 L.W. 138=23 A.L.J. 662=49 M.L.J. 109=27 Bom.L.R. 1076=29 C.W.N. 1013=1925 M.W.N. 717=1925 P.C. 181 ; But see *Sitamma* v. *Sitapati*, 46 L.W. 651.

(e) *Bilas Kunwar* v. *Desraj*, 37 A. 557 =42 I.A. 202=2 L.W. 630=13 A.L.J. 991=17 Bom. L.R. 1006=19 C.W.N. 1207=29 M.L.J. 335=1915 M W N. 757 1915 P.C. 96

(f) *Durga Prosad* v *Prankrishna*, 39 I.C. 530; *Diwan Ran* v *Indarpal*, 26 C. 871=26 I.A. 226=4 C.W.N. 1=2 Bom. L. R. 1; *Gampat* v. *Secretary of State*, 45 B. 1106=1921 B. 138=23 Bom. L.R. 462; *Perumathal* v. *Chinnappayyan*, 1933 M. W.N. 474.

There is no presumption in Hindu Law that a business carried on by a member of a joint family is joint family business; nor is there a presumption that a business carried on by him in partnership with a stranger is joint family business. (g)

264. Rights of coparceners.—The following are the rights of each coparcener:—(1) Right by birth, (2) Right by survivorship, (3) Right to partition, (4) Right to joint possession and enjoyment, (5) Right to restrain unauthorised acts, (6) Right of alienation, (7) Right to accounts, and (8) Right to make self-acquisition.

265. Right by birth.—Every coparcener gets an interest by birth in the coparcenary property. (h)

266. Right of survivorship.—The system of a joint family with its incident of succession by survivorship is a peculiarity of the Hindu Law. In such a family no member has any definite share and his death or somehow ceasing to be a member of the family causes no change in the joint status of the family. (i) Where a coparcener dies without male issue his interest in the joint family property passes to the other coparceners by survivorship and not by succession to his own heirs. (j) Even where a coparcener becomes afflicted with lunacy subsequent to his birth, he does not lose his status as a coparcener which he has acquired by his birth, and although his lunacy may under the Hindu Law disqualify him from asking a share in a partition in his family, yet where all the other coparceners die and he becomes the sole surviving member of the coparcenary, he takes the whole joint family property by survivorship (k) and becomes a fresh stock of descent to the exclusion of the daughter of the last predceased coparcener. (l) The beneficial interest of each coparcener is liable to fluctuation, increasing by the death of another coparcener and decreasing by the birth of a new coparcener. But this right of a surviving coparcener to take by survivorship the interest of a deceased coparcener is defeated: (1) where the deceased coparcener's interest had vested in the Official Assignee on his insolvency: (m) (2) where the

(g) *Nanilal* v. *Nutbehari*, 38 C.W.N. 861; *Krishna Kumar* v. *Gopal*, 1934 Oudh 475; *Mulchand Hemraj* v. *Jairamdas*, 37 Bom. L.R. 288=1935 B. 287.

(h) *Mitak*, i, 1-27, 28

(i) *Sadananda* v. *Balkuntha*, 1921 Pat. 298=2 P.L.T. 299.

(j) *Katama Natchiar* v. *Raja of Shivaganga*, 9 M.I.A. 539.

(k) *Vithaldas* v. *Vadilal*, 1938 B. 191 =38 Bom. L.R. 287; *Mt. Diraj* v. *Rikheswar*, 13 P. 712=1934 P. 373; *Muthusami* v. *Meenammal*, 43 M. 464=1920 M. 652= 38 M.L.J. 291=1920 M.W.N. 253.

(l) *Mool Chand* v. *Chahta*, 1937 A.L.J. 631 (F.B.), a case of leprosy of the last surviving coparcener.

(m) *Nunna* v. *Chideraboyina*, 26 M. 214; *Lakshmanan* v. *Srinivasa*, 44 M.L.W. 657=1937 M. 131=71 M.L.J. 707; *Fakirchand* v. *Hurrukchand*, 7 B. 438; *Narayana* v. *Sankar*, 53 M. 1=30 M.L.W. 781.

said interest had been attached during the deceased coparcener's lifetime in execution of a decree against him : [n] (3) where the deceased coparcener has transferred his interest for consideration without the consent of the other coparceners in Madras,[o] Bombay[p] and the Central Provinces,[q] and with the consent of the other coparceners or for family necessity in Bengal and United Provinces,[r] Oudh,[s] the Punjab[t] and Bihar and Orissa : [u] (4) where he has become a convert to an alien faith and (5) by his contracting a marriage under the Special Marriage Amendment Act. 1923.

267. Right to partition.—Except in Bombay and in the Punjab where a son cannot claim partition without the consent of his father when the father is joint with his own father or brothers,[v] every coparcener is entitled to have a partition of his own share in the coparcenary property though, when a suit is brought for partition on behalf of a coparcener who is a minor, the Court may refuse to decree the suit if it thinks that the partition is not likely to be for the minor's benefit.[w] This indefeasible right of each coparcener to demand partition is not affected by a deed executed by his father on the footing of there being no joint family or joint family property.[x] But a coparcener cannot enforce his right to partition when it has been barred by ouster and adverse possession by the other coparceners[y] or when he has entered the holy order[z] or is suffering from a disability which disqualifies a person for inheritance.[a]

268. Joint possession and enjoyment.—There is community of interest and unity of possession between all the members of the joint family,[b] and every coparcener is entitled to joint possession

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(n) *Deendyal* v. *Jugdeep Narain*, 4 I.A. 247=3 C. 198.

(o) *Vitla Butten* v. *Yamenamma*, 8 M. H.C.R. 6; *Atyyagari* v. *Aiyyagari*, 25 M. 690; *Suraj Bunsi Koer* v. *Sheo Persad*, 6 I.A. 88=5 C. 148.

(p) *Fakirapa* v. *Chanapa*, 10 Bom. H.C. R. 162; *Pandu* v. *Goma*, 43 B. 472=21 Bom. L.R. 213=50 I.C. 765; *Pandurang* v. *Bhagwandas*, 44 B. 341=55 I.C. 544=22 Bom. L.R. 120.

(q) *Syed Kasam* v. *Jorawar Singh*, 49 I A. 358=50 C. 84=16 L.W. 223=1922 P.C. 353=43 M.L.J. 676=25 Bom. L.R. 1=21 A.L. J. 57=27 C.W.N. 179.

(r) *Madho Parshad* v. *Mehrban Sing*, 17 I.A. 194=18 C. 157; *Balgobind Das* v. *Narain Lal*, 20 I.A. 116=15 A. 339.

(s) *Madho Parshad* v. *Mehrban Sing*, 17 I.A. 194=18 C. 157.

(t) *Piare* v. *Ram*, 11 I.C. 443.

(u) *Amardyal* v. *Har Pershad*, 5 P.L.J. 605=58 I.C. 72=1 P L.T. 511.

(v) *Apaji* v. *Ramchandra*, 16 B. 29; *Bhupal* v. *Tavanappa*, 45 B. 435=1922 B. 292=23 Bom. L.R. 1236, *Gahru Ram* v. *Mt. Hardevi*, 89 I.C. 176=1926 L. 85.

(w) *Bholanath* v. *Ghasi Ram*, 29 A. 373; *Damoodur* v. *Senabutty*, 8 C. 537; *Thangam* v. *Suppa*, 12 M. 401 ; See S. 335.

(x) *Mukund* v. *Balkishna*, 52 B. 8=1927 P.C 224=54 I A. 413=29 Bom. L.R. 1496= 32 C.W.N. 203=27 L.W. 198=53 M.L.J. 468 =1927 M W.N. 732.

(y) See S. 343.

(z) See S. 411.

(a) See Ss. 343 and 406 to 413

(b) *Katama Natchiar* v. *Raja of Shivaganga*, 9 M.I.A. 543.

and enjoyment of the coparcenary property and to be maintained with his wife and children out of the common fund in the family dwelling house. Thus a coparcener who is excluded by the other members is entitled to a decree for joint possession[c] and is not under a necessity to bring a suit for partition;[d] but a suit for a perpetual injunction to the effect that the defendants should allow the plaintiff to retain joint possession is not maintainable.[e] According to the true notion of an undivided family, no individual member thereof, while it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain share. The proceeds of the undivided property must be brought to the common chest or purse and there dealt with according to the modes of enjoyment by the members, and no individual member can go to the place of receipt of rent and claim to take from the receiver of the rents, a certain definite share.[f] The duties which a coparcener is to perform and the profits which he is to receive are to be regulated by the discretion of the head of the family, and a member is not liable to his coparceners simply because larger expenses have been incurred on his account by reason of his having a larger family or more daughters to be married at the family expense than others.[g] Though no coparcener is entitled to take possession of any portion of the joint property or income to the exclusion of the others,[h] there is nothing to prevent one member from being in possession of a portion of the joint property so long as it does not amount to a dispossession of the other members and is consistent with the continuance of their joint ownership and possession.[i] Again even where there is no partition by mutual agreement between the members of a joint family, they may remain, for purposes of convenience, in occupation of separate portions of the family property, and till a new arrangement is come to between them each member remains in exclusive possession and enjoyment of a portion of the joint property.[j] So also one coparcener can be the tenant in his individual capacity of the joint family as such under an agreement express or implied[k] or can be the mortgagee of the whole coparcenery interest.[l] Besides, if in a case of

(c) *Narsubhai* v. *Ranchod*, 26 B. 141 3 Bom. L.R. 598.

(d) *Ibid.* But see *Radhakanta* v. *Manomohinee*, 60 C. 292=1933 C. 397.

(e) *Atma Ram* v. *Godhu Ram*, 14 L. 306=34 P.L.R. 5=1933 L. 712.

(f) *Appovier* v. *Rama Subba Aiyan*, 11 M.I.A. 75; *Ganpat* v. *Annaji* 23 B. 144.

(g) *Kameswara Sastri* v. *Veerachariu*, 34 M. 422=1910 M.W.N. 649=20 M.L.J. 855=8 I C. 195; *Abhaychandra* v. *Pyari*, 5 Beng. L.R 347 (F.B.).

(h) *Ramchandra* v. *Damodhardas*, 20 B. 467.

(i) *Lachmeswar* v. *Manowar*, 19 I.A. 48 =19 C. 253 (P.C.).

(j) *Sheopersad* v. *Leela Singh*, 12 Beng. I R. 188.

(k) *Alladinee* v. *Sreenath*, 20 W.R. 258.

(l) *Thillai* v. *Ramanatha*, 20 M. 295.

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 rules of justice, equity and good conscience to restrain him from proceeding with his work or to allow another shareholder to appropriate to himself the fruits of the former's labour or capital.[m] But one coparcener has no right to deal with it in any way that alters its character[n] or places it in his exclusive possession so as to prevent the joint enjoyment of others.[o] Nor can a coparcener erecting a building at his own cost on the joint homestead of the family claim, as a matter of course, compensation for the building, since it is unjust to permit one co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired.[p] But the mere erection of a building by a coparcener on the joint land does not amount to an ouster of, or adverse possession against, the other coparceners.[q] But when he erects a building on a portion of such land for his own exclusive enjoyment and so as to injure the rights of the other coparceners, the others may be given a decree to have the building pulled down,[r] even where the portion occupied by the building is not in excess of that which on partition would fall to the share of the coparcener who has erected it. "The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favour one co-sharer, adversely to the other co-sharers, making a partition in his own favour, and selecting the portion of the land he likes by erecting a building upon it"[s] though in proper cases, the Court, in the exercise of its discretion, can order compensation to the other coparceners, instead of the demolition of the building.[t]

269. Right to restrain improper acts.—A coparcener who does any act which is either illegal or improper and prejudicial to the joint interests or enjoyment can be restrained from such act by an injunction at the instance of the other coparceners.[u] In suits for an injunction as between members of a coparcenary with

P.C.

(n) *Sheopersad* v. *Leela Sing*, 12 Beng. L.R. 188.

(o) *Stalkartt* v. *Gopal*, 12 Beng. L.R. 197.

(p) *Nanilal* v. *Nutbehari*, 38 C.W.N. 861

(q) *Basanta* v. *Mohesh*, 18 C.W.N. 328 —21 I.C. 621.

(r) *Najju* v. *Imtiaz-ud-din*, 18 A. 115; *Shadi* v. *Anup Singh*, 12 A. 436 (F.B.).

(s) *Hajiokhan* v. *Initea Juddin*, 10 A. (t) *Paras Ram* v. *Sherjit*, 9 A. 661. See also *Ganpat* v. *Annaji*, 23 B. 144; *Soshi* v. *Gonesh*, 29 C. 500 on the question of injunction restraining one coparcener from preventing another from joint enjoyment of the common property.

(u) *Ravji* v. *Gangadhar*, 4 B. 29; *Vithoba v. Haribo*, 6 Bom. H.C.R. 54; *Sheopersad* v. *Leela*, 12 Beng. L.R. 188; *Gopee Kishen* v. *Memchunder*, 13 W.R. 312.

reference to joint family property, the exercise of the Court's jurisdiction is limited to acts of waste, illegitimate use of the family property or acts amounting to ouster.[v] A suit against one coparcener in respect of an unauthorised act of his must be one by or on behalf of all the other coparceners, and one coparcener alone in his individual capacity cannot maintain such a suit.[w] But where a decision has been given against the family in a suit represented by the manager, it is open to any member of the family affectd by the decision to appeal against it, even though the manager of the family keeps quiet.[x]

270. Right to impeach alienation.—A member of a coparcenary is entitled to impeach an unauthorised alienation made by any other member, be he the manager, father or an ordinary coparcener, if the coparcener impeaching the alienation was at the time of the alienation already born or in his mother's womb.[y] Besides, a coparcener born subsequent to an unauthorised alienation by another coparcener, like the father, has a right to avoid the alienation if made at a time when other members of the coparcenary not parties to the deed were alive. But this does not mean that he has a fresh start for purposes of limitation from the time of his birth. When an alienation is made which is not justified by necessity a cause of action arises in favour of other coparceners to have it set aside and recover possession from the alienee, but there is only one cause of action in favour of these members and no successive causes of action can arise as new members are born year after year.[z] The mere fact that all the others have joined in the alienation does not make the alienation binding upon the coparcener who has not joined in it.[a] No doubt a son cannot object to an alienation validly made by his father before he was born or begotten,[b] but if the alienation was made by a father without the consent of the sons then living and not for any binding purpose, it would not only be invalid against them, but also against any son born before they had ratified the trans-

(v) *Anant* v. *Gopal*, 19 B. 269; *Ganpat* v. *Annaji*, 23 B. 144; *Jagernath* v. *Jainath*, 27 A. 88=1 A.L.J. 488.

(w) *Dwarakanath* v. *Tara*, 17 C. 160.

(x) *Ambi* v. *Kelan*, 46 M.L.W. 375=1937 M. 843=1937 M.W.N. 1001.

(y) *Sabapathi* v. *Somasundaram*, 16 M. 76 -2 M.L.J. 244; *Lachmi Narain* v. *Kishan*, 38 A. 126=33 I.C. 913=14 A.L.J. 25; *Girdharee Lal* v. *Kanto Lall*, 1 I.A. 321· *Khagendranath* v. *Monmotho*, 38 C. W.N. 90=1934 C. 469,

(z) *Sita Ram* v. *Cheddi*, 46 A. 882=1924 A 798=22 A.L.J. 809; *Ranodip* v. *Parmeshwar*, 47 A. 165=52 I.A. 69=21 L.W. 236=23 A.L.J. 176=27 Bom. L.R. 175=48 M.L.J. 29=1925 M.W.N. 262=29 C.W.N. 666=1925 P.C. 33; *Ram Deo* v. *Ram Rathi*, 1935 A L.J. 946=1935 A. 742; *Udayamuthier* v. *Shunmugam*, 41 M.L.W. 610=1935 M. 431.

(a) *Niranjan* v. *Soudamini*, 53 C. 694=1926 C. 714=30 C.W.N. 511 (F.B.).

(b) *Konga* v. *Thambaya*, 1922 M. 452=1922 M.W.N. 526=16 L.W. 981,

action [c] and where there had been no such ratification, a son born before or after the alienation, is entitled to impeach it on the ground that it is unauthorised by a suit instituted for the purpose, and the fact that some of the sons who were alive at the date of the alienation had not brought a suit within the period of limitation for setting it aside does not operate as a bar to a suit, instituted at the instance of the others of such sons who were minors at the time and the after-born sons, to have the alienation set aside, if the suit is brought within three years after the attainment of majorty by such of those plaintiffs as were alive on the date of the alienation.[d] But if the sons in existence (including existence in the mother's womb) at the time of the father's alienation subsequently die, and a son not conceived during their life-time is afterwards born, such an after-born son is not entitled to question the alienation, since his right of action is one derived from those who were in existence at the time of the alienation and is lost to him when it is lost to them either by their death or by their allowing the period of limitation for challenging the alienation to expire.[e] For the purpose of entitling an after-born son to impeach the alienation by his father, the son must be deemed to have been conceived at least 210 days before his birth, so that it must be held that any alienation made within 210 days before the birth of the son is impeachable by him on any of the grounds open to him under the Hindu Law. [f]

271. Right to account.—See Manager's liability to account—S. 280.

272. Right of alienation.—The Mitakshara denies to a coparcener, except when he is the sole owner, [g] the power of disposal in respect of his undivided share and such a power is inconsistent with the strict theory of a joint and undivided family. [h] But the equity of the purchaser or alienee from him induced a recognition of such a right in a coparcener in some of the Courts, and it is now the settled law in the provinces of

(c) *Re. Amirthalinga*, 28 L.W. 634=1928 M. 986=1928 M.W.N. 802; *Bhup Kuar* v. *Babir*, 44 A. 190=1922 A. 342=19 A.L.J. 978; *Mansingh* v. *Karan*, 78 I.C. 260=1924 N. 200; *Tulshirom* v. *Babu*, 33 A. 654=10 I.C. 906=8 A.L.J. 733; *Dwarka* v. *Krishna*, 2 Lah. 114=1921 L. 34; *Jinvarsa* v. *Gunwantrao*, 1936 N. 34; *Hurodoot* v. *Beer Narain*, 11 W.R. 480; *Chandramani* v. *Jambeswara*, 1931 M.W.N. 263=34 L.W. 598=1931 M. 550.

(d) *Jawahir* v. *Udai Parkash*, 48 A. 152=53 I.A. 36=24 A.L.J. 97=1926 M.W.N. 197=50 M.L.J. 344=28 Bom. L.R. 851=30 C.W.N. 698=1926 P.C. 16; *Jowala* v. *Sant*, 13 Lah. 520=33 P.L.R. 808=1932 Lah. 605; *Govind* v. *Ram*, 1937 Lah. 420. See also S. 315; *Harnam* v. *Aziz*, 1938 Lah. 1.

(e) *Visweswara* v. *Surya Rao*, 43 M.L.W. 349=70 M.L.J. 360=59 M. 667=1936 M.W.N. 163=1936 M. 440; *Mukand* v. *Wazirudin*, 1933 L. 359; *Pappu Reddi* v. *Appaji*, 1938 M. 224=1937 M.W.N. 1261.

(f) *Rama Rao* v. *Venkata*, 46 M.L.W. 309.

(g) *Kanhai* v *Nawab*, 62 I.C. 811=1921 Oudh. 171.

(h) *Suraj Bunsi Koer* v. *Sheo Proshad*, 5 C. 158=6 I.A. 88 (P.C.).

Madras, (i) Bombay, (j) Berar, (k) and the Central Provinces, (l) that *one of several coparceners in a Hindu undivided Mitakshara family may, without the assent of his coparceners, sell, mortgage or otherwise alienate his share in the undivided family estate, moveable or immoveable, for valuable consideration.* (m) But under the Mitakshara law as administered in Bengal and the North Western Provinces, (n) Oudh, (o) the Punjab, (p) Behar, Orissa and the United Provinces, (q) a coparcener cannot, without the consent of his other coparceners, (r) mortgage or sell his undivided share on his own account and not for the benefit of the family, and where he does make such an alienation, the other coparceners are entitled to get back the property sold, (rr) and the purchaser has no equity against them for the repayment of the purchase money. (s) But in these Provinces the alienation by a member of a joint family is voidable only at the option of the other members (t) and cannot be impeached by the alienor himself, (u) and if the alienor becomes, subsequent to the alienation, solely entitled to the entire property by right of survivorship owing to the death of his coparceners who were alive at the date of his alienation, he cannot avail himself of the right of the deceased coparceners to challenge his own alienation. (v) But on the question of the coparcener's power to make a gift or will in respect of his undivided share, there is no difference of opinion between the Courts and all of them hold that he cannot dispose of his undivided inter-

(i) *Virasvami* v *Ayyasvami*, 1 M.H.C.R. 471; *Nanjundaswami* v. *Kanagaraju*, 42 M. 154—36 M.L.J. 242—1919 M.W.N. 139—9 I.W. 132—49 I.C. 666; *Aiyyagari* v. *Aiyyaparti*, 25 M. 690.

(j) *Vasudev* v. *Venkatesh*, 10 Bom. H.C. C. 139. *Fakirapa* v. *Chanapa*, 10 Bom. H. C.R. 162 (F.B.); *Pandu* v. *Goma*, 43 B. 472—21 Bom. L.R. 213=50 I.C. 765; *Bhau* v. *Budha*, 50 B. 204=1926 B. 399—26 Bom. L.R. 765; *Pandurang* v. *Bhagwandas*, 55 I.C. 544—44 B. 341=22 Bom. L.R. 120; *Gundayya* v. *Shrinivas*, 38 Bom. L.R. 1095 —1937 B. 51.

(k) *Sitaram* v. *Laxman*, 8 N.L.R. 128= 17 I.C. 133.

(l) *Syed Kasam* v. *Jorawar Singh*, 50 C. 84=49 I.A. 358=16 L.W. 223=43 M.L.J. 676 =25 Bom. L.R. 1=21 A.L.J. 57=27 C.W N. 179=1922 P.C. 333; *Seth Kisanlal* v. *Nathu*, 16 N.L.R. 131=58 I.C. 44.

(m) As to the quantum of the alienee's interest. See *Jiwaraa* v. *Gunwantrao*, 1936 N. 34; *Muthukumara* v. *Sivanarayana*, 56 M. 534=1933 M.W.N. 199—64 M.L.J. 66= 37 L.W. 19=1933 M. 158.

(n) *Bal Gobind* v. *Narain Lal*, 15 A. 339=20 I.A. 116; *Mahindra* v. *Sitaram*, 16 Pat. L.T. 377—1935 P. 349.

(o) *Bhagannah* v. *Chandi*, 14 O.C. 295-13 I.C. 466; *Madho Parshad* v. *Mehrban Singh*, 18 C. 157. 17 I.A. 194 (P.C.).

(p) *Pirre* v. *Ram*, 11 I.C. 443; *Ralla Ram* v *Atma Ram*, 14 L 584=34 P L R 113= 1933 L. 343.

(q) *Chandradeo* v. *Mata Prasad*, 31 A. 176—6 A.L.J. 283=1 I.C. 47 (F.B.); *Jowala Prasad* v. *Maharaja Protap*, 37 I.C. 184; *Kali Shankar* v. *Nawab Singh*, 31 A. 501—6 A.L.J. 762—3 I.C. 909; *Madho Parshad* v. *Mehrban Sing*, 18 C. 157=17 I.A. 194; *Ghasitey* v. *Har Prasad*, 1937 A. L.J. 90=1937 A. 99.

(r) *Nabin Chandra* v. *Shona*, 35 C.W.N. 279=1932 C. 25;

(rr) *Puttoo Lal* v. *Raghubir*, 9 Luck. 237—1933 Oudh. 535. This includes also the alienor's share.

(s) *Mathura Prasad* v. *Raj Kumar*, 1921 P. 447=2 P.L.T. 407 (F.B.); *Bal Gobind* v. *Narain Lal*, 15 A. 339=20 I.A. 116.

(t) *Kharag Narayan* v. *Jankl*, 16 Pat. 230=1937 P. 546.

(u) *Madan Lal* v. *Chiddu*, 53 A. 21= 1930 A. 852=1930 A.L.J. 1528.

(v) *Bharat* v. *Jeobodh*, 1934 A.L.J. 593= 1934 A. 891.

est by gift [w] or will, [x] though the consent of the other coparceners will validate it. [y] *A fortiori* a will of family property made by all the coparceners will be valid, [z] the principle being that when they so join together, they have the entire ownership of the property as in the case of an individual absolute owner who can make a valid will. [z] All the High Courts are also agreed that the undivided interest of a coparcener can be taken in execution under a judgment against him at the suit of his personal creditor provided the interest is attached during his lifetime in execution of a decree. [a] But an attachment of a coparcener's undivided interest after his death will not avail the decree-holder and the Court-sale does not prevail as against the surviving coparceners, who, by his death, have obtained the deceased coparcener's interest by survivorship. [b]

273. Renunciation of rights.—A coparcener can renounce his interest in the joint family estate. Such a renunciation merely extinguishes his interest in that estate, but does not affect the status of the remaining members *quoad* the family property, and they continue to be coparceners as before, the only effect of the renunciation being to reduce the number of persons to whom shares would be allotted if, and when, a division of the estate takes place. [c] But a coparcener can renounce his interest only in favour of all the other coparceners and when he renounces in favour of only one of them, the renunciation enures for the benefit of all the others. [d]

274. Right to make self-acquisitions.—Every coparcener is entitled to acquire property of his own and keep it free from the

(w) *Bottala* v. *Pullicat*, 27 M. 162; *Kalu* v. *Barsu*, 19 B. 803; *Faiz Ali* v. *Harkuar*, 1923 N. 334 See also *Gundayya* v. *Shrinivas*, 38 Bom. L.R. 1095 :1937 B. 51 holding that a gift by one of two coparceners of his interest to the other is valid.

(x) *Lakshman* v. *Ramchandra*, 5 B. 48=7 I.A. 181; *Villa* v. *Vemanamma*, 8 M.H.C. R. 6; *Lalla Prasad* v. *Sri Mahadeoji*, 42 A. 461=18 A.L.J. 503=58 I.C. 667; *Hari Lal* v. *Bai Mani*, 29 B. 351=7 Bom. L.R. 255; *Bhikhabhai* v. *Purshottam*, 50 B. 558=1926 B. 378=28 Bom. L.R. 695; *Lakshmichand* v. *Anandi*, 53 I.A. 123=48 A. 313=24 A. L.J. 609=28 Bom. L.R. 910=51 M.L.J. 52 =1926 M.W.N. 529=31 C.W.N. 101=1926 P.C. 54; *Subbarami* v. *Ramamma*, 43 M. 824=12 L.W. 249=59 I.C. 681=1920 M.W.N. 529.

(y) Venkoba v. Ranganayaki, 44 M.L.W. 483=71 M.L.J. 454=1936 M. 967; *Babu Singh* v. *Mt. Lal*, 1933 A. 830; *Tagore* v. *Tagore*, 9 Beng. L.R. 377.

(z) *Lakshmi* v. *Mt. Anandi*, 45 A. 245=1923 A. 109=21 A.L.J. 73.

(a) *Deendyal* v. *Jugdeep Narain*, 4 I.A. 247=3 C. 198; *Lakshman* v. *Ramchandra*, 7 I.A. 181=5 B. 48; See S. 289.

(b) *Suraj Bansi Koer* v. *Sheo Proshad*, 6 I.A. 88=5 C. 148; See S. 289.

(c) *Venkatapathi* v. *Venkatanarasimha*, 44 M.L.W. 408=1936 P.C. 264=63 I.A. 397=38 Bom. L.R. 1238=41 C.W.N. 7=17 P.L.T. 881=1936 A.L.J. 1039=71 M.L.J. 558.

(d) *Karam Singh* v. *Surendar*, 1931 L. 289 (2); *Shivaji* v. *Wasant*, 33 B. 267=10 Bom. L.R. 778=2 I.C. 249; *Vasant* v. *Anand*, 6 Bom L.R. 925; *Chandar* v. *Dampat*, 16 A 369. But see *Peddayya* v. *Ramalingam*, 11 M. 406 upholding the validity of renunciation in favour of some only of the coparceners.

claims of his coparceners. [e] Property obtained by collateral succession is the separate property of the person inheriting where it is not thrown into the common stock. [f] In respect of such acquisition, the coparcener has absolute powers of disposal including the power to dispose of it by gift or will. [g]

275. Manager.—So long as the members of a joint family remain undivided, the senior member of the family is entitled to manage the family properties, and the father, and in his absence, the next seniormost male member of the family, is its manager provided he is not incapacitated from acting as such by illness or other sufficient cause. The father's right to be the manager of the family is the survival of the *patria potestas*, and he is in all cases naturally, and in the case of minor sons necessarily, the manager of the joint family property. [h] In the absence of the father, or if he resigns, the management of the family property devolves upon the eldest male member of the family provided he is not wanting in the necessary capacity to manage it. [h] Where the seniormost member is physically incompetent or has resigned his office even the junior member can be chosen as such manager. [i]

276. Position of Manager.—In a Hindu family the Karta or manager occupies a position superior to that of the other members in so far as he manages the family property or business or looks after the family interests on behalf of the other members. The managership of the joint family property comes to a person by birth and he does not owe his position as manager to the presumed consent of his coparceners. Though he is likened to a trustee or agent of the joint family, he is not under the same obligation to economise or to save as in the case of an agent or trustee. [j] Thus at the time of partition, the account must be settled not upon the footing that frugality and skill had been employed by the manager in his management of the joint estate but upon the footing of what

(e) *Annamalai* v. *Subramanian*, 29 L. W. 91—1929 P C 1—1928 M.W.N. 39 =1929 A.L.J. 9 =31 Bom. L R. 280 =33 C.W N. 435 —56 M.L.J. 435—10 P L.T. 283.

(f) *Phulwanti* v *Janeshar*, 46 A. 575= 1924 A. 625—22 A.L J. 521.

(g) *Beer Pertab* v. *Rajender*, 12 M I.A. 1; *Somasundara* v. *Ganga*, 28 M. 386; *Balwant Singh* v. *Rani Kishori*, 25 I.A 54 —20 A. 267—2 C.W N. 273 P.C.

(*b*) See page 267, foot-note (*b*).

(h) *Mudit* v. *Rangiai*, 29 C. 797; See also *Siddappa* v. *Lingappa* 16 Mys. L.J. 32=42 Mys. H.C.R. 669 holding that a temporary absence of the father is not sufficient to clothe the son with the powers of the manager where there is nothing to show that the father is in a remote country or that his whereabouts are not known or that his return within a reasonable time is out of question.

(i) *Mudit* v. *Ronalal*, 29 C. 797; *Tara* v. *Hari*, 50 .'. 447 .1928 A. 251—26 A.L.J. 116; *Krishna* v. *Krishnaswami*, 23 M. 597; *Ram Singh* v. *Sri Charan*, 1938 A. 147= 1938 A.L.J. 12; See *Siddappa* v. *Lingappa*, 16 Mys. L.J. 32—42 Mys. H.C.R. 669 which contains a discussion of this question.

(j) *Muhammad* v. *Radhe Ram*, 22 A. 307; *Perrazu* v. *Subbarayadu*, 44 M. 656= 48 I.A. 280=3 P.L.T. 1=1921 M.W.N. 540 =19 A.L.J. 621—18 Bom. L.R. 920=41 M.L.J. 33—26 C.W.N. 1=14 L.W. 270=1922 P.C. 71.

has been actually spent and what in fact remains for division as between the members. [k] Yet at the present day, when personal luxury has increased, and the change of manners has somewhat modified the relations of the members of a joint family, it is by no means unusual that in the common Khatta book an account of the separate expenditure of each member is opened and kept against him; and on a partition, even in the absence of fraud or exclusion, those accounts enter into the general account on which the final partition and allotment are made. [l] A manager is in *loco parentis* to the other members of the family and his position which is unique is the result of both necessity and ancient privilege. His position is purely honorary, though in case of onerous services by the manager, he may be allowed by the family, under a special arrangement, to charge for the same. [m] In this respect there is the widest possible difference between the position of the manager of a joint Hindu family and that of any other manager of the property held in common. The latter can receive a salary or can take out of the common business his fair share and that property when it comes into his hands, becomes his sole property and out of it he can buy other property which thereby becomes his own acquisition. But the manager of a Hindu joint family can do none of these things. If he receives any money from the family property it does not become his money (except when there is a special arrangement to that effect), [m] but still remains the money of the joint family; and if he uses it for buying property, it does not become his property, but becomes the property of the joint family to which he belongs. [n]

277. Powers and duties of Manager.—The powers of a manager may be considered under (1) Possession and management, (2) Power to contract debts, (3) Liability to account, (4) Power of representation and (5) Power of alienation.

278. Right to possession and management.—No coparcener being entitled to separate possession of the coparcenary estate, the actual possession and management thereof must vest in the manager. He is the protector of the household and can prevent, by obtaining an injunction, a riotous member thereof from entering the family house without his permission to disturb its peace and tranquillity. [o] Being entitled to the possession of the whole joint estate, he can eject a coparcener from his exclusive possession

(k) *Tara Chand* v. *Reeb Ram*, 3 M.H.C. R. 177; *Jugmohandas* v. *Mangaldas*, 10 B. 528; *Damodardas* v. *Uttamram*, 17 B. 271; See also Ss. 280 and 342.

(l) *Soorjeemoney* v. *Denobundoo*, 6 M. I.A. 526.

(m) *Krishnasami* v. *Rajagopala*, 18 M. 73 4 M.L.J. 212.

(n) *Pandu* v. *Jairam*, 1936 N. 134=I.L.R. 1936 N. 34

(o) *Bhaskari* v. *Bhaskaram*, 31 M 318= 18 M.L.J. 343.

of any portion of the estate, [p] except when he has been in exclusive possession thereof with the acquiescence or consent of all the members. [q] Every member being entitled to reside in the family dwelling house, the manager is not entitled to eject him therefrom, [r] except when his conduct is riotous. [o]

279. His power over income.—The position of the manager is not the same as that of an agent,[s] or even like that of a trustee, [t] for he is not under the same obligation to economise and to save as would be the case if he were a trustee or agent. [u] It is now well settled that when accounts have to be taken with a view to a partition of joint family properties, the account which has to be taken of the entire property in the hands of the different members is mainly an enquiry into the existing assets. The head of the family cannot in general be called upon to defend the propriety of the past transactions of the family. [v] He is not bound to account for all sums in excess of what a frugal man would have expended, [w] and is not even bound to keep accounts. [x] Enjoying a position of superiority in the family, he has an absolute and exclusive control over the family income and expenditure, and, so long as he manages the estate for the purposes of the family, he is not under the same obligation to economise or to save as would be the case with a paid agent or trustee. A manager cannot be held liable for his negligence, [y] and his discretion exercised *bona-fide* cannot be too closely scrutinised. [z] In the absence of proof of direct misappropriation, or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys have been properly dealt with. [a] But if he has misappropriated the family funds or has

(p) *Jallidar Singh* v. *Ram Lal*. 4 C. 723; *Baldeo* v. *Sham Lal*, 1 A 77; *Badri Das* v. *Ratanlal*, 1892 A W N 75.

(q) *Collector* v *Debnath*, 21 W.R. 222; *Surbessur* v. *Gossain Doss*, 17 W.R. 210· See also S. 268

(r) *Dharma Das* v. *Anuliyadhan*, 32 C. 1119

(o) See page 269. foot-note (o).

(s) *Muhammad* v. *Radhe Ram*. 22 A. 307; *Annamalai* v. *Murugesa*, 26 M. 544=30 I.A. 220=7 C.W N. 754—13 M.L.J. 287—5 Bom. L.R. 494.

(t) *Perrazu* v. *Subbarayadu*, 44 M. 656—3 P.L.T. 1=48 I A. 280=1921 M.W.N. 540—19 A.L.J. 621=18 Bom. L.R. 920=41 M.L.J. 33—26 C.W.N. 1..14 L.W. 270=1922 P C. 71.

(u) *Tara Chand* v. *Reeb Ram*, 3 M.H.C. R. 177; *Damodardas* v. *Uttamram*, 17 B. 271

(v) *Shookmoy* v. *Monoharri*, 11 C. 684 - 12 I A. 103 (P.C.); *Perrazu* v *Subbarayadu*, 44 M. 656 48 I.A. 280—14 L.W. 270 -1922 P C. 71 -19 A.L J 621—22 Bom. L.R. 920 -3 P.L.T. 1-1921 M.W.N. 540—26 C.W N. 1—41 M.L.J. 33 (P.C.).

(w) *Tara Chand* v. *Reeb Ram*, 3 M.H.C. R. 177.

(x) *Ramnath* v. *Goturam*, 44 B. 179—54 I.C. 115—21 Bom. L.R. 1179.

(y) *Raya* v. *Gopal*, 11 I.C. 666.

(z) *Ratnam* v. *Govindarajulu*, 2 M. 339; *Vaikuntam* v. *Avudiappa*. 1936 M.W.N. 809=1937 M. 127.

(a) *Perrazu* v. *Subbarayadu*, 44 M. 656 =48 I.A. 280—14 L.W. 270=1922 P.C. 71= 19 A.L.J. 621—22 Bom. L.R. 920=3 P.L.T. 1=1921 M.W.N. 540—26 C.W.N. 1=41 M.L.J. 33 (P.C.),

spent them for other than joint family purposes, there is a liability upon him to make good the amounts to the other members.[b] The manager has an absolute discretion in the matter of expenditure and if he lives expensively or manages the property recklessly or inefficiently the remedy of the other members is in a partition of the family property,[c] and when accounts have to be taken with a view to such partition, the manager cannot in general be called upon to defend the propriety of his past transactions.[d] *See* also Ss. 280 and 342.

280. Manager's liability to account.—In the absence of proof of direct misappropriation or fraudulent and improper conversion of the joint family moneys to the personal use of the manager, he is liable to account only for what he received and not for what he ought to or might have received if the said moneys had been profitably dealt with.[a] The rules applicable to strict accounts between trustees and *cestui que trust* that exist in England do not apply to the relationship that exists between the manager and the other members of the joint family.[a] The manager is not even bound to keep accounts,[e] and cannot be held liable for his negligence.[f] A coparcener seeking partition is only entitled to an account from the manager of the joint family assets as they exist at the time he demands partition,[g] and he cannot call upon the manager to account for his past dealings or defend the propriety of his past transactions in respect of the family property[h] unless it is established that he has fraudulently misappropriated the family funds for his own personal use.[e] The right of a coparcener to demand an account from the manager, when it exists, is incident to the right to require partition, and this right has been held not to be enforceable except upon a partition.[i] Hence, though a coparcener has a joint interest in the joint family estate with the manager, he

(b) *Abhay Chandra* v. *Pyari Mohan*, 5 Beng. L.R. 347.

(c) *Tara Chand* v. *Reeb Ram*, 3 M.H.C. R. 177; *Bhowani* v. *Juggernath*, 13 C.W. N. 309=3 I.C. 241.

(d) *Shookmoy* v. *Monoharri*, 11 C. 684=12 I.A. 103 (P.C.); *Parmeshwar* v. *Gobind*, 43 C. 459=20 C.W.N. 25=33 I.C. 190; *Perrazu* v. *Subbarayadu*. 44 M. 656=48 I. A. 280=14 L.W. 270=1922 P.C. 71=19 A. L.J. 621=22 Bom. L.R. 920=3 P.L.T. 1= 1921 M.W.N. 540=26 C.W.N. 1=41 M.L.J. 33 (P.C.); *Narayan* v. *Nathaji*, 28 B. 201 =5 Bom. L.R. 945.

(a) See page 270, foot-note (a).

(e) *Ramnath* v. *Goturam*, 44 B. 179=54 I.C. 115=21 Bom. L.R. 1179.

(f) *Shookmoy* v. *Monoharri*, 11 C. 684= 12 I.A. 103 (P.C.); Perrazu v. Subbarayadu, 44 M. 656=48 I A. 280=14 L.W. 270 =1922 P.C. 71=19 A.L.J. 621= 22 Bom. L R 920 26 C.W.N. 1=41 M.L.J. 33 (P.C.) =3 P.L. T. 1=1921 M.W.N. 540; *Sri Ranga* v. *Srinivasa*, 50 M 866=26 L.W. 125 . 1927 M. 801=53 M.L.J. 189.

(g) *Ramnath* v. *Goturam*, 44 B. 179=54 I.C. 115=21 Bom. L.R. 1179; *Balakrishna* v. *Muthusami* 32 M. 271=19 M.L.J. 70=3 I.C. 878; *Parmeshwar* v. *Gobind*, 43 C. 459 =33 I.C. 190=20 C.W.N. 25.

(h) *Narayan* v. *Nathaji*, 28 B. 201=5 Bom. L.R. 945; *Perrazu* v. *Subbarayadu*. 44 M. 656=48 I.A. 280=14 L.W. 270=1922 P.C. 71=19 A.L.J. 621=22 Bom. L.R 920 =26 C.W.N. 1=41 M.L.J. 33 (P.C.)=3 P. L.T. 1=1921 M.W.N. 540.

(i) *Soorjeemoney* v. *Denobundoo*, 6 M. I.A. 526.

cannot, as long as that estate remains joint, call upon the manager for an account of his management of that estate and a suit for a mere account or for mesne profits for the period during which it was under his management was held incompetent.[j] It has, however, been held in a case in Bengal,[k] and this seems to be the sounder view, that a coparcener is entitled to bring a suit for account against the manager, without a prayer for partition, for the purpose of acquainting himself with the real state of affairs in respect of the family property. The manager's non-liability to account in respect of his past dealings in the absence of fraud or wrongful conversion on his part is not in any way affected by the junior members of the family being minors.[l] But there may be a valid agreement between the members of the family under which one of them who is the manager is liable to account to others as if he is an ordinary agent.[m] Besides, during the account-taking at the time of partition, the junior members are not bound to accept the *ipse dixit* of the manager but are entitled to show that any amount alleged to have been spent by the manager for the purposes of the family has not really been so spent[n] and that the manager has not disclosed all the assets available for division among the members.[o] Where it is proved that there are outstandings still to be collected and that some outstandings have been recently collected, an account may be ordered at the time of partition in respect of those outstandings.[p] Where the accounts produced by the manager are shown to be vitiated by errors sufficient in number or importance for reopening the accounts, the Court can order the accounts to be reopened, whether the errors are due to mistake or fraud.[q] Besides, from the date there is severence in interest in the family either by institution of a suit for partition[r] or otherwise,[s] the manager is under an obligation to account strictly in respect of all disbursements and receipts subsequent to such severance, taking credit for all sums spent for the benefit or necessity of the joint estate during that period. Where the manager having books of account has

(j) *Shudanand* v *Bonomalee*, 6 W.R. 256; *Ganpat* v *Annaji*, 23 B. 144; *Soorjeemoney* v. *Denobundoo*, 6 M I.A. 526.

(k) *Abhay Chandra* v. *Pyari Mohan*, 5 Beng. L.R. 347.

(l) *Sri Ranga* v. *Srinivasa*, 50 M 866 - 26 L.W. 125—1927 M. 801=53 M.L J 189.

(m) *Raja Setrucherla*, v. *Raja Setrucherla*, 26 I A 167=22 M. 470 -3 C.W.N. 533—1 Bom. L.R. 388.

(n) *Tammi Reddi* v. *Gangi Reddi*, 45 M. 281—16 L.W. 55=1922 M. 236 (2)—42 M.L. J. 570; *Valkuntam* v. *Avudiappa*, 1936 M. W.N. 809=1937 M. 127 ; *Narendra* v. *Abani*, 42 C.W.N. 77—1938 C. 78.

(o) *Ibid—Parmeshwar* v. *Gobind*, 43 C. 459=33 I.C. 190=20 C.W.N. 25.

(p) *Ramakrishna* v. *Parameswara*, 1931 M W N. 215.

(q) *Bhowani* v. *Juggernath*, 13 C.W.N. 309—3 I.C 241.

(r) *Ramaswami Iyer* v. *Subramania Aiyar*, 46 M. 47 16 L.W. 297—43 M.L.J. 106 1923 M. 147; *Sri Ranga* v. *Srinivasa*, 50 M. 866—26 L.W. 125=53 M.L J. 189=1927 M. 801; *Tammi Reddi* v. *Gangi Redds*, 45 M. 28=16 L.W. 55=1922 M. 236 (2)—42 M.L.J. 570.

(s) *Ramakrishna* v. *Muthuswami*, 52 M. 672—56 M.L.J. 657=29 L.W. 560—1929 Mad. 456; *Suraj Narain* v. *Iqbal Narain*, 40 I.A. 40=35 A. 80=15 Bom. L.R. 456=17 C.W. N. 333=11 A.L.J. 172=1913 M.W.N. 183= 24 M.L.J. 345=18 I.C. 30

suppressed them with the result that it is impossible to find out what are the savings effected from the income of the joint family property, the only possible way of discovering those savings is to see what was the income of the joint family properties and what expenses were incurred by the joint family year by year. Although the manager is neither a trustee nor an agent of the joint family in the strict sense of those terms, it is still his duty to conserve the joint family properties and to disclose them to the other members of the family at the time of partition, and if he fails to do this, he must be charged with the utmost value of the whole net produce after deducting therefrom what is proved by him to have been spent for the joint family.(t) A manager is not liable to pay mesne profits to the other members(u) except on proof that he has excluded them from the joint enjoyment or has held the property in his own individual right and not as manager of the joint family.(v)

281. Manager's power to contract debts—The Karta being ordinarily in sole charge of the management of the family affairs there is an implied authority in him to contract debts for family purposes in his capacity as the manager so as to make the debts binding on the other members to the extent of their interest in the family property whether they be adults(w) or minors.(x) But the mere fact that a certain person is the manager of a joint family is not enough to make his acts binding on the other members, and it must be shown by the party relying on those acts and seeking to bind the other members that the acts were done by the manager either for the benefit or for some necessity of the family.(y) There is no presumption that a loan contracted by the manager is for a family purpose,(z) and the authority of the manager to borrow being a limited one the onus is in the first instance on the lender to show that both the borrowing and its terms were within the authority which he can exercise as such manager.(a) A manager has

(t) *Gobind Dube* v. *Parameshwar*, 62 I.C. 83=1921 P. 487 (2).

(u) *Ramnath* v. *Goturam*, 44 B. 179=54 I.C. 115=21 Bom. L.R. 1179.

(v) *Pirthi Pal* v. *Jewahir*, 14 C. 493 P.C.=14 I.A. 37.

(w) *Chalamayya* v. *Varadayya*, 22 M. 166=9 M.L.J. 3.

(x) *Bishambar* v. *Fateh Lal*, 29 A. 176=4 A.L.J. 95; *Ram Partab* v. *Foolibai*, 20 B. 767; *Sanyasi Charan* v. *Ashutosh*, 42 C. 225=28 I.C. 836; *Nunna* v. *Chidaraboyna*, 26 M. 214.

(y) *Narayan* v. *Political Agent, Sawantwadi*, 7 Bom. L.R. 172.

(z) *Suppai* v. *Murugappa*, 1924 M. 710=19 L.W. 605; *Khazana* v. *Jagan*, 4 Lah. 200=1924 L. 44; *Abdul Majid* v. *Sharaswati Bai*, 61 I.A. 90=36 Bom. L.R. 225=38 C.W.N. 201=1934 A.L.J. 79=66 M.L.J. 65=1934 M.W.N. 4=39 L.W. 72=1934 P.C. 4; *Ramyappa*, v. *Narayanarao*, 18 B. 520; *Sunkur* v. *Goury Pershad*, 5 C. 321; *Ganpat* v. *Munni Lal*, 34 A. 135=13 I.C. 34=9 A.L.J. 54.

(a) *Sunder Mull* v. *Satya Kinkar Sahana*, 55 I.A. 85=27 L.W. 461=7 P. 294=26 A.L.J. 364=9 P.L.T. 203=54 M.L.J. 427=1928 M.W.N. 242=30 Bom. L.R. 793 32 C.W.N. 657=1928 P.C. 64; *Ganpat* v. *Munni Lal*, 34 A. 135=9 A.L.J. 54=13 I.C. 34; *Nazir* v. *Rao Raghunath*, 46 I.A. 145=41 A. 571=11 L.W. 188=17 A.L.J. 591 =21 Bom. L.R. 484=23 C.W.N. 700=36 M.L.J. 521=1919 M.W.N. 498=1919 P.C. 12; *Ram Bujhawan* v. *Nathu*, 50 I.A. 14=2 P. 285=18 L.W. 767=4 P.L.T. 29=44 M.L.J. 615=25 Bom. L.R. 568=1923 M.W.N. 382=28 C.W.N. 446=1923 P.C. 37.

authority to borrow upon reasonable commercial terms,[b] the expression "commercial terms" being understood in contradistinction to such terms as would be in excess of the necessity of the family and therefore in excess of the authority of the manager. Compound interest cannot be said to be in itself in excess of the manager's authority regardless of the other facts and circumstances of any particular case. Thus compound interest at a moderate rate or with infrequent rests may not be oppressive while compound interest with a high rate and frequent rests may be in excess of his authority to borrow. There is no rule that simple interest must always be judicially preferred to compound interest or that the rates which appear high in England are necessarily unreasonable even in India.[c] Where the lender to a manager brings a suit upon the loan and seeks to render the interests of the other members also liable for the debt, it is incumbent on the lender to show either there was necessity to borrow on the terms on which he has made the loan[d] or that he made reasonable enquiry and satisfied himself that such necessity existed.[e] In such a suit it is open to the other members to admit the necessity to borrow the principal and at the same time contend that the rate of interest was unnecessarily high.[d] In the absence of necessity for the loan, or reasonable and *bona fide* enquiry by the lender in respect of such necessity, the interests of the other members in the joint family property will not be liable for the loan contracted by the manager even where there is a joint family business and the manager contracted the loan on the representation that he required it for that business.[f] Even where the loan has been contracted by the manager for purposes of the joint family the other members are not personally liable[g] unless they have ratified the transaction or have shown by their conduct that they can also be treated as the real contracting

(b) *Manna Lal* v. *Karu Singh*, 13 L.W. 652=36 I.C. 766=1 P.L.T. 6=1919 P.C. 108

(c) *Sunder Mull* v. *Satya Kinkar*, 55 I A. 85=27 L.W. 461 : 7 P. 294=26 A.L.J. 364 : 9 P.L.T. 203=54 M.L.J. 427 : 1923 M. W.N. 242=30 Bom. L.R. 793=32 C.W.N 657=1928 P.C 64.

(d) *Nazir* v. *Rao Raghunath*, 46 I A. 145 =41 A. 571=11 L.W. 188 :17 A.L.J. 591= 21 Bom. L.R. 484 : 23 C.W.N. 700 36 M.L.J. 521=1919 M.W.N. 498 :1919 P.C. 12; *Ram Bujhawan* v. *Nathu*, 50 I A. 14 =2 P. 285=18 L.W. 765=4 P.L.T. 29=44 M.L.J. 615=25 Bom. L.R. 568=1923 M.W.N. 382=28 C.W.N. 446=1923 P.C. 37; *Harihar* v. *Lachhman*, 9 Luck. 657 =1934 Oudh. 246.

(e) *Krishna* v. *Vasudeva*, 21 B. 808; *Solam Ram* v. *Parduman*, 8 Lah. 673= 1928 L. 103=105 I.C. 785; *Sunkur* v. *Goury*, 5 C 321.

(f) *Nismat Rai* v. *Din Dayal*, 54 I A. 211=52 M.L.J 729=29 Bom. L.R. 886=25 A.L.J 599=1927 M W.N. 453 1921 P.C. 121 =8 P.L.T. 647; *Gaupat* v. *Munni Lal*, 34 A 135=9 A.L.J. 54=13 I.C. 34; *Nagendra* v. *Amar Chandra*, 7 C.W.N. 725; *Vithal* v *Shivappa*, 47 B. 637 25 Bom. L.R. 323 : 1923 B. 265(2); *Girdhari Lal* v. *Kishen Chand*, 5 Lah. 511=1925 L. 240; See contra in *Raghunathji* v. *Bank of Bombay*, 34 B. 72=11 Bom. L.R. 255=2 I.C. 173. This question has been left open by the Madras High Court in *Guruswami* v. *Gopalasami*, 42 M. 629=9 L.W. 547=50 I.C. 775=36 M.L.J. 568=1919 M.W.N. 301.

(g) *Jiwan* v. *Peoples Bank*, 1937 Lah. 926; *Shivcharan* v. *Hari Ram*. 17 Lah. 395 =1935 Lah. 247; *Mutsadi Lal* v. *Sakhir*, 17 Lah. 311=1935 Lah. 735.

parties along with the manager.[h] But the manager contracting the debt for the joint family is always personally liable to the creditor,[i] and it is open to the creditor to sue the whole family as liable on the debt[j] or to sue the manager alone in his representative capacity.[k]

282. Promissory note by the manager.—The manager of a joint family, by executing a promissory note unconditionally in his own name, though for a family purpose, cannot thereby bind the other members or their interests in the family property and the creditor cannot sue the other members as liable on the promissory note.[l] The maker alone can be sued on the note and the fact that under the Hindu Law the other members of the family are liable in respect of debts incurred by the manager on behalf of the family or by the father for his own purposes which are neither illegal nor immoral, does not affect the principle involved, namely, that no one whose name does not appear on the negotiable instrument can be held liable thereon.[m] The other members of the family would only be bound by a promissory note or bill of exchange signed by the Karta for family purposes if their names appear and are disclosed in the instrument in such a way that, on any fair interpretation of the document, they could be taken to be the persons really liable on the bill.[n] A debt contracted under a promissory note by the manager for family purposes, does not attract the Hindu Law doctrine of family responsibility for the family debt since such a doctrine is incompatible with the object and effect of the law relating to negotiable instruments. But in a suit aptly framed, the creditor may claim in the alternative the amount of the original debt for which the promissory note was given as security and may proceed under the Hindu Law against the property of the joint family as a whole,[o] but if he chooses to adopt this alternative the coparceners will be entitled to

(h) *Purnayya* v. *Kolayya*, 34 L.W. 761 —61 M L J 518—1931 M. 788; *Official Assignee of Madras* v. *Palaniappa Chetty*, 41 M. 824—8 L.W 530—35 M.L.J. 473 .1918 M W N. 721—49 I C. 230; *Ranjit Singh* v *Amulya*, 9 C.W.N. 923; *Mutsadi Lal* v. *Sakhir*, 17 L. 311—38 P.L.R. 654 .1935 L. 735.

(i) *Deen Dyal* v. *Jugdeep Narain*, 4 I A. 247 3 C. 198 (P.C.).

(j) *Sundar* v. *Chitar*, 29 A. 1—3 A.L.J. 644; *Baldeo* v. *Mobarak*, 29 C. 583 .6 C.W. N. 370; *Babaji* v. *Dhuri*, 9 B. 305; *Guruvappa* v. *Thimma*, 10 M. 316.

(k) *Bissessur* v. *Luchmessur*, 6 I.A. 233; *Venkatanarayana* v. *Venkatasomaraju*, 46 L.W. 112—1937 M.W.N. 427=(1937) 2 M.L. J. 251=1937 M. 610 (F.B.).

(l) *Hari Mohan* v. *Sourendra*, 41 C.L.J. 535—1925 C. 1153; *Vithal* v. *Vithal*, 25 Bom L.R. 151—1923 B. 244.

(m) *Maruthamuthu* v. *Kadir Badsha*, 47 L.W. 309; *Sadasuk* v. *Sir Kishen*, 46 C. 663.10 L.W. 143—46 I.A. 33=17 A.L.J. 405 =21 Bom. L.R. 605 · 23 C.W.N. 937=36 M.L.J. 429=50 I.C. 219=(1919) M.W.N. 310.

(n) *Ramgopal* v. *Dhirendra*, 54 C. 380= 31 C.W.N. 397=1927 C. 376; *Hari Mohan* v. *Sourendra*, 41 C.L.J. 535=1925 C. 1153; See contra in *Raghunath* v. *Sri Narain*, 45 A. 434=21 A.L.J. 323=1923 A. 424; *Krishnashet* v. *Hari*, 20 B. 488; *Siri Kant* v. *Sidheshvari*, 16 Pat. 441=1937 Pat. 455.

(o) *Krishna* v. *Krishnaswami*, 23 M. 597 explained in *Maruthamuthu* v. *Kadir Badsha*, 47 L.W 309=(1938) 1 M.L.J. 378 =1938 M.W.N. 238 (F.B.).

raise the defence that the debt was not contracted nor the loan applied for the family purposes.(p) But a suit which is primarily a suit on a promissory note executed by the manager cannot be treated as a suit for the debt for which the promissory note was passed so as to make the whole joint family property liable for the debt.(q) In the recent case of *Maruthamuthu* v. *Kadir Badsha*(m) a Full Bench of the Madras High Court after considering the previous decisions and indicating its view against the maintainability of a suit by the promisee against the other members of the joint family on a promissory note executed by the father-manager, held that such a suit would certainly not be maintainable at the instance of the endorsee of the promissory note.

283. His power of alienation.—In addition to his power to contract debts for family purposes, a manager can make, within reasonable limits, a gift of a portion of the family property, provided it is by an act *inter vivos* and not by will, and is made for pious purposes,(r) and can alienate the joint family property for the family benefit,(s) or for family necessity, (t) even without the consent of the other adult members of the family.(u) The mere fact that the manager did not describe himself as manager does not make the alienation not binding on the other members of the family, if really the alienation is one for the benefit or necessity of the family.(v) The power of the manger to alienate the family property for legal necessity is analogous to that vested in the head of a religious endowment or in the guardian for an infant.(w) His power is a limited and a qualified power and can only be exercised rightly in a case of need, or for the benefit of the estate. But where in a particular instance the charge is one which a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the

(p) *Ramgopal* v. *Dhirendra*, 54 C. 380 =31 C.W.N. 397=1927 C. 376; *Sivikant* v. *Sidheshwari*, 16 Pat. 441=1937 Pat. 455.

(q) *Vithal* v. *Vithal*, 25 Bom. L.R. 151 =1923 B. 244; See contra in *Bhagwan Singh* v. *Bakshi*, 1933 L. 494.

(m) See page 275, foot-note (m).

(r) *Gangi Reddi* v. *Temmi Reddi*, 50 M. 421=54 I.A. 136=26 L.W. 139=52 M.L.J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W.N. 799=1927 M.W.N. 502=1927 P.C. 80; *Ramalinga* v. *Sivachidambara*, 42 M. 440=9 L.W. 224=1919 M.W.N. 426=36 M.L. J. 575=49 I.C. 742; *Amar* v. *Saradamayee*, 57 C. 39=1929 C. 787=33 C.W.N. 690; *Imperial Bank* v. *Mst. Maya*, 16 L. 714=37 P.L.R. 831=1935 L. 867.

(s) *Jagmohan* v. *Prag Ahir*, 47 A. 452 =1925 A. 618=23 A.L.J. 209; *Nagindas* v. *Mahomed*, 46 B. 312=23 Bom. L.R. 1094=1922 B. 122; *Ratnam* v. *Govindarajulu*, 2 M. 339.

(t) *Daulat Ram* v. *Mehrchand*, 14 I.A. 187=15 C. 70; *Gharib-ullah* v. *Khalak Singh*, 30 I.A. 165=25 A. 407=5 Bom. L.R. 478=7 C.W.N. 681.

(u) *Sham Sundar* v. *Achhan Kunwar*, 25 I.A. 183=21 A. 71=2 C.W.N. 725; *Sahu Ram* v. *Bhup Singh*, 44 I.A. 126=39 A. 437 =6 L.W. 213=15 A.L.J. 437=19 Bom. L.R. 498=21 C.W.N. 698=33 M.L.J. 14=1917 M. W.N. 439=1917 P.C. 61.

(v) *Chhaju* v. *Multan*, 1936 L. 936

(w) *Sahu Ram* v. *Bhup Singh*, 44 I.A. 126=39 A. 437=6 L.W. 213=15 A.L.J. 437 =19 Bom. L.R. 498=21 C.W.N. 698=33 M. L.J. 14=1917 M.W.N. 439=1917 P.C 61.

danger to be averted, or the benefit to be conferred upon it in the particular instance is the thing to be regarded. The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and he is not bound to see to the application of the money. The purposes for which a loan is wanted are often future as respects 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, and a *bona fide* creditor ought not to suffer when he acted honestly and with due caution, but is himself deceived.(x) Besides necessity, an alienation by a manager is good even when it is for the benefit of the estate,(y) the expression 'benefit' including 'spiritual benefit,'(z) or when it has been consented to by all the other coparceners if they happen to be *sui juris*. But where the manager's alienation is for neither family necessity nor benefit and some only of the other coparceners have consented thereto, the alienation is not binding on the interests of even the alienor and the consenting coparceners except in Bombay and Madras as it should be treated merely as a coparcener's alienation. In the case of a joint family business, the manager has authority to raise money not only for the payment of its debts, but also for the purpose of carrying on the business. Whether he should do it by mortgage or by sale is purely a question for the manager to decide and not for the lender to go into.(a) *See* also Ss. 291 to 296.

284. Manager's power to represent the family.—In all matters concerning the joint family as a whole, the manager acts as its representative. He can make contracts for the purposes of the family,(b) give receipts, compromise(c) or discharge claims(d)

(x) *Hunoomanpersaud* v. *Mussumat Babooee*, 6 M.I.A. 393; *Ramkrishna* v. *Ratan Chand*, 53 A. 190=58 I.A. 173=34 L.W. 175 =1931 A.L.J. 458=33 Bom. L.R. 988 :35 C.W.N. 841=1931 M.W.N. 733=61 M.L.J. 685=1931 P.C. 136.

(y) *Palaniappa* v. *Devasikamony*, 40 M. 709=44 I.A. 147=6 L.W. 222=15 A.L.J. 485 =19 Bom. L.R. 567=21 C.W.N. 729=33 M. L.J. 1=1917 M.W.N. 507=1917 P.C. 33; *Johnston* v. *Gopal Singh*, 12 L. 546=1931 L. 419; *Sohan* v. *Zorawar*, 1937 A.L.J. 73 =1937 A. 219.

(z) *Gangi Reddi* v. *Tammi Reddi* 50 M. 421=54 I.A. 136=26 L.W 139=1927 P.C. 80=52 M.L.J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W.N. 799=1927 M.W.N. 502.

(a) *Nlamat Rai* v. *Din Dayal*, 8 L. 597 =54 I.A. 211=52 M.L.J. 729=29 Bom. L.R. 886=25 A.L.J. 599=1927 M.W.N. 453.

(b) *Mt. Dhapo* v. *Ramchandra*, 57 A. 374=1934 A.L.J. 1028=1934 A. 1019; *Triberi Prasad* v. *Jainarain*, 1937 Pat. 425; *Adinarayana* v. *Venkata*, 1937 M. 869 :46 L.W 761=(1937) 2 M.L.J. 653.

(c) *Dangal Ram* v. *Jaimangal*, 5 P. 480 1926 P. 364; *Satyid* v. *Chandhri*, 1927 P.C. 204=1927 M.W.N. 723=29 Bom L.R. 1376 =32 C.W.N. 93=53 M.L.J. 345; *Pathal Singh* v. *Seobachan*, 1934 P. 283; *Bhagwan Singh* v. *Beharilal*, 1937 N 237

(d) *Umakant* v. *Martand*, 1933 B. 245= 35 Bom. L.R. 388.

ordinarily incidental to a business carried on in the interests of the family[e] and make a reference to arbitration so as to be binding upon other members including minors.[f] But he cannot revive a barred debt so as to be binding upon the family,[g] though he can acknowledge a debt not barred,[h] nor can he start a new business so as to be binding upon the other members[i] or relinquish a debt due to the family.[j] He can sue and be sued on behalf of the joint family[k] and the manager can so effectively represent all other members of the family that the family as a whole is bound.[l] Hence a decree passed against the manager in respect of a liability incurred within the scope of his authority is executable against the interest of the other members in the family property, even though they had not been made parties to the suit and the decree does not show on the face of it that the defendant had been sued in his capacity as manager. It is not the frame of the suit or the form of the decree which is conclusive of the matter, but whether the liability which is the basis of the decree was in fact incurred by the defendant within the scope of his authority as the family manager.[m] But if in a suit against the joint family, the plaintiff also impleads a minor member in his individual capacity and does not get a guardian appointed for him, the fact that the manager has

(e) *Kishen Prasad* v. *Har Narain*, 33 A. 272=15 C.W.N. 321=8 A.L.J. 256 -21 M.L.J. 378=13 Bom. L.R. 359=(1911) 2 M.W.N. 395 9 I.C. 739=38 I.A. 45.

(f) *In the matter of Romon Kissen* v *Hurrolall*, 19 C. 334; *Nanak Chand* v. *Benarsi*, 12 L. 65=1930 L. 425; *Balaji* v. *Nana*, 27 B. 287=5 Bom. L.R. 95; *Nawal Kishore* v. *Sardar*, 37 P.L.R. 572=1935 L. 667; *Shantilal* v. *Munshilal*, 56 B. 595=34 Bom. L.R. 862=1932 B. 498; *Datta Mal* v. *Amar Nath*, 1938 A.L.J. 544.

(g) *Chinnaya* v. *Gurunatham*, 5 M. 169 (F.B.); *Thakar Das* v. *Mst. Putli*, 5 L. 317=1924 L. 611. *Narayana* v. *Venkataramana*, 25 M. 220 (F.B.); *Chunnilal* v. *Chakkilal*, 1937 N. 327, *Dinkar* v. *Appaji*, 20 B. 155; *Bhasker* v. *Vijalal*, 17 B. 512; but see *Ram Singh* v. *Sri Charan*, 1938 A. 146 holding that an alienation by the manager for purposes of discharging the barred debt of the family is valid.

(h) *Sitla* v. *Jagatpal*, 86 I.C. 693=1925 Oudh. 394; *Chinaya* v. *Gurunatham*, 5 M. 169 (F.B.); *Bhasker* v. *Vijalal*, 17 B. 512; *Sarada Charan* v. *Durgaram*, 37 C. 461=5 I.C. 484=14 C.W.N. 741; *Ram Charan* v. *Gaya Prasad*, 30 A. 422=5 A.L.J. 375 (F.B.); S. 21 (3) (b) of Lim. Act.

(i) *Tammi Reddi* v. *Gangi Reddi*, 45 M. 281=16 L.W. 55=1922 M. 236(2)=42 M.L.J. 570.

(j) *Dasaratharama* v. *Narasa*, 51 M. 484

(k) *Kishan Prasad* v. *Har Narain*, 33 A. 272=15 C.W.N. 321=8 A.L.J. 256 21 M.L.J. 378=13 Bom. L.R. 359=(1911) 2 M.W.N. 395 9 I.C 739=38 I.A. 45 (P.C.); *Lalchand* v. *Sheopobind*, 8 P. 788 =1929 P 741; *Sheo Shankar* v. *Jaddo*, 36 A 383=41 I.A. 216=1 L.W. 645=12 A.L.J. 1173=16 Bom. L.R. 810 18 C.W.N. 968=1914 M.W.N. 593=1914 P.C. 136. *Sheik Ibrahim* v. *Rama Aiyar*, 35 M. 685=10 I.C. 874=21 M.L.J. 508=(1911) 1 M.W.N. 442.

(l) *Sheo Shankar* v. *Jaddo*, 36 A. 383=41 I.A. 216=1 L.W. 645=12 A.L.J. 1173=16 Bom. L.R. 810=18 C.W.N. 968=1914 M.W.N. 593=1914 P.C. 136; *Hori* v. *Munman*, 34 A. 549=15 I.C. 126=9 A.L.J. 819; *Lingangouda* v. *Basangouda*, 51 B. 450=54 I.A. 122 -52 M.L.J. 472=25 L.W. 789 =25 A.L.J. 319=31 C.W.N. 570=1927 M.W.N. 352=29 Bom. L.R. 848=8 P.L.T. 462 -1927 P.C. 56; *Rachotappa* v. *Konher*, 59 B 194=36 Bom. L.R. 1083=1935 B. 41.

(m) *Jai Kishen* v. *Ramchand*, 1935 L. 1; *Madhgouda* v. *Halapa*, 58 B. 348=36 Bom. L.R. 327=1934 B. 178; *Ram Kishan* v. *Ganga Ram*, 12 L. 428=32 P.L.R. 199=1931 L. 559; *Bhagwansingh* v. *Beharilal*, 1937 N. 237; *Venkatanarayana* v. *Venkatasomaraju*, 46 L.W. 112=1937 M.W.N. 427=(1937) 2 M.L.J. 251=1937 M. 610; *Gyan Dat* v. *Sada Nand*, 1938 A. 163=1938 A.L.J. 56; *Hori* v. *Munman*, 34 A. 549=9 A.L.J. 819=15 I.C. 126.

been made a party to the suit does not make the decree binding on the minor.[n] Though a manager of a joint family has no power to bind the minor members by a contract for the sale of joint family property and such a contract cannot ordinarily be allowed to be specifically enforced against their interests,[o] yet where the acquisition of fresh property for the joint family was the object of the above contract and in the new property so acquired the minors take a share they cannot be allowed to repudiate the contract.[p]

285. Trading family-partnerships.—In the case of a joint Hindu family carrying on ancestral business, the general rules applicable to an ordinary Hindu coparcenary become considerably modified due to the exigencies of the trade. In such a case the members carrying on the business may be members exclusively of one joint family or may consist of members drawn from different families. In the former case the incidents are those of the Hindu Law rather than those of a partnership under the Indian Contract Act,[q] and the partnership does not become dissolved by the death of one of the members,[r] and the manager, who may even be a junior member of the family,[s] is not accountable to the other members for past profits and losses;[t] the interest of the family in the business passes by survivorship and the managership in the business goes by consent of the members and not by any right by birth;[u] so also every coparcener gets an interest in the business by birth and not by agreement on his part or by his admission into the business by other members.[v] The difference between a partnership business and joint family business has been well brought out by Page C.J. of the Rangoon High Court in *Chidambaram* v. *Mutaya*, 14 R. 122=1936 R. 160 as follows:-

"It seems to me that the application of the term "partnership" to the relations *inter se* of the members of a Hindu joint family which owns and carries on a business involves a misuse of the term, and a misconception of the characteristics of such a family. It sometimes happens—I speak with all

(n) *Chandi Prasad* v *Balaji*, 53 A. 427=1931 A. 136=1931 A.L.J. 152; *Krishna Kumar* v. *Gopal*, 11 O.W.N. 1236=1934 Oudh 475.

(o) *Balaswami* v. *Lakshmana*, 44 M. 605=1924 M. 172; See *Adinarayana* v. *Venkata*, 1937 M. 869=(1937) 2 M.L.J. 653=46 L.W. 761 (Ratification by minors).

(p) *Sohanlal* v. *Atal Nath*, 1933 A. 846=56 A. 142=1933 A. L.J. 1584.

(q) *Ramlal* v. *Lakhmichand*, 1 Bom. H C.R. (Appx.) 51; *Mahabir* v. *Ram Krishen*, 1936 A. 855=1936 A.L.J. 1151.

(r) *In the matter of Haroon Mahomed*, 14 B. 189; *Lala Baij Nath* v. *Ram Gopal*, I.L.R. (1938) I.C. 369.

(s) *Ramsebuk* v. *Ramlall*, 6 C. 815; *Ramakrishna* v. *Manikka*, (1937) 1 M.L.J. 587=1937 M. 375=45 L.W. 757=1937 M.W. N. 489.

(t) *Ganpat* v. *Annaji*, 23 B. 144.

(u) *Laiji* v. *Keshavji*, 37 B 340=14 Bom. L.R. 840; *Anant* v *Channy*, 25 A. 378; *Lutchamanen* v. *Siva Prakasa*, 26 C. 349=3 C.W.N. 190; See also *Ram Nath* v. *Chiranji Lal*, 57 A. 605=1935 A.L J. 177=1935 A. 221 (F.B.) on the question when an alienation fot the purposes of a newly started business will be binding on the joint family. See also *Ganesh Prasad* v. *Sheogobind*, 16 Pat. 719.

(v) *Official Assignee of Madras* v. *Palaniappa*, 41 M. 824=8 L.W. 530=49 I.C. 220=35 M.L.J. 473=1918 M.W N. 721; *Bhagwan Singh* v. *Beharilal*, 1937 N. 237.

respect—that Judges to support a thesis or to illustrate a proposition, loosely make use of a term with a technical meaning and of peculiar significance in circumstances in which, applied in its true sense, it is out of place and *nihil ad rem*, thus sacrificing accuracy to rhetoric. Indeed, it is not only in connection with a Hindu joint family that the term partnership has been misused. In *Ma Paing* v. *Maung Shwa Hpaw*, 5 Rang. 296 a Full Bench of this Court erroneously held that in respect of the property of the marriage a Burmese husband and wife were 'partners'. Since the passing of the Partnership Act in 1932 however there is no excuse for any one to labour under such a misconception, for by S. 5 the legislature provided that:

"The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such, are not partners in such business".

The legislature in enacting S. 5 did no more, in my opinion, than restate what had previously been the true legal position in which the parties concerned stood. How it could ever have been supposed that the members of a joint Hindu family, merely because they carried on a family business were "partners" of a "firm" in the sense in which those terms are used in legal parlance, I am bound to say, that I am at a loss to understand. Of course, a member of a Hindu undivided family is at liberty to enter into a partnership with a stranger or with other members of his own family, but in such circumstances the rights and obligations of the partners are determined by the Partnership Act and not by the personal law by which the parties may be governed. Again, it is obvious that the doctrine of estoppel by "holding out" is as applicable to a Hindu as to any one else. But, in my opinion, with all due deference, there has never been any justification in law or common sense for holding that the members of a Hindu joint family who carry on business as such, are partners governed by the Partnership Act. The only substantial resemblance between the two forms of association would seem to be that in each case the members carry on business together. In other material respects the two forms of association appear to me wholly dissimilar.

The interest of the partners in a firm is determined by contract; the interest of the members of a Hindu joint family in ancestral business is acquired by status. Ancestral business devolves upon the members of a Hindu joint family as part of their inheritance, and their rights and obligations in respect of it are not governed by any contract into which they have entered but by the personal law to which they are subject. A partnership is dissolved by death, but the death of a member does not dissolve a Hindu joint family, the result of such an event merely being that an accession is made to the inheritance of the other members who survive. On insolvency a partner ceases to be a member of the firm, but the insolvency of a member does not prevent him continuing to be a member of a Hindu joint family; *Fakirchand Motichand* v. *Motichand Hurruck Chand*, 7 Bom. 438. Subject to S. 30, which, I am disposed to think, does not apply to a minor member of a Hindu joint family the members of which carry on business as such, [*Official Assignee, Madras* v. *Palaniappa Chetty*, 41 Mad. 824; *Sanyasi Charan* v. *Krishnadhan Banerji*, 49 I.A. 108=49 Cal. 560 (P.C.)] and to the contract of partnership no person can be introduced as a partner into the firm without the consent of all the existing partners (S. 31), but a member of Hindu joint family acquires an interest in the business at birth and the other members cannot deprive him of it. Under S. 12, Partnership Act:

"Subject to contract between the partners: (a) Every partner has a right to take part in the conduct of the business; (b) every partner is bound to attend diligently to his duties in the conduct of the business; (c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and (d) every partner has a right to have access to and to inspect and copy any of the books of the firm".

It would seem that none of the above rights or obligations however appertain to the members of a Hindu joint family that owns a family business, and the members are not entitled to claim payment of an equal or indeed, until partition, any separate share of the profits. Subject to the provision of the Partnership Act "a partner is the agent of the firm for the purpose of the business of the firm". That however is not the normal position of the members of a Hindu joint family who own and carry on a family business. Further under the Companies Act 1913, (S. 4), only ten persons for banking or twenty for any other business can form a partnership, but the members of a Hindu joint family which owns and carries on a business may be unlimited in number. These are some, but by no means all, of the characteristics in which a partnership differs from a Hindu joint family which owns and carries on a business, and it is unnecessary to dilate upon them for the purpose of demonstrating how inapposite and misleading it is to apply the terms "partnership" and "firm" to the relations *inter se* of the members of a Hindu joint family which owns and carries on a family business as such. The result of this misuse of language has been in my opinion, that a real and manifest injustice has been done to those members of the family who take an active part in carrying on the family business. So long as a member of the family which owns the business is a minor or takes no active part in the management or working of it his liability is limited to the extent of his interest in the family property; but if he takes an active part in carrying on the business after he has attained his majority he makes himself personally liable for the obligations of the business contracted after he came of age: *Joykisto Cowar* v. *Nittyanund Nundy*, 3 Cal. 738; *Samalbhai Nathubhai* v. *Someshvar Mangal* 5 Bom. 38; In the matter of *Haroon Mahomed* 14 Bom. 189; *Vadilal* v. *Shah Khushal* 27 Bom. 157; *Chalamayya* v. *Varadayya* 22 Mad. 166; *Lutchmanen Chetty* v. Siva *Prokasa Mudeliar* 26 Cal. 349; *Anant Ram* v. *Channu Lal*, 25 All. 378; *Bishambhar Nath* v. *Sheo Narain*, 29 All. 166; *Sanyasi Charan Mandal* v. *Asutosh Ghose*, 42 Cal. 225; *Gangayya* v. *Venkataramiah*, 41 Mad. 454; *Mamayya* v. *K. R. Rice Mill Co.*, 44 Mad. 810; *Nagasubrahmania Mudali* v. *Krishnamachariar*, 50 Mad. 981; *Debi Dayal* v. *Baldeo Prasad* 50 All. 982; *Sanyasi Charan* v. *Krishnadhan Banerji* 49 I.A. 108=49 Cal. 560; but see *Joharmal Ladhooram* v. *Chetram Harising*, 39 Bom. 715".

The manager of ancestral business has authority to raise money not only for the payment of its debts(*w*) but also for the purpose of carrying on the business,(*x*) and for this purpose he can pledge the

(*w*) *Ramkrishna* v. *Ratan Chand*, 53 A 190=58 I.A. 173=34 L.W. 175=1931 A.L.J. 458=33 Bom. L.R. 988=35 C.W.N. 841=1931 M.W.N. 733=61 M.L.J. 685=1931 P.C. 126; *Bhagwan Singh* v. *Beharilal*, 1937 N. 337.

(*x*) *Niamat Rai* v. *Din Dayal*, 8 L. 597 =54 I.A. 211=26 L.W. 442=53 M.L.J. 729 =29 Bom. L.R. 886=25 A.L.J. 599=1927 M. W.N. 453=3 P.L.T. 647=1927 P.C 121; *Hanmantappa* v. *Dundappa*, 36 Bom. L.R. 474=1934 B. 234.

credit of the family upto any extent.[y] The manager of a trading family has wider powers than those of the manager of a non-trading family. No doubt there is no deviation from the fundamental principle that what is done by him must be for the benefit and necessities of the family, but acts as the incurring of debts and drawing of negotiable instruments are necessities to a trading family. Even where debts in fact are incurred merely for personal purposes of the manager, they will bind the family if they are within the ostensible authority of the manager conducting the family business. So it is, that those who deal with him and to whom he incurs debts are not put upon enquiry as to whether the debts were incurred for the benefit or necessities of the family so long as they are incidental to the family business.[z] What is a necessary or a beneficial purpose is a question which, in the case of a trading family, is governed by considerations different from those that apply to an ordinary Hindu coparcenary. The lender discharges his duty by showing that there were in fact trade debts in existence, that is to say, that the debts had been incurred in the course of, or for purposes of the trade. There his duty ends, and he is not called on to prove further that in the incurring of the debts the manager had acted prudently; nor is he required to prove that the debts could have been discharged otherwise than by borrowing the amount from him. To hold differently would be to throw upon the lender a duty so onerous that no ordinary man can be expected to perform it adequately. Moreover, it would neither be reasonable nor in the interests of the borrowing family itself, to require the lender to make an investigation and ascertain whether the manager could have carried on the trade more advantageously by pursuing a different course.[a] This implied authority to contract debts on behalf of the family business, does not make the other coparceners personally liable on the debts contracted, but makes them liable only to the extent of their family assets[b] except when they can be said to have ratified the transaction or treated as parties thereto by reason of their con-

(y) *Niamat Rai* v. *Din Dayal*, 8 L. 597 54 I.A. 211=26 L.W. 442:-52 M.L.J. 729:-29 Bom. L.R. 886=25 A.L.J. 599-:1927 M. W.N 453 -8 P.L.T. 647—1927 P.C 121, See also *Ram Lal* v. *Lakhmi Chand*, 1 Bom. H.C.R. (App.) 51. *Ram Krishna* v. *Ratan Chand*, 58 I.A. 173:-53 A 190 -33 Bom. L.R. 988=35 C.W.N. 841 -61 M.L.J 665=34 L.W. 175—1931 M.W.N. 733:-1931 P.C. 136: *Ram Nath* v. *Chiranj Lal*, 57 A. 605=1935 A.L.J. 177=1935 A. 221 (F.B.).

(z) *Rajagopala* v. *Raman*, 1927 M. 1190 (2):-1927 M.W.N. 879; *Kesar* v. *Santokh*, 17 Lah. 824=169 I.C. 769; *Mt. Champa* v *Official Receiver, Karachi*, 15 L. 9:-1933 L. 901:-36 P.L.R. 450; *Ram Gopal* v. *Baijnath*, 1937 C. 396.

(a) *Visvanathan* v. *Ramanathan*, 46 M. L.W. 275:-1937 M. 816; *Raghunathji* v. *Bank of Bombay*, 34 B. 72=11 Bom. L.R. 255 - 2 I.C 173; but see contra in *Vithal Yeshvant* v. *Shivappa*, 47 B. 637 and *Nanny Shanker* v. *Bashyam*, 1938 M.W.N. 126.

(b) *Ghasiram* v. *Otia*, 1936 P. 485; *Raghunathji* v. *Bank of Bombay*, 34 B. 72 =11 Bom. L.R. 255=2 I.C. 173; *Niamat Rai* v. *Din Dayal*, 8 L. 597:-54 I.A. 211=52 M.I.J. 729—29 Bom. L.R. 886=25 A.L.J. 599=1927 M.W.N. 453=8 P.L.T. 647=1927 P.C 121 -26 L.W. 442.

duct.[c] But the liability of a minor member of the family for the debt of the business is limited to his interests in the joint family property[d] and does not attach to his separate assets. But there is no necessary inference that because money is raised by the manager mortgaging the family property, the money is required for the family business.[e] Besides, as the members of a joint Hindu family are not as such partners, except where the said members by taking an active part in the family business or by other conduct induce a belief in those dealing with the family that they are really partners in the business, no notice of severance in the family having the effect of dissolving the joint family business as such, need be given to the creditors dealing with the manager of the business, and a person who advances money to the manager subsequent to severance of interest in the family, and for a purpose other than the preservation of the business, is not entitled to make the other members of the family liable on the ground that he had no notice of severance in the family and of the consequent cessation of the family business as a joint family concern.[f]

In cases where the members carrying on a business together are drawn from different families, their legal relations are regulated by the partnership provisions of the Contract Act and the partnership becomes dissolved on the death of any of the persons carrying on the business.[g] Where a partnership has been formed between a stranger and a manager of a joint family, the other members of the family do not *ipso facto* become partners under the Contract Act[h] and cannot sue for a dissolution.[i] In such a case, the family as a unit does not become a partner, but only such of its members as, in fact, enter into a contractual relation with the stranger.[h] But a new business started by the manager, though he be the father of the joint family, cannot be regarded as ancestral so as to render the interests of the minors in the joint family property liable for debts incurred for the business. The manager has no power to impose upon a minor member of the joint family, the risk and liability of a new business started by him and there is no distinction on principle in this matter between a case under the Dayabhaga and

(c) *Bishen Singh* v. *Kidar Nath*. 2 L. 59=1921 L. 61; *Chidambaram* v. *Mulaya*. 1936 R. 160—14 R. 122.

(d) *Jwala Prasad* v. *Bhuda Ram*. 10 P. 50C—1931 P. 328=12 Pat. L.T. 707.

(e) *Vithal* v. *Shivappa*. 47 B 637=1923 B. 285=25 Bom. L.R. 323.

(f) *Ramaswami* v. *Srinivasa*. 43 M.L.W. 437=1936 M. 94=70 M.L.J. 214=1936 M. W.N. 134.

(g) *Sokkanadha* v. *Sokkanadha*. 28 M. 344; *Dalva* v. *Selvu*. 1936 M. 479.

(h) *Lakshman* v. *Bhikchand*. 1930 B. 1 —31 Bom. L.R. 1179; *Mirza* v. *Rameshar*. 51 A. 827=1929 A. 536=1929 A.L.J. 641; *Pichappa* v. *Chockalingam* 38 C.W.N 1185 =1934 M.W.N. 828=1934 A.L.J 895=15 P.L. T. 655=36 Bom. L.R. 976 67 M.L.J. 366; 40 M.L.W. 256—1934 P.C 192; *Kanhaya Lal* v. *Devi Dayal*. 1936 L. 514; See also *Bhagwansinah* v. *Beharilal*. 1937 N. 237.

(i) *Gangayya* v. *Venkataramiah*. 41 M. 454=6 L.W. 708=43 I C 9=1917 M.W.N. 805=34 M.L.J. 271.

one under the Mitakshara.(j) A mere division among the co-sharers who have together inherited an ancestral business does not put an end to its character as ancestral business..(k) Nor is an extension of ancestral business such a new business as is outside the competency of the manager.(l) The question to be determined in each case should be whether, having regard to the recognised business, profession, means of livelihood or what is called *Kulachara* of the family, the particular enterprise in question is one within the reasonable limits of its exercise or really, having regard to its nature or extent, a new speculative enterprise.(m) Besides, what is known as a Hindu joint family firm is a special form of partnership, the members of which must be either the whole of the joint family or the whole of a branch of a joint family. The members concerned in such a joint family firm, including the minor members, have certain rights and liabilities by virtue of their membership of the joint family or of the branch. Those rights cannot be conferred nor liabilities imposed by contract, subject to the possible exception that, if a joint family consists of adult members only, or a branch consists of adult members only, then a joint family firm may be started by the members of that family or branch with the consent, express or implied, of all of them. But some only of the members of a joint family or of a branch of the joint family cannot create, for themselves and their sons, grandsons and great-grandsons alone, to the exclusion of other members of their joint family or branch, a joint family firm with all its legal incidents in which their future sons etc. would have an interest by birth and that interest would always be liable for the debts of the firm.(n)

The mere fact that a junior member has taken some interest in the family business does not make him personally liable for its debt except when his conduct justifies his being treated as a party to the loan or as a partner with the manager.(o)

(j) *The Benares Bank, Ltd v Hari Narain*, 36 L.W. 56 -59 I.A 300 51 A. 564 =1932 P.C. 182—63 M L J 92- 1932 M.W.N 788 36 C.W.N 826 -31 Bom. L.R 1079; *Venkatasami* v. *Palaniappa*, 52 M. 227 28 L.W. 762—1929 M 153 -56 M L J. 380; *Sanyasi Charan Mandal* v *Krishna Dhan Banerji*, 49 C. 560—49 I.A. 108—16 L.W 536—20 A.L.J. 409—24 Bom. L.R. 700—43 M.I. J. 41—1922 M.W N. 364- 26 C.W N. 954—1922 P C. 237; *Mulchand Hemraj* v. *Jairam*, 37 Bom. L.R. 288.-1935 B. 287; See also *Krishnaswami* v. *Ramanadhan*, 68 M.L.J. 251=1935 M.W.N. 20—41 M.L.W. 224—1935 M. 314 on the question whether a business started by the father can be ancestral as regards his sons.

(k) *Baruda Prosad* v. *Krishna*, 38 C.W. N. 33: 1934 C. 414.

(l) *Rajagopala* v. *Raman*, 1927 M. 1190 (2)—1927 M.W.N 879; *Bhagwansingh* v. *Beharilal*, 1937 N 237; *Chockalingam* v. *Muthukaruppan*, 48 L.W. 185. See also *Ramkrishna* v. *Ratanchand*, 53 A. 190= 58 I.A. 173

(m) *Damodaram* v. *Bansilal*, 51 M. 711 —1928 M. 566—28 L.W. 521—55 M.L.J. 471; *Bhagwansingh* v. *Beharilal*, 1937 N. 237.

(n) *Official Assignee of Madras* v. *Neelambal*, 38 L.W. 792=1933 M. 920=1933 M.W.N. 957—65 M.L.J. 798.

(o) *Alagappa* v. *Bank of Chettinad, Ltd.*, 48 L.W. 707; *Mam Raj* v. *Sher Singh*, 1938 L. 694.

CHAPTER IX

DEBTS AND ALIENATIONS

286. Sources of liability to pay debts.—A debt which a person is liable to pay may have been contracted either by himself or by some one else. In the latter case the legal liability may arise out of one or more of the following duties: (1) a legal duty to discharge the debt contracted by another as the agent of the person liable to pay, (2) a moral duty to pay the debts of a person to whose assets he has succeeded and (3) a religious duty of releasing the person actually incurring the debt from the sin of his liability; the moral duty in Cl. (2) exists in the case of heirs and donees, and the religious duty in Cl. (3) is best illustrated by the pious obligation of the sons to pay their father's debts.

287. Liability of separate property.—The separate property of every debtor is liable to be proceeded against, both during and after his lifetime, for his own personal debt or liability arising out of a contract entered into by him or out of his delict or tort.

288. Liability of heirs and donees.—He who takes the benefit should shoulder the burden also, and hence where the property of a debtor descends, after his death, to an heir, the heir is under a duty to pay the debts of the deceased[a] out of, and only to the extent of, the deceased's estate, whether the purpose for which the debt was incurred was proper or improper. There is no personal liability upon him in respect of that debt,[b] except where he has alienated what he has inherited before paying the debt.[c] So also in the case of a universal donee (S. 128 of the Transfer of Property Act) and a donee under a gift made with intent to defraud creditors (S. 53 of the Transfer of Property Act) they are bound to pay the debts of the donor out of and to the extent of the property gifted to them. "But the property of a deceased Hindu is not so hypothecated for his simple debt as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party, who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, if he has alienated the property for his own purposes but he cannot follow the property."[d] Even where

(a) *Karimuddin* v. *Gobind*, 31 A. 497 =6 A.L.J. 807=11 Bom. L.R. 911=13 C. W.N. 1117=19 M.L.J. 687=3 I.C. 795=36 I.A. 138 (P.C.).

(b) *Lallu* v. *Tribhuvan*, 13 B. 653.

(c) *Jamiyatram* v. *Parbhudas*, 9 Bom. H.C.R. 116.

(d) *Unnapoorna* v. *Gunga*, 2 Suth. 296; *Veerasokkaraju* v *Paplah*, 26 M. 792=13 M.L.J. 258.

the property of a deceased debtor remains in the hands of his heir, it does not follow that a creditor of the deceased is entitled to proceed against that property if the heir has made payments to other creditors to the extent of the full value of that property, and the fact that the heir has not made payments to the creditors of the deceased rateably does not affect the question as the heir is not in the same position as that of an executor or administrator under the Succession Act. [e]

289. Liability of coparcener and his undivided interest for his debt.—Besides the separate property of a coparcener, his undivided interest in the coparcenary property or in any specific item thereof [f] can be proceeded against by his creditor for the coparcener's personal debt, when he has either attached that interest during the coparcener's lifetime in execution of a decree on the debt [g] or has secured, in the provinces of Bombay and Madras, a mortgage or charge for the debt in respect of the undivided interest, [h] and in either case the fact that the debt has been borrowed for an immoral purpose would not affect the availability of that interest for the satisfaction of the debt. [i] In the former case the attachment must be during the debtor-coparcener's lifetime, and the decree also must have been obtained before the coparcener's death. [j] But if the attachment is an attachment before judgment followed by a decree during the coparcener's lifetime, and there has been no fresh attachment after decree, the Madras High Court rightly holds, on the view that in such a case no fresh attachment after decree is necessary, [k] that the attached undivided interest of the coparcener-debtor is available to his creditor in execution, [l] while the contrary view is held by the Bombay High Court. [m] If the decree is followed by attachment during the coparcener's lifetime, the circumstance that the order for sale was made after his death is immaterial. [n] Where there is no such charge or attachment effected in respect of a coparcener-

(e) *Veerasokkaraju* v. *Papiah*, 26 M. 792=13 M.L.J. 258; *Haji Saboo* v. *Ally Mahomed*, 30 Bom. 270=6 Bom. L.R. 1135; *Kanchamalai* v. *Shahaji*, 43 L.W. 238 =70 M.L.J. 162=1936 M.W.N. 60 (F.B.); *Thiagaraja* v. *Narayanaswami*, 47 L.W. 782=1938 M.W.N. 518. See also S 52 of the Civil Procedure Code.

(f) *Harjas Rai* v. *Hans Raj*, 34 P.L.R 983=1933 L. 150.

(g) *Suraj Bunsi* v. *Sheo Persad*, 5 C. 148=6 I.A. 88 (P.C.); *Deendyal* v *Jugdeep*, 3 C. 198=4 I.A. 247.

(h) *Suraj Bunsi* v. *Sheo Persad* 5 C 148=6 I.A. 88 (P.C.).

(i) *Vishwanath* v. *Prakash*, 1935 A. 278 =4 A.W.R. 1483.

(j) *Ramanayya* v. *Rangappayya*, 17 M. 144; *Muthaya* v. *Lakshmanan*, 34 M.L.W. 1001=1931 M.W.N. 1015=136 I.C. 778.

(k) *Civil Procedure Code*, O 38, R. 2.

(l) *Sankaralinga* v. *Official Receiver*, 49 M.L.J. 616=92 I.C. 504=1926 M. 72=1925 M.W.N. 832; *Muthuswami* v. *Chinnamnal*, 26 M.L.J. 517=24 I.C. 320.

(m) *Subrao* v. *Mahadevi*, 38 B. 105=21 I.C. 330=15 Bom. L.R. 849.

(n) *Faquir Chand* v. *Sant Lal*, 48 A. 4=1926 A. 157 (2)=23 A.L.J. 877; *Suraj Bunsi* v. *Sheo Persad*, 5 C. 148=6 I.A. 88.

debtor's interest during his lifetime, on his death, his undivided interest accrues to the other coparceners by virtue of their rights of survivorship and the creditor is left without a remedy to fix that undivided interest with the liability. The above principles apply to the immoral or Avyavaharika debts of the father, grandfather or great-grandfather or to the debts incurred by the manager which are not incurred for the benefit or necessity of the joint family, though if the debts of such ancestor are not Avyavaharika, or if the debts of the manager are for binding purposes, the same can be realised by attachment and sale effected subsequent to his death of not only his own interest but also the interest of other coparceners who are liable to pay those debts, though in no case can the person or personal property of a coparcener be proceeded against for a debt of the manager or the father except when that coparcener is himself a party to the debt. (o) Besides, the effect of insolvency of one of the members of the coparcenary is to divest his share of its character as joint family property, and when, on the annulment of adjudication, that share reverts to the quondam insolvent, it reverts as his individual property and not as joint family property, so that, if on the date of such reversion, he is not alive, it goes by inheritance and not by survivorship, and his creditor's recourse to that share cannot be defeated on the ground that, there having been no attachment of that share during the insolvent's life-time, the creditor's right cannot prevail as against the right of survivorship of the other coparceners. (p)

Alienation by coparcener. (See S. 272).

290. Manager's debts.—(See also Manager's power to contract debts—S. 281).

A manager of a joint family can contract debts so as to be binding upon the undivided interests of all the other coparceners either for family necessity or for the family benefit. But the creditor in respect of a debt borrowed by the manager on the representation that it was for necessity is not entitled to a decree against the whole coparcenary property including the interests of other coparceners unless he establishes that such necessity existed or that he made reasonable enquiry before he lent as to the existence of such necessity and the facts elicited on such enquiry were such as made him honestly believe that there was a necessity for the loan. If the debt incurred by the manager is for the family benefit or necessity, the fact that subsequently there has been a partition in the family does not preclude the creditor from instituting a suit

(o) *Jagannath* v. *Bastat*, 1937 P. 195. L.W. 657 :71 M.L.J. 707=1937 M. 131=
(p) *Lakshmanan* v. *Srinivasa*, 44 M. I.L.R. 1937 Mad. 203=1936 M.W.N. 1043.

against all the divided members and realising his dues by sale of their shares in execution of the decree obtained against them.(q)

291. Manager's alienation.—(See Manager's power of alienation—S. 283). The principles applicable to the manager's power to contract debts on behalf of the joint family apply also to his power to alienate the joint family property. Thus an alienation by the manager by way of mortgage or sale of joint family property will be good as against the other coparceners either when all the coparceners had consented to the transaction, or the creditor is able to show that it was supported by legal necessity or benefit of the family or that he made *bona fide* and reasonable enquiries which made him believe that such necessity existed, even though no such necessity did in fact exist.(r) Thus a deed of exchange executed by the manager, unless shown to have been executed for family benefit or necessity, is liable to be set aside at the instance of the other members.(s)

292. Legal necessity and benefit.—The terms 'legal necessity' and 'benefit' are generally used side by side in dealing with the manager's power of alienation. "Legal necessity" implies pressure to the estate and relates to its preservation, but does not mean actual compulsion, but only the kind of pressure which the law recognises as serious and sufficient;(t) while the term "benefit" implies something done for the improvement or the enlargement of the estate. Family necessity must receive a reasonable construction, and the head of the family and those dealing with him, must, in the interest of the family itself, be supported in transactions, which, though in themselves diminishing the estate, yet prevent and tend to prevent still greater losses.(u)

293. Instances of legal necessity.—The items of expenditure in a joint Hindu family justifying the manager to alienate the corpus of the estate in case its income is insufficient to meet them are so varied in their nature that it is not easy to exhaustively catalogue them. As observed in K. M. Battacharya's Law of the Joint Hindu Family, p. 488 "Legal necessity is of various kinds. All the indispensable religious ceremonies such as marriage(v) and the

(q) *Suryanarayana* v. *Viswanadhan* 44 M L W. 476 71 M L J 518 1936 M. 956; *Ramachandra* v *Kondayya*, 24 M. 555.

(r) *Hunoomanpersaud* v. *Mussumat Babooee*, 6 M I.A. 393.

(s) *Balzor Singh* v. *Raghunandan*, 54 A. 85=1932 A. 548 - 1932 A.L.J. 33.

(t) *Venkataraman* v. *Sivagurunatha*, 144 I.C. 584=1933 M. 639.

(u) *Babaji* v. *Krishnaji*, 2 B. 666.

(v) *Gopalakrishnam* v. *Venkatanarasa*, 37 M. 273=1912 M.W.N. 903=23 M.L.J. 288 17 I C. 308; *Bhagirathi* v. *Jokhu Ram*, 32 A 575 7 A.L.J. 667 6 I.C. 465; *Sundrabai* v *Shivnarayana*, 32 B. 81-9 Bom. L R. 1366; *Debi Lal* v. *Nand Kishore*, 1 P. 266-3 P.L T. 759—1922 P. 22; *Kameswara* v. *Veeracharlu*, 34 M. 422= 1910 M.W.N. 649-20 M.L.J. 855-8 I.C. 195; *Vaikuntan* v. *Kallapiran*, 23 M. 512 -10 M.L.J. 111; *Durga Prasad* v. *Jewdhari*, 62 C. 733—1936 C. 116—61 C.L.J. 593; *Tola Ram* v. *Kotu Ram*, 37 P.L.R. 339-158 I.C. 458.

investiture with the sacred thread, the obsequies, the cremation and the periodical offerings to the manes, (w) the ceremonies customary in the family, (x) the subsistence of the family, (y) the education of the younger members, the payment of the ancestral debts,(z) 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". Added to these are the payments of Government revenue,(a) the cost of judicial proceedings for preserving or recovering the estate,(b) or defending the head, (c) or any other member of the family, (d) the latter costs being necessary for removing the stigma of disgrace to which the whole family will be subject in case of conviction. (e) The question whether there existed legal necessity for raising the loan for the defence of a member of a joint family does not depend upon the result of the trial, (d) and in such a time of distress it is open even to a junior member of the family to alienate a portion of the joint family property.(f) But if the member of the family is already sentenced, an alienation in order to obtain the release from gaol of the said member, is not one for necessity, for in that case the family has already been disgraced and the member's release will not remove that stigma. (g) So also assisting the prosecution of a person charged with the murder of a member of a joint family is not a necessity or benefit of the family and a mortgage by the manager of that family for raising money for such assistance is not binding on the family. (h) Nor is the danger of the share of one of the coparceners being sold in execution to a stranger such as to give rise to a legal necessity or benefit so as to justify the manager in alienating joint family property to prevent such a sale. (i)

(w) *Nathuram* v. *Shoma*, 14 B. 562.

(x) *Sardar Singh* v *Kunj Behari*, 44 A. 503=49 I.A. 383=44 M.L.J. 766=27 C.W.N. 653 =25 Bom. L.R. 648=16 L.W. 871=1922 P.C. 261 ; *Nathu Ram* v. *Shoma*, 14 B. 562 ; *Puran Dai* v. *Jai Narain*, 4 A. 482.

(y) *Mukundi* v. *Sarabukh*, 6 A. 417.

(z) *Vembu* v. *Srinivasa*, 23 M.L.J. 638 =17 I.C. 609.

(a) *Gharib-ullah* v. *Khalak Singh*, 30 I.A. 165=5 Bom. L.R. 478=7 C.W.N. 681 =25 A. 407.

(b) *Karimuddin* v. *Gobind*, 31 A. 497 =36 I.A. 138=6 A.L.J. 807=11 Bom. L.R. 911=13 C.W.N. 1117=19 M.L.J. 687 =3 I.C. 795 (P.C.).

(c) *Said Ahmad* v. *Raja Barkhandi*, 1932 O. 255=8 Luck. 40 ; *Beni Ram* v. *Man Singh*, 34 A. 4=8 A.L.J. 1015=11 I.C. 663 ; *Ramalingam* v. *Muthayyan*, 26 M.L.J. 528=1 L.W. 544=24 I.C. 356 ; *Ram Raghubar Lal* v. *Dip Narain*, 45 A. 311 1923 A. 287=21 A.L.J. 168.

(d) *Ibid*—*Dhanukhdari* v. *Rambirich*, 1 P. 171=1922 P. 533.

(e) *Murli Mandhar* v. *Bindeswari*, 1933 P. 708 ; *Sitla Baksh* v. *Ram Raji*, 143 I.C. 683=1933 Oudh. 289.

(f) *Ibid*—*Sitla Baksh* v. *Ram Raji*, 143 I.C. 683=1933 Oudh 289.

(g) *Beni Ram* v. *Man Singh*, 34 A. 4=8 A.L.J. 1015=11 I.C. 663.

(h) *Maruthappan* v. *Niralkulathan*, 1937 M.W.N. 87=1937 Mad. 434=45 L.W. 217 (1937) 1 M.L.J. 331=I.L.R. 1937 M. 943.

(i) *Sabhachand* v. *Sambhoo*, 39 Bom. L.R. 118=1937 B 182.

294. Instances of family benefit.—As was observed by Lord Atkinson in *Palaniappa Chetty* v. *Devasikamony Pandara*,[j] a case involving the question of a Mahant's power to alienate debutter land, "No indication is to be found.....as to what is in this connexion the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible.....to give a precise definition of it applicable to all cases.....The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not". It will be clear that all necessities will obviously be benefits to the estate and the instances enumerated in the above passage can be brought under the category of necessity. It is this construction of the passage that made the Allahabad High Court take the view in its earlier cases [k] that a transaction to be valid on the ground of benefit to the estate must be of a defensive nature calculated to protect the estate from possible danger or destruction, but the later view [l] laid down that the real test of validity of the transaction as being for the benefit of the estate is not whether it was brought about to protect the estate from a threatened danger or destruction but whether the transaction was one which a prudent owner would have entered into with the knowledge then available to him and that if the answer is "Yes" the transaction would be upheld as beneficial to the estate,[m] though ultimately it turned out not to be for the family's benefit.[n] Whether a transaction should be upheld as beneficial to the estate depends very much upon the status and position of the family, the nature of the property, the facility or difficulty in managing it, the nature and quantum of its yield and several other considerations, and no hard and fast rule can be laid down to guide the determination of the question in all cases.[o] Thus benefit to the estate would not include an alienation of the property for the

(j) 40 M. 709—44 I A 147—1917 P.C. 33: 15 A.L.J. 485—19 Bom L.R 567—21 C.W.N. 729—33 M.L.J. 1 6 L.W. 222 1917 M.W.N. 507.

(k) *Bhagwan Das* v. *Mahadeo*. 45 A 390—21 A.L.J. 271—1923 A. 298 (2); *Inspector Singh* v. *Kharak Singh*. 50 A. 776—1928 A. 403—26 A.L.J. 577.

(l) *Jagat Narain* v. *Mathura Das*. 50 A 969—1928 A. 454—26 A.L.J. 841 (F.B.); *Amraj* v. *Shambhu*, 1932 A. 632—1932 A.L.J. 895 (F.B.).

(m) *Markandey* v. *Badan*, 1933 A.L.J. 1247—1933 A. 568; *Ralla Ram* v. *Govardhan Das*. 1930 L. 679; *Amraj* v. *Shambhu*. 55 A 1-1932 A L J. 895—1932 A. 632 (F.B.) (a case of mortgage for satisfying pre-emption decree); *Sellappa* v. *Suppan*, 45 M L W 340-(1937) 1 M.L.J. 422; But see *Hemraj* v. *Nathu*. 59 B. 525—37 Bom. L.R 427 1935 B. 295 (F.B.); *Hans Raj* v. *Khushal*. 14 L. 162—33 P.L.R. 472—1932 L. 420.

(n) *Gobindji* v. *Lallamul*, 1930 A. 767 1930 A.L.J. 1170.

(o) *Brij Mohan* v. *Sarabjit*, 1937 Oudh 513; *Ganpatrao* v. *Ishwar*, 1938 N. 482.

purpose of speculatively investing the proceeds so as to yield a better return and would not imply vast powers of management amounting to an authorisation to embark on speculative ventures.(p) The mortgage of family property for purchasing fresh property,(q) or sale thereof with a view to invest the price for getting larger income,(r) cannot be justified on the ground of benefit, though a sale of joint property for purchasing better land,(s) or a sale of a dilapidated house not fetching any rent,(t) or a sale of property unproductive and difficult to manage with a view to apply the price for extension of the family business,(u) will be valid on that ground.(v) In a recent Allahabad case it was held that where a father sold fractional shares in three scattered villages for an adequate price and with the sale proceeds purchased a compact share in one village which was more productive, the alienation was one beneficial to the estate.(w) So also a mortgage of family property in order to raise money to pay off a pre-emption decree(x) or to continue a business which is the mainstay of the family or to complete an incomplete house,(y) or for carrying on a litigation to establish the adoption of one of the members of the family,(y-a) would be binding on the family on the ground of either benefit or necessity of the family concerned. The question whether the transaction is for the benefit of the estate or not is to be decided with reference to the circumstances existing at the time of the transaction and not by looking at the ultimate result of the transaction many years later.(z) Benefit to the estate includes also the education and advancement of the family members consistent with its means.

(p) *Ragho* v *Zaga Ekoba*, 53 B. 419=1929 B 251=31 Bom L. R. 364 ; *Nataraja* v *Lakshmana*, 1936 M.W.N. 871=1937 M. 195 ; *Narayanrao* v. *Mulchand*, 1933 N. 109 ; *Raj Singh* v. *Kishan*, 1935 A.L.J. 464=1935 A. 299 ; *Pateshwari* v. *Jai Karan*, 1931 A.L.J. 882 1931 A. 748.

(q) Brij Mohan v. Sarabjit, 1937 Oudh 513 ; *Subramania* v. *Chidambara*, 14 L.W. 495—41 M.L.J. 459=1921 M.W.N. 740—69 I.C. 756 ; *Ram Bilas* v. *Ramyad*, 5 P.L.J. 622=58 I.C. 303 ; See also *Balzor* v. *Raghunandan*, 54 A. 85=1932 A.L.J. 33—1932 A. 548, a case of exchange ; But see *Kalika* v. *Shiva*, 1922 P. 122—3 P.L.T. 149 ; See also *Beni Madho* v. *Chander*, 3 Pat. 451=1925 Pat. 189 ; *Jan Mahammad* v. *Bikoo*, 7 Pat. 798=1929 Pat. 130 , *Ramkaran* v. *Baldeo*, 1938 Pat. 44.

(r) *Vishnu* v. *Ramchandra*, 25 Bom. L.R. 508=1923 B. 453 ; *Palaniappa* v. *Devasikamony*, 40 M. 709=44 I.A. 147=1917 P.C. 33 -15 A.L.J. 485—19 Bom. L.R. 567—21 C.W.N. 729—33 M.L.J. 1=6 L.W. 222=1917 M.W.N. 507.

(s) *Muthuswamy* v. *Sendana*, 1927 M. 649 53 M L.J 218.

(t) *Nagindas* v. *Mahomed*, 46 B. 312=1922 B. 122 . 23 Bom. L R. 1094

(u) *Jagmohan* v. *Prag Ahir*, 47 A. 452 1925 A. 618 23 A.L.J. 209. See also Chhotey Lal v. Dalip Narain, 17 Pat. 386.

(v) *Sellappa* v. *Suppan*, 45 M.L.W. 340 —(1937) 1 M.L.J. 422.

(w) *Markandey* v *Badan*, 1933 A.L.J. 1247—1933 A. 568.

(x) *Dhara* v. *Bharat*, 1936 A. 613=1936 A.L.J. 323=1936 A.W R. 377.

(y) *Ram Prasad* v. *Bishambhar*, 1936 A. 607 . 1936 A L.J. 1051 ; *Chhotey Lal* v. *Dalip*, 17 Pat. 386. See also *Prabh Dayal* v. *Basant*, 40 P L.R. 678 (a case of new business).

(y-a) *Govind Gurunath* v. *Deekappa*, 40 Bom. L.R 539.

(z) *Rukhmabai* v. *Vithusa*, 78 I.C. 384=1924 N 398 ; *Jagmohan* v. *Prag Ahir*, 47 A. 452=1925 A. 618=23 A.L.J. 209 ; *Jagat Narain* v. *Mathura Das*, 1928 A. 454—50 A. 969=26 A.L.J. 841.

295. Burden of proof of necessity on alienee.—In order that a debt or an alienation of joint family property by the manager may be upheld as against the other members of the family, the alienee has got to prove either that a necessity existed for the loan or alienation or that he enquired into the necessity for the transaction and that he satisfied himself as well as he could that the manager was acting in the particular instance for the benefit or necessity of the estate.[a] And for this the representations made by the borrower or the alienor are evidence which can be used to corroborate the recitals in the deed.[b] In the case of a mortgage by the manager, if the interest agreed to is in excess of the ordinary commercial rate, the onus of proving the necessity for the loan as well as for the high rate of interest is upon the mortgagee.[c] A recital in a mortgage deed executed by the manager is not necessarily evidence of the truth of the statements contained therein and does not debar a person from proving other facts not recited in the document which would go either to validate or invalidate the transaction as against the joint family when the question arises as to how far the family property is bound thereunder.[d] The following observations of the Privy Council with reference to the effect of recitals in deeds of alienation on the onus of proof, though made with reference to an alienation by a widow apply even in the case of an alienation made by the manager of a joint family: [e] "It is well established.....that recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed it is obvious that if such proof were permitted, the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. But in such a case as the present, their Lordships do not think that these recitals can be disregarded nor on the

(a) *Hunoomanpersaud* v. *Mussamat Babooee*, 6 M.I.A. 393; *Anant Ram* v. *Collector of Etah*, 40 A 171=7 L.W. 323=16 A.L.J. 245=20 Bom. L.R. 524—22 C.W.N. 484=34 M.L.J. 291—1918 M.W.N. 446=1917 P.C. 188; See *Shankar* v. *Dasoji*, 58 I.A. 206=53 A. 396=34 L.W. 119=33 Bom. L.R. 1000=35 C.W.N. 693=1931 A.L.J. 373—61 M.L.J. 212=1931 P.C. 118—1931 M.W.N. 679 (S. 41, T. P. Act held not applicable as against minors). See also *Ganpatrao* v. *Ishwar*, 1938 N. 482.

(b) *Dwarka Ram* v. *Bakshi*, 14 P. 595 =1935 P. 178.

(c) *Ram Bujhawan* v. *Nathu Ram*, 2 P. 285=50 I.A. 14=4 P.L.T. 29=44 M.L.J. 615=25 Bom. L.R. 568=1923 M.W. N. 382=28 C.W.N. 446=18 L.W. 767=1923 P.C. 37; *Mahadeo Prasad* v. *Bissessar*, 2 P. 488—4 P.L.T. 707=1924 P. 71; *Nazir Begam* v. *Rao Raghunath*, 46 I.A. 145=41 A. 571—17 A.L.J. 391=21 Bom. L.R. 484=23 C.W.N. 700—36 M.L.J. 521—11 L.W. 188=1919 M.W.N. 498=1919 P.C. 12. See S. 283; *Kanta Prasad* v. *Durga*, 1935 P. 368; *Suraj Bakhsh* v. *Kedar*, 7 Luck. 505 =1932 Oudh 66; *Durga Prasad* v. *Jewdhari*, 62 C. 733=61 C.L.J. 593=1936 C. 116.

(d) *Sohan* v. *Zorawar*, 1937 A.L.J. 73 =1937 A. 219; *Puttoo Lal* v. *Raghubir*, 9 Luck. 237=1933 Oudh 535.

(e) *Anant* v. *Collector of Etah*, 40 A. 171=7 L.W. 323=16 A.L.J. 245=20 Bom. L.R. 524=22 C.W.N. 484=34 M.L.J. 291=1918 M.W.N. 446=1917 P.C. 188.

other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time."(f)

296. Consideration not applied for necessity or only partially applied.—If the lender to or an alienee from the manager of a joint family has satisfied himself by making reasonable and *bona fide* enquiries that a necessity existed for the manager's transaction, neither the circumstance that in fact no necessity existed, nor the circumstance that the money paid by the creditor or the alienee was not utilised at all or only partially utilised for meeting the necessity, will invalidate the transaction as against the members of the family.(g) As was observed by the Privy Council in *Hunooman-persaud's case,*(h) "if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge,.....

(f) *Banga Chandra v. Jagat Kishore,* 44 C. 186=43 I.A. 249=14 A.L.J. 1103=18 Bom. L.R. 868=21 C.W.N. 225=31 M.L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=1916 P.C. 110; *Puttoo Lal v. Raghubir,* 9 Luck. 237=1933 Oudh 535; See also Ss. 541 and 542.

(g) *Sri Krishan Das v. Nathu Ram,* 49 A. 149=54 I.A. 79=25 A.L.J. 80=1927 M.W.N. 89=31 C.W.N. 462=8 P.L.T. 210=52 M.L.J. 720=29 Bom. L.R. 825=1927 P.C. 37.

(h) 6 M.I.A. 393; See also *Ram Krishna v. Ratanchand,* 58 I.A. 173=53 A. 190=35 C.W.N. 841=33 Bom. L.R. 988=61 M.L.J. 665=1931 M.W.N. 753=34 L.W. 175=1931 P.C. 136=1931 A.L.J. 458.

and he is not bound to see to the application of the money..... The purposes for which a loan is wanted are often future as respects 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." The mere fact that a part of the consideration, however small, is not substantiated by legal necessity would not necessarily nullify a deed of alienation by the manager, or show that there was no justification for its execution. The material question that has to be considered is whether the transaction itself was justified by necessity. And if on such consideration it is found that a substantial portion of the consideration was for legal necessity, that the transaction itself was justified by such necessity, that the price was not unreasonably low, that the alienee made due enquiries and acted honestly, the transaction will be upheld even though the alienee is not in a position to prove how the surplus was applied.(i) Where it is necessary to sell property to discharge a binding legal obligation the purchase price must occasionally exceed the actual cash requirements and unless it appears that the transaction itself is an improper one or that some more advantageous arrangement could have been made, the courts should be slow to set aside a sale to a *bona fide* purchaser simply because the consideration paid is somewhat greater than the actual requirements.(j) Where enquiry is made and it is established that there is a valid necessity in respect of a substantial portion of the money raised, the presumption is that the portion not accounted for has been spent for the benefit of the family and this principle applies to a mortgage as well as to a sale.(k) The recent decision of the Privy Council in *Sri Krishan Das* v. *Nathu Ram*,(l) lays down that even where a portion of the consideration which cannot be described as small has not been proved to have been applied for legal necessity, the sale by the manager should not be set aside merely on that ground. To quote the words of their Lordships of the Privy Council, "It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it

(i) *Ram Sundar Lal* v. *Lachhmi Narain*, 51 A. 430—30 L.W. 24—1929 A.L.J. 561 33 C.W.N. 699—31 Bom. L.R. 803—57 M L.J 7—1929 M.W.N 463—1929 P.C. 143; *Gauri Shanker* v. *Jiwan Singh*, 27 L.W 203 25 A.L.J. 967—53 M.L.J. 786 - 1928 M.W.N. 1—32 C.W.N. 257 P.C.; *Ambalavana* v. *Gowri*, 44 M.L.W. 467 -1936 M. 871 -1936 M.W.N. 1274. *Durga Prasad* v *Jewdhari*, 1936 C. 116—62 C. 733; *Mrs Johnstone* v. *Gopal*, 12 L. 546—32 P L.R. 840 - 1931 I. 419; *Hanmantappa* v. *Dundappa*, 36 Bom. L.R. 474 =1934 B. 234.

(j) *Achutanand* v. *Surjanarain*. 5 P. 746 - 1926 P. 427 =7 P.L.T. 719.

(k) *Ambalavana* v. *Gowri*, 44 M.L.W. 467—1936 M. 871—1936 M.W.N. 1274; *Hitendra* v. *Sukhdeb*, 8 P. 558 -10 P.L.T. 79—1929 P. 360; But see *Thakur Jai* v. *Lala Khairati*, 4 Luck. 107—1928 Oudh 465 holding that this principle does not apply to a mortgage.

(l) 49 A. 149 54 I.A. 79—25 A L J. 80 - 1927 M.W.N. 89 31 C.W.N. 462—8 P.L.T. 210—52 M.L.J. 720—29 Bom. L.R. 825= 1927 P.C. 37.

has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where a purchaser acts in good faith and after due enquiry and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale".[m] But if the transaction itself is not justified by necessity or benefit, but it is found that a portion of the consideration has been spent for family purposes, then, in the Presidencies of Madras and Bombay, the transaction may be set aside at the suit of the objecting coparceners to the extent of their interests on their paying their proportionate share of the amount found to have been spent for family purposes.[n] If the transaction is one by way of mortgage and a portion of the consideration was utilised for family purposes, though the transaction itself was not as such justified, the security may be limited to the amount found binding. But if such transaction is one by way of sale and is not supported by family necessity and has been entered into by the manager in Provinces other than Madras and Bombay, the whole transaction and not only to the extent of the interests of the objecting coparceners, should be set aside, subject of course to the equity of the alienee of his being paid the portion of the consideration found to have been spent for the family purposes.[o]

PIOUS OBLIGATION

297. Pious Obligation.—Every son, grandson or great-grandson is under a pious duty to discharge the debts with interest of respectively the father,[p] the grandfather,[q] or great-grandfather,[r] provided he had not become divided from his respective ancestor at the time the debts were incurred and they are neither immoral nor illegal. The liability imposed on a son to pay the just debts of his father is not a gratuitous obligation thrust on him by

(m) See also *Niamat Rai* v. *Din Dyal*, 8 Lah. 597=54 I.A. 211=52 M.L.J. 729=29 Bom. L.R. 886=25 A.L.J. 599 1927 M.W.N. 453=8 P.L.T. 647=26 L.W. 442=1927 P.C. 121 which follows *Krishan Das's* case.

(n) *Vadivelam* v *Natesan*, 37 M 135=6 I.C. 835=23 M.L.J. 256=1912 M.W.N. 851; See also S. 315 and *Venkatapathi* v. *Pappia*, 51 M. 824=55 M.L.J. 489=22 L.W. 228=1928 M. 788=1928 M.W.N. 410.

(o) See S. 315

(p) *Girdharee Lall* v. *Kantoo Lall*, 1 I.A. 321; *Brij Narain* v. *Mangal Prasad* 46 A. 95=51 I.A. 129 21 A.L.J 934 28 C.W.N. 253=46 M.L.J 23 5 P.L.T. 1 1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500=1924 P.C. 50.

(q) *Lachman Das* v. *Khunnu Lal*, 19 A. 26 (F.B.).

(r) *Masit Ullah* v. *Damodar Prasad*, 48 A 518=53 I.A. 204=1926 M.W.N. 816=25 A.L.J 1 28 Bom. L.R. 1402=51 M. L.J. 792=24 L.W. 551=7 P.L.T. 815=31 C.W.N. 293=1926 P.C. 105; *Ramji* v. *Mahamaya*, 1936 P. 158=16 P.L.T. 789; *Sheo Ram* v. *Durga Baksh*, 3 Luck. 700=1928 Oudh 378.

Hindu Law but is a necessary corollary, if not a salutary counterbalancing proviso, to the rule that the son acquires an interest in the joint family property from the moment of his birth.[s] Neither the fact that the debt was incurred only for the personal purposes of the father and not for the general benefit or necessity of the family[t] nor the fact that the father is not the manager of the family is a ground for excluding this liability.[u]

298. Nature, extent and duration of pious obligation.—Brahaspati declares that "He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor's house, a slave, a servant, a woman or a quadruped"[v] and, a debt having been considered as a sin, it was enjoined by the Sastras that the son, whether he possesses any joint family property or not, should extricate the father from the after-death tribulations consequent thereon by paying off the father's debt if the same was not tainted by illegality or immorality.[w] But the pious obligation, as it is enforced by the British Indian Courts now, is hedged in by limitations. The liability of the son under this doctrine is not a personal liability but one limited to his interest in the joint family property, and where there is no joint family property, the liability does not exist even though the son may possess his own separate property.[x] The Provident Fund amount which stood to the credit of a deceased judgment-debtor at the time of his death and was paid over to his son as his dependant cannot be proceeded against for the father's debt, inasmuch as it is the son's property under the statute.[y] Though the pious obligation exists both during and after the father's life-time,[z] and though it is enforceable even in respect of a debt incurred prior to the son's birth, the liability lasts only so long as the father's liability lasts,[a] and neither arises when

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(s) *Lalla Prasad* v *Gajadhar*, 55 A. 783 =1933 A. 235=1933 A.L.J. 550.

(t) *Sripat Singh* v. *Tagore*, 44 C. 524= 44 I.A. 1=18 A.L.J. 147=19 Bom. L.R. 290 =21 C.W.N. 442=32 M.L.J. 133=1917 M.W.N. 193=1916 P.C. 220; *Muttayan* v. *Zamindar of Sivagiri*, 9 I.A 128 6 M 1 (P.C.).

(u) **See S. 299.**

(v) *Colebrooke's Digest*, Vol I-334.

(w) *Narada*, iii-4, 5 and 6.

(x) *Sukhdeo* v. *Madhusudan*, 10 P. 305=12 P.L.T. 75=1931 P. 177; *Lalla Prasad* v. *Gajadhar*, 55 A. 283=1933 A.L.J. 550=1933 A. 235; *Peda Venkanna* v. *Sreenivasa*, 41 M. 136=6 L.W. 649=33 M.L.J. 519=1918 M.W.N. 55=43 I.C. 225; *Bissessor* v. *Ramakant*, 13 P. 7=15 P.L.T. 571=1934 P. 187; *Tribeni Prasad* v. *Bishambar*, 1934 A. 212; *Raja Baksh* v. *Raja Ram*, 1933 Oudh 309; *Devidas* v. *Jada Ram*, 15 L. 50=35 P.L.R. 80=1933 L. 897.

(y) *Thaj Mahomed* v. *Balaji*, 57 M. 440=39 L.W. 186=1933 M.W.N. 1473=1934 M. 173=66 M.L.J. 207.

(z) *Brij Narain* v. *Mangal Prasad*, 46 A. 95=51 I.A. 129=21 A.L.J. 934=28 C. W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500=1924 P.C. 50; *Bal Rajaram* v. *Manekbai*, 56 B. 36=1932 B. 136=34 Bom. L.R. 55; *Devi Das* v. *Jada Ram*, 15 L. 50=1933 L. 857; *Chhotey Lal* v. *Ganpat*, 57 A 176=1934 A.L.J. 483=1934 A. 590 (F.B.).

(a) *Lakshman* v. *Mahableshwar*, 1931 B. 542=33 Bom. L.R. 1234; *Narayanan* v. *Veerappa*, 40 M. 581=4 L.W. 422=35 I.C. 918=(1916) 2 M.W.N. 271=31 M.L.J. 398.

the father contracts the liability subsequent to a partition with his son[b] nor continues after such debt has become barred by limitation.[c] But the conversion of a father or the son from Hinduism to an alien faith like Mahomedanism or Christianity would not operate to rid the son of his pious liability in respect of a debt incurred by the father prior to the conversion.[c-a] The liability of the son has been succinctly summarised by Wadia J. in *Mulchand* v. *Jairam*, 37 Bom. L.R. 288 = 1935 B. 287, as follows :

"The liability of the son is however not a personal liability. It is limited to sons who are joint with their father, and it is limited only to their interests in the coparcenary property. It subsists so long as the liability of the father subsists. It would cease on the debt becoming time-barred against the father. It is not a joint or a joint and several liability in the sense in which those terms are understood in English Law."

A long catena of recent decisions has now established that the son's share is liable even after his partition with the father for the latter's *nonavyavaharika* debts incurred prior to partition, and the argument, though plausible, that the father's creditor should not be held to be in a better position than the father himself and hence should not be allowed to proceed against the son's share when the father himself cannot touch it after partition, has not found acceptance.[d] These rulings do not countenance any distinction between a case of partition where there is no provision made for the discharge of father's debts and a case of an honest division of net assets after making full provision for the discharge of those debts, even though in the former case it would be unjust to deprive the creditor of his remedy against the son's share, and in the latter case it would be inequitable to call upon the son to pay once again what he has virtually paid off by ample provision in the partition.[e] But what is thus established is only the right of the father's creditor to proceed against the son's share after partition, and not the form of the remedy by which that right can be enforced. The creditor can enforce the son's pious obligation even after partition by bringing a suit against him in respect of the father's pre-partition debt. But can the creditor execute against the son's share after partition a decree obtained against the father alone prior to partition ? On

(b) *Ram Saran* v. *Bhagwan*, 52 A. 71 =1929 A. 775 ; *Ram Ghulam* v. *Nand Kishore*, 4 P. 469=1925 P. 688=6 P.L.T. 613.

(c) *Lakshman* v. *Mahableshwar*, 33 Bom. L.R. 1234=1931 B. 542 ; See also S. 308.

(c-a) *Somasundara* v. *Narasimhacharlar*, 48 L.W. 452.

(d) *Annabhat* v. *Shivappa*, 52 B. 376= 1928 B. 232 ; *Subramania* v. *Sabapathy*, 51 M. 361=27 L.W. 688=1928 M.W.N. 346=54 M.L.J. 726=1928 M. 657 ; *Lalta Prasad* v. *Gajadhar*, 1933 A. 235=1933 A.L.J. 550=55 A. 283 ; *Jawahar* v. *Parduman*, 14 L. 399=1933 L. 116 ; *Hem Raj* v. *Basheshar*, 14 L. 22=1933 L. 253 ; *Bankey Lal* v. *Durga Prasad*, 53 A. 868= 1931 A.L.J. 917=1931 A. 512 (F.B.) ; *Atul Krishna* v. *Lala Nandanji*, 14 P. 732=1935 P. 275 (F.B.).

(e) *Bankey Lal* v. *Durga Prasad*, 53 A. 868=1931 A. 512 ; *Tribeni* v. *Bisham-bar*, 1934 A. 212.

this question the decisions are not uniform, some decisions taking the view that once there is a partition between the father and the son, the creditor's right is only to sue the son to enforce the pious obligation,(f) the other set of decisions taking the view that the decree, though obtained against the father only, can be executed against the son's share.(g) The latter view appears to be the sounder of the two. Once it is established that the son is liable for the pre-partition debts of the father, it must be assumed that the decree obtained against the father in respect of such a debt is binding on the son as well, and there is no conceivable reason why if the creditor has a right to proceed against the joint family property in execution of a decree against the father before partition takes place, that right should be taken away by a partition being effected subsequent to the decree. No doubt, if, as was held in *Atul Krishna* v. *Lala*, 14 P. 732=1935 P. 275 (F.B).. the decree against the father in respect of his pre-partition debt was obtained subsequent to the partition with his sons, the creditor should not be allowed to execute the decree against the sons' shares. But if the decree itself is prior to the partition, it is difficult to see on what principle the decree-holder's right to proceed against the sons' shares in execution of that decree can be taken away by a partition subsequently come to between the father and his sons. In this connection the recent decision of a Full Bench of the Madras High Court(h) to the effect that a suit and decree against a father-manager in respect of a family liability should be held binding on the son, even though subsequent to the commencement of the suit a partition had been come to between the father and son, contains valuable and instructive *dicta* pointing to the executability of a decree obtained against the father alone, against even the sons, though a partition has intervened between the date of the decree and the date of execution.

If a pre-partition debt of the father is renewed by him subsequent to partition, the son cannot be made liable in respect of the renewal.(i) The recent decision of the Madras High Court in *Munu-*

(f) *Advi* v. *Tirumalaipalli*, 1934 M.W.N. 1097=1934 M. 662=40 M.L.W. 588; *Veerappa* v. *Annamalai*, 1935 M. 316=41 M.L.W. 431=68 M.L.J. 157=1935 M.W.N. 190; *Veerayya* v. *Bommadevara*, 44 M.L.W. 861=1936 M. 887; *Tirumalamuthu* v. *Subramania*, 1937 M.W.N. 122=1937 M. 452=45 M.L.W. 174=(1937) 1 M.L.J. 243; *Kuppan* v. *Masa*, 45 M.L.W. 212=1937 M. W.N. 113=(1937) 1 M.L.J. 249=1937 M. 424; *Jainarayan* v. *Sonaji*, 1938 Nag. 24.

(g) *Panna Lal* v. *Ram Nand*, 1936 L. 193=38 P.L.R. 712; *Nand Kishore* v. *Madan Lal*, 1936 L. 64; *Kishan Sarup* v. *Brijlaraj*, 51 A. 932=1929 A. 726; *Bankey Lal* v. *Durga Prasad*, 53 A. 868=1931 A 512; *Puttu Lal* v. *Parbati*, 1935 Oudh 443; *Raghunandan* v. *Moti Ram*, 6 Luck. 497=6 Oudh W.N. 689=1929 Oudh 406; *Atul Krishna* v. *Lala*, 14 Pat. 732.

(h) *Venkatanarayana* v. *Venkata Somaraju*, I.L.R. 1937 M. 880=46 L.W. 112=1937 M.W.N. 427=(1937) 2 M.L.J. 251=1937 M. 610 (F.B.).

(i) *Peda Venkanna* v. *Sreenivasa*, 41 M. 136=33 M.L.J. 519=1918 M.W.N. 55=6 L.W. 649=43 I.C. 225; *Subramania* v. *Subbiah*, 1930 M.W.N. 658.

sami Gownden v. *Kutti Mooppan*[j] that the sons are liable for a debt on a promissory note executed by the father before partition and kept alive by the father by endorsements of part-payments made subsequent to partition, is, it is submitted, not correct.[k] It was held by the Allahabad High Court in *Ajodhia Prasad v. Data Ram*,[l] relying upon the observations of the Privy Council in *Brij Narain's case*,[m] that for the pious obligation to arise the debt should have been contracted by the father as the manager of the family. The following is the passage in *Brij Narain's case*[m] which was relied upon for the above view: "If he (the manager) is the father and the reversioners are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt." It is submitted that in view of the facts of the case with reference to which the said passage has to be construed, it is not correct to deduce the further condition for the operation of the pious doctrine which the Allahabad High Court sought to impose. In another case, the Allahabad High Court enunciated a further condition for the operation of the pious doctrine, namely, that the son's share in a joint family property was not liable under the doctrine of pious obligation unless the family consisted of only the father and sons.[n] But in *Lalta Prasad* v. *Gajadhar*,[o] it was definitely ruled that every Hindu is under a religious obligation to discharge his father's debts which are neither illegal nor immoral, irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of coparceners other than the father and sons, such as collaterals and ascendants. The Full Bench decision of the Allahabad High Court in *Bankey Lal* v. *Durga Prasad*,[p] definitely disapproves of the view in *Ajodhia Prasad's case*,[l] and a recent decision of the Madras High Court[q] follows the view taken in *Lalta Prasad* v. *Gajadhar*.[o] The latest decision of a Full Bench of the Allahabad High Court in *Chhotey* v. *Ganpat*,[r] definitely brings the Allahabad view in

(j) 56 M 833—1933 M W.N. 955. 38 L.W. 325—65 M L J. 311—1933 M. 708

(k) See *Peda Venkanna* v. *Sreeniwasa*. 41 M. 136—33 M.L.J. 519—1918 M.W.N 55 —6 L.W. 649—43 I.C. 225; *Subramania* v. *Subbiah*. 1930 M.W.N. 658; *Subramania* v. *Sabapathy*. 51 M. 361 at 410—1928 M. 657—1928 M.W.N. 346—54 M.L J. 726=27 L.W. 688 (F.B.); *Rama Vadhyar* v. *Manian*, 45 L.W. 767. See also *Panguliya* v. *Uthandiya*. 48 L.W. 251=(1938) 2 M.L.J. 33, a case of a manager.

(l) 1931 A. 131—1931 A.L.J. 104.

(m) 46 A. 95—51 I.A. 129—1924 P.C. 50=21 A.L.J. 934—28 C.W.N. 253—46 M.L. J. 23—5 P L T. 1=1924 M.W.N. 68—19 L.W. 72—26 Bom L R. 500.

(n) *H.P Oil Mills* v. *Jamna Prasad*. 55 A 417—1933 A 234—1933 A.L.J. 233; See contra in *Lalta Prasad* v. *Gajadhar*, 55 A. 283—1933 A 235—1933 A L J. 550.

(o) 1933 All. 235—55 A. 283=1933 A. L.J 550

(p) 53 A. 868 1931 A 512—1931 A.L. J. 917.

(q) *Virayya* v. *Parthasarathy*. 38 L.W. 436=1933 M. 690=57 M. 190=65 M.L.J. 417—1933 M.W.N 821.

(r) 1934 A. 590—1934 A.L.J. 483.

line with that taken by the Madras High Court,[s] the true basis of the pious obligation according to this view being the relationship of father and son and not the accident of the father being the manager of the joint family.[t] But the debt should not have become time-barred under the provisions of the Limitation Act,[u] even though a debt in spite of its having been barred by time may be a valid consideration as an antecedent debt for a father's alienation.[v] The fact that the property that descended to his son is ancestral and not the self-acquired property of the ancestor does not exclude the son's pious obligation and affords him no ground for resisting the claim of the ancestor's creditor to enforce it.[w] This liability to discharge the ancestor's debts not being either a joint or a joint and several liability with the ancestor's,[x] the father alone can be sued, but the son alone cannot be sued during the father's life-time,[y] though the son can be sued along with the father during the father's lifetime or alone after his death.[z]

299. Pious obligation of grandson and great-grandson.—The text of Brahaspati,[a] which enjoins on the son the duty of paying his father's debts with interest, lays down that the grandson, though he is bound to pay the grandfather's debts, yet need not pay the interest thereon and that the great-grandson need not at all pay his great-grandfather's debts unless he has assets in his hands. But this difference in the liability of the respective descendants was denied judicial recognition by the Privy Council in *Masit Ullah* v. *Damodar Prasad*,[b] wherein it was finally held that the liability of the great-grandson to pay off his great-grandfather's debts was co-extensive with that of the grandson to pay off his grandfather's debts and that of the son to pay off his father's debts and the fact that an intermediate ancestor was alive did not prevent the operation of the great-grandson's pious obligation to discharge his great-grandfather's liability. This view nullifies the effect of the decision in *Chet Ram* v. *Ram Singh*[c] that the liability in respect of the grandfather's debt does not arise so long as the father is alive.[d]

(s) See also *Paghu Mal* v. *Dhani*, 1934 L. 101.

(t) *Shunmukam* v. *Nachu*, 44 L.W. 738=1937 M. 140=1936 M.W.N. 1263=(1937) 1 M.L.J. 278.

(u) *Gajadhar* v. *Jagannath*, 46 A. 775=22 A.L.J. 601=1924 A. 551 (F.B.); *Subramania* v. *Gopala*, 33 M. 308=7 I.C. 898=20 M.L.J. 633; See also S. 308

(v) *Gajadhar* v. *Jagannath*, 46 A. 775=22 A.L.J. 601=1924 A. 551 (F.B.).

(w) *Girdharee Lall* v. *Kantoo Lall*, 1 I.A. 321.

(x) *Narayanan* v. *Veerappa*, 40 M. 581=4 L.W. 422=35 I.C. 918=(1916) 2 M.W.N. 271=31 M.L.J. 386.

(y) *Periasami* v. *Seetharama*, 27 M. 243=14 M.L.J. 84 (F.B.).

(z) *Gulamkhaja* v. *Shivlal*, 40 Bom. L.R. 381.

(a) Colebrooke, Vol. I. p. 285.

(b) 48 A. 518=53 I.A. 264=1926 M.W.N. 816=25 A.L.J. 1=28 Bom. L.R. 1402=51 M.L.J. 792=31 C.W.N. 293=24 L.W. 551=7 P.L.T. 815=1926 P.C. 105.

(c) 44 A. 368=49 I.A. 228=16 L.W. 89=3 P.L.T. 363=43 M.L.J. 98=1922 M.W.N. 455=24 Bom. L.R. 1231=21 A.L.J. 114=1922 P.C. 247.

(d) *Guru Din* v. *Rameshwar*, 1933 Oudh 102; *Brjmohan* v. *Mahabeer*, 63 C. 194=40 C.W.N. 808.

In a recent ruling, in spite of the effect of the decision in *Masit Ullah's case*[b] that the liability of the grandson and the great-grandson to discharge the respective ancestor's debts is co-extensive with that of the son to discharge the debt of the father, the Allahabad High Court observes that while the son is liable in respect of a debt incurred by the father standing . . surety for payment, the grandson is not liable for such debt of his grandfather.[c]

300. Debts not attracting pious obligation.—As was already pointed out, it is only debts which, for convenience of description, may be said to be neither illegal nor immoral, that attract this pious obligation to pay the three immediate male ancestors' debts. The following is the classification of the debts, which according to the texts of Brahaspati, Gautama, Manu and Usanas, the son is not under the pious obligation to discharge: (1) Debts for spirituous liquor, (2) Debts due for lust, (3) Debts due for gambling, (4) Unpaid fines, (5) Unpaid tolls, (6) Useless gifts, or promises without consideration or made under the influence of lust or wrath, (7) Suretyship debts, (8) Commercial debts and (9) Avyavaharika debts.[f] It may now be taken as settled that the text extending to the son an immunity from paying father's commercial debts has become obsolete,[g] and the text dealing with the suretyship debts applies only in the case of such debts for appearance or honesty of another[h] and does not apply in the case of surety debts for payment of money[i] and for delivery of goods.[j] In a recent case of the Allahabad High Court, *Dwarka Das v. Kishan Das*,[k] the following observations were made with reference to the suretyship debts: "Under the Mitakshara the lia-

(b) See p. 300 foot note (b).

(c) *Dwarka Das* v. *Kishan Das*, 55 A. 675=1933 A.L.J. 1459=1933 A. 587; *Bharatpur State* v. *Sri Krishan*, 1936 A. 327=1936 A.L.J. 236=1936 A.W.R. 329.

(f) *Chhakauri* v. *Ganga Prasad*, 39 C. 862=12 I.C. 609=16 C.W.N. 519.

(g) *Achutaramayya* v. *Ratnajee*, 49 M. 211=23 L.W. 193=50 M.L.J. 208=1926 M.W.N. 258=1926 M. 323; *Ramkrishna* v. *Narayan*, 40 B. 126=31 I.C. 301=17 Bom. L.R. 955; *Pirthi Singh* v. *Mam Chand* 16 L. 1077=1935 L. 761; *Bhola Prasad* v. *Ramkumar*, 11 P. 399=14 P.L.T. 63=1923 P. 231; *Aya Ram* v. *Sadhu*, 1938 L. 781.

(h) *Choudhuri* v. *Hayagriba*, 10 P. 94 =1932 P. 162=13 P.L.T. 473; *Tukaram* v. *Gangaram*, 23 B. 454; *Maharajah of Benares* v. *Ram Kumar*, 26 A. 611; *Brijnath* v. *Bindeshwari*, 86 I.C. 791=48 M.L.J. 456=1925 M. 751; *Lakshminarayana* v. *Hanumantha*, 58 M. 375= 1935 M. 144—68 M.L.J. 528—41 M.L.W. 25 1935 M.W.N. 4.

(i) *Rasik* v. *Singheswar*, 39 C. 843 —16 C.W.N. 1103—14 I.C. 147; *Satyacharan* v. *Sathir*, 4 P.L.J. 309—51 I.C. 791; *Thangathammal* v. *Arunachalam*, 41 M. 1071—35 M.L.J. 229—1918 M.W.N. 673—48 I.C 76; *Mata Din* v. *Ram Lakhan*, 52 A. 153—1930 A. 37—1929 A.L.J. 1285; *Tukaram* v. *Gangaram*, 23 B. 454; *Choudhuri* v. *Hayagriba*, 10 P. 94—13 P.L.T. 473—1932 P. 162; *Tulshi Prashad* v. *Dip Prakash*, 53 A. 695. 1931 A.L.J. 559—1931 A. 631; *Satrohan* v. *Umadutt*, 1935 Oudh 455; *Shamrao* v. *Shantaram*, 37 Bom. L.R. 123—1935 B. 174.

(j) *Choudhuri* v. *Hayagriba*, 10 P. 94= 1932 P. 162—13 P.L.T. 473.

(k) 55 All. 675=1933 All. 587=1933 A.L.J. 1459.

bility of the surety himself exists for the payment of the debt where the surety is for appearance. for confidence or for payment, the liability of the son exists in the case of surety for payment but the liability of the grandson for the payment of the debt incurred as surety does not exist.[l] But if the surety for appearance or for confidence had bound himself after taking pledge, then his sons also must pay the debt incurred by becoming surety from the property taken in pledge." In addition to the above, neither a debt contracted by the father while under a disability like minority,[m] nor a debt which is barred by time,[n] attracts the son's liability to pay it by virtue of the pious obligation, though in the latter case of a barred debt, the father is entitled to renew it so as to make the renewal binding on the son.[n] The whole question can be considered under the term "Avyavaharika" which may be adopted as a compendious expression describing the debts to which the pious obligation does not attach.

301. Avyavaharika debts.—The term Avyavaharika has not had a uniform definition at the hands of those who had to deal with it, and has been commonly rendered in the judicial decisions as "illegal or immoral". Apararka describes it as meaning "not righteous or proper," and Colebrooke defines it as "for a cause repugnant to good morals." The Allahabad High Court[o] defines an Avyavaharika debt as one involving an element of criminality, while the Bombay High Court[p] takes it for a debt which the father ought not, as a decent and respectable man, to have incurred and which is attributable to his failings, follies or caprices. Justice Mookerjee renders it as one which is not lawful, usual or customary,[q] while Justice Sadasiva Aiyar paraphrases it as "a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a Court of justice."[r] In this state of differing definitions, the only thing that is possible is to make a study of the cases where the question has been considered and to find out the existence or the implication of the common element in cases where the debt has been held to be Avyavaharika and the absence of that element in those where the

(l) *Narayan* v. *Venkatacharya*, 28 B 408=6 Bom L.R. 434.

(m) *Baldeo* v *Bindeshri*, 44 A. 388=1922 A. 215=20 A.L.J. 241.

(n) *Gajadhar* v. *Jagannath*, 46 A. 775=1924 A. 551=22 A.L.J. 601 (F.B.); *Subramania* v. *Gopala*, 33 M. 308=7 I.C. 898=20 M.L.J. 633.

(o) *Jagannath* v. *Jugal*, 48 A. 9=1926 A. 89=23 A.L.J. 882; but see *Raghunandan* v. *Badri*, 1938 A.L.J. 268 where Colebrooke's definition is adopted.

(p) *Durbar* v *Khachar*, 32 B. 348=10 Bom. L.R. 297. This definition, however, is not approved in *Bai Rajaram* v. *Manekbai*, 56 B. 36=34 Bom L.R. 55=1932 B. 136 and *Ramkrishna* v. *Narayan*, 40 B. 126=31 I.C. 301=17 Bom. L.R. 955.

(q) *Chhakauri* v. *Ganga*, 39 C. 862=12 I.C. 609=16 C.W.N. 519.

(r) *Venugopala* v. *Ramanadhan*, 37 M. 458=22 I.C. 899=23 M.L.J. 61; *Rajeshwar* v. *Mangniram*, 1933 N. 89=15 N.L.J. 159,

debt has been held not to be such. A tabular classification of the two groups of cases will facilitate reference.

AVYAVAHARIKA *Element of Criminality.*	VYAVAHARIKA *Absence of Criminal element.*
1. Money misappropriated in circumstances rendering the original taking itself a criminal offence.(s)	1. Money retained in breach of civil duty but not criminally and not accounted for.(a)
2. Money criminally misappropriated as agent.(t)	2. Failure to return articles entrusted(b) or pay the money given to be paid over to another.(c)
3. Costs of suit on false allegations.(u)	3. Civil liability for meddling with another's property or rights(d) such as closing up a channel(e) or cutting down trees.(f)
4. Decree for money obtained by theft.(v)	4. Borrowing for defending a suit for defamation.(g)
5. Money criminally misappropriated as guardian.(w)	5. Costs of imprudent litigation(h) and mesne profits decreed against father.(i)
6. Fine imposed as a result of criminal trial.(x)	6. Money borrowed for defending against charges of forgery and falsification.(j)
7. Money payable as a result of criminal breach of trust.(y)	7. Borrowing for litigation to set up an adoption.(k)
8. Decree against the father for damages for malicious prosecution.(z)	8 Expenses incurred for an Asura form of marriage.(l)
9. Liability in respect of subscriptions received for conducting a lottery.(z-a)	9. Civil liability for negligently allowing misappropriation by subordinate staff.(m)

(s) *McDowell* v. *Rayava Chetty*, 27 M. 71.

(t) *Mahabir* v. *Basdeo*, 6 A. 234

(u) *Ramiengar* v. *Secretary of State*, 4 I.C. 105. 20 M L.J 89.

(v) *Pareman Das* v. *Bhattu*, 24 C. 672.

(w) *Bai Mani* v. *Yusuf Ali*, 33 Bom. L.R. 130 1931 B. 229.

(x) *Said Ahmed* v. *Raja Barkhandi*, 139 I.C. 64 at 73 8 Luck. 40—1932 O. 255.

(y) *Widya Wanti* v. *Jai Dayal*, 13 Lah. 356 1932 L. 541=33 P.L.R. 874; *Toshenpal* v. *Dt. Judge of Agra*, 56 A. 548=61 I.A. 350—39 C.W.N. 145—68 M.L.J. 1- 40 M.L.W 420—1934 P.C. 238—1934 A L.J. 925—16 P.L.T. 25; *Brij Behari* v. *Phunni*, 1937 A.L.J. 470.

(z) *Raghunandan* v. *Badri*, 1938 A.L.J. 268 1938 A. 330.

(z-a) *Muthusami* v. *Pichai*, 45 L.W. 244 (1937) 1 M.L.J. 231=1937 M.W.N. 512= 1937 M. 344; *Muniyandia* v. *Muthusami*, 48 L.W. 271.

(a) *Venkatacharyulu* v. *Mohana*, 44 M. 214—39 M.L.J. 586=1920 M.W.N. 650=12 L.W. 390=1921 M. 407; *Natasayyan* v. *Ponnusami*, 16 M. 99=3 M.L.J. 1; *Hanmant* v. *Ganesh*, 43 B. 612=51 I.C. 612—21 Bom. L.R 135

(b) *Brij Nath* v *Lakshmi*, 8 Luck. 35 —1932 Oudh 165.

(c) *Niddha Lal* v *Collector of Bulandshahr*, 11 A L.J. 610 35 I.C. 209, *Padma Charan* v *Ashutosh*, 13 P 510 1934 P. 439.

(d) *Gursarn* v. *Mohan*, 4 L. 93—1923 L. 399.

(e) *Chhakauri* v. *Ganga*, 39 C. 862. 12 I.C. 609—16 C.W N 519; See contra in *Darbar* v. *Khachar*, 32 B. 348=10 Bom. L.R. 297.

(f) *Chandrika* v *Narain*, 46 A. 617= 1924 A 745 .22 A.L.J. 468.

(g) *Sumer Singh* v. *Liladhar*, 33 A. 472 —9 I.C. 624—8 A.L.J. 306.

(h) *Prayag* v. *Kasi*, 6 I.C. 258=14 C.W.N. 659; *Ramlal* v. *Jagdish*, 1933 A. 591.

(i) *Ramasubramania* v. *Sivakami*, 21 L.W. 606—1925 M. 841 :1925 M.W.N. 371.

(j) *Beni Ram* v. *Man Singh*, 34 A. 4= 11 I.C. 663—8 A.L.J. 1015.

(k) *Khalilul* v. *Gobind*, 20 C. 328.

(l) *Bhagirathi* v. *Jokhuram*, 32 A. 575 —6 I.C. 465—7 A.L.J. 667.

(m) *Shib Narain* v. *Jamuna*, 1937 P. 220.

It would be seen from the above tabular summary that there is an element of criminality in cases of debts held Avyavaharika and the same is absent in the other group of cases. No doubt there are some cases in which this distinction is not discernible. But the mere circumstance that the debt has been recklessly incurred,[n] or is imprudent or dishonest or unreasonable,[o] or that the debt is attended with impropriety or lapse from right conduct,[p] does not render the debt Avyavaharika. If the liability arises from the commission of a crime,[o] though no conviction therefor has been given, or has in it a criminal element,[q] or is grossly dishonest and utterly repugnant to good morals,[p] or falls under the ban of S. 23 of the Contract Act, the son can well claim immunity from his pious obligation. This is the only working principle that can be laid down having regard to the examples given in the ancient texts themselves, and each case has to be decided with reference to this principle. No useful purpose will be served by cataloguing all the cases in which the question whether the debt in respect of particular facts is Avyavaharika or not has been decided, the reason being that in many of them no appreciable attempt has been made to lay down any clear principle with reference to which this question can be decided in any given case. After all, in each case the decision of this question has to depend on the mental attitude of the Judge and the degree of moral disapprobation it evokes. In such vague matters like this, only a general principle like the above can be laid down, leaving its application to the facts of each case and to the goodsense of the Judges who have to deal with them. Unless the debt falls within the description of Avyavaharika as defined above so as to exonerate the son from the duty of paying it, the discharge of it, even though it affects ancestral estate, is still an act of pious duty on the son. "By the Hindu Law, the freedom of the son from the obligation to discharge the father's debt has reference to the nature of the debt, and not to the nature of the estate whether ancestral or acquired by the creator of the debt."[r]

302. Alienation by father.—In addition to his absolute powers in respect of his self-acquired property,[s] a father of a Hindu joint family still retains some of the privileges attaching to his position as *pater familias* in ancient days, and possesses, by virtue of special eminence which he enjoys in his family, certain powers

(n) *Bal Rajaram* v. *Maneklal*, 56 B. 36 = 34 Bom. L.R. 55=1932 B. 136.

(o) *Ramasubramania* v. *Sivakami*, 21 L.W. 606=1925 M. 841=1925 M.W.N. 371.

(p) *Rajagopal* v. *Veeraperumal*, 53 M L.J. 232=1927 M. 792 · *Hemraj* v. *Khemchand*, 1938 A. 601.

(q) *Chandrika* v. *Narain*, 46 A. 617= 1924 A. 745=22 A.L.J. 468.

(r) *Hunoomanpersaud* v. *Mussumat Babooee*, 6 M.I.A. 393 at 421.

(s) *Wazir* v. *Moti*, 7 L. 522=1926 L. 395.

in addition to those which he may have as an ordinary coparcener or the manager of the family. Thus he can make, within reasonable limits, gifts of ancestral movable or immovable property either for pious purposes[t] or through affection.[u] Such gifts of affection of a reasonable portion of family property may be made to the daughter[v] or wife.[w] But in no case can a gift by father be valid if made by a will and not by an act *inter vivos*[x] or if it is of an unreasonably large portion of family property[y] or when it is made to a stranger.[z] Besides, a father can alienate joint family property either by way of sale or mortgage, so as to bind even the son's interest therein, to discharge his *antecedent debts* which are neither illegal nor immoral, though such debts were incurred only for his own personal benefit and not for the benefit or necessity of the family,[a] and even though the father is not the manager of the joint family, but is only one of its junior members. The true basis of the son's pious obligation to discharge the father's debts is the relationship of father and son and not the accident of the father being also the manager of the joint family, and it is on this principle of the liability of the son's share for the discharge of the father's debts that the father's power of disposal of the son's share for the satisfaction of those debts has been based. It is true that a distinction has been made between an involuntary sale of the father's property for the satisfaction of his debts and a voluntary disposition by him, by introducing the limitation that in the latter case the debt must be antecedent to the transfer of property and not contemporaneous with the transfer. But this limitation was

(t) *Gangi Reddi* v. *Tammi Reddi*, 50 M. 421=54 I.A. 136=52 M.L.J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W.N. 799 1927 M.W.N. 502=26 L.W. 139=1927 P.C. 80; *Karam Singh* v. *Surender*, 1931 L. 289.

(u) *Hari Shankar* v. *Ram Sarup*, 1938 L. 113, holding that a father's power to make a gift in favour of one of the sons to the exclusion of the rest is confined to moveable property.

(v) *Bachoo* v. *Muskorebai*, 31 B. 373=34 I.A. 107=17 M.L.J. 343 9 Bom. L.R. 646=11 C.W.N. 769 P.C.; *Sundararamayya* v. *Sitamma*, 35 M. 628=21 M.L.J. 695=(1911) 1 M.W.N. 422=10 I.C. 56; *Ramalinga* v. *Narayana*, 45 M. 489=1922 M.W.N. 399=26 C.W.N. 929=43 M.L.J. 428=20 A.L.J. 839=24 Bom. L.R. 1209=16 L.W. 639=49 I.A. 168=1922 P.C. 201 P.C.; *Sithdlakshmamma* v. *Kotayya*, 44 M.L.W. 289=71 M.L.J. 259=1936 M. 825; *Chenna* v. *Kempamma*, 14 Mys. L.J. 456; *Ramakrishna* v. *Parameswara*, 1931 M.W.N. 215. See contra in *Jinnappa* v. *Chinmava*, 59 B. 459=37 Bom. L.R. 484=1935 B. 324.

(w) *Subbarmi* v. *Ramamma*, 43 M. 824=12 L.W. 249=59 I.C. 681=1920 M.W.N. 529.

(x) *Deivachila* v. *Venkatachariar*, 1926 M. 46=49 M.L.J. 317 1925 M.W.N. 556=22 L.W. 188; *Gangi Reddi* v. *Tammi Reddi*, 50 M. 421=54 I.A. 136=52 M.L.J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W.N. 799=1927 M.W.N. 502=26 L.W. 139 =1927 P.C. 80; *Lakshman* v. *Ramchandra*, 5 B. 48 (F.C.); *Subbarami* v. *Ramamma*, 43 M. 824=1920 M.W.N. 529=12 L.W. 249=59 I.C. 681.

(y) *Kamakshi* v. *Chakrapany*, 30 M. 452=17 M.L.J. 405.

(z) *Rasat Ali* v. *Iqbal*, 16 L. 659=37 P.L.R. 846 :1935 L. 827; *Rab Prasad* v. *Chhotey*, 1936 Oudh W.N. 899=164 I.C. 1000 holding that a gift by father to his concubine was invalid.

(a) *Rama Rao* v. *Hanumantha*, 52 M. 856=30 L.W. 251=1930 M. 326=57 M.L.J. 720; *Mt. Kulwanta* v. *Karam*, 1938 C. 714.

introduced on the principle of *stare decisis*,[b] and the power of the father cannot be said to be further limited by restricting it to cases in which he also happens to be the managing member of the joint family.[c] In *Brij Narain* v. *Mangal Prasad*,[d] their Lordships summed up the propositions which they wished to lay down as a result of the authorities as follows: "(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity. (2) If he is the father and other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. (3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest. (4) Antecedent debt means, antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. (5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdened the estate, is alive or dead." But this power of the father to sell the sons' shares for his debts exists only so long as the joint family remains undivided[e] and even where the family continues joint, except where circumstances exist to justify the exercise of these additional powers, the father's position is the same as that of an ordinary coparcener in respect of his powers of alienation.[f]

303. Antecedent debt.—Antecedent debt means a debt antecedent in fact as well as in time to the alienation in question, that is to say, that the debt must be truly prior to and independent and not part of the transaction impeached.[g] It may be a simple debt or a mortgage debt,[h] it may be an ascertained or an unascertain-

(b) *Venkataramanayya* v. *Venkataramana*, 29 M. 200 (F.B.); *Brij Narain* v. *Mangal Prasad*, 46 A. 95=51 I.A. 129=21 A.L.J. 934=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500 1924 P.C. 50.

(c) *Shanmukam* v. *Nachu*, 44 M.L.W. 738=1937 M. 140=1936 M.W.N. 1263=(1937) 1 M.L.J. 278.

(d) 46 A. 95=51 I.A. 129=1924 P.C. 50=21 A.L.J. 934=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500.

(e) *Sat Narain* v. *Sri Kishen*, 44 M.L.W. 417=17 P.L.T. 717 71 M.L.J. 812=1936 P.C. 277=40 C.W.N. 1382=38 Bom. L.R. 1129=17 L. 644=63 I.A. 384.

(f) *Sahu Ram* v. *Bhup Singh*, 44 I.A. 126=39 A. 437=15 A.L.J. 437=19 Bom. L.R. 498=21 C.W.N. 698=33 M.L.J. 14=6 L.W. 213=1917 M.W.N. 439=1917 P.C. 61.

(g) *Brij Narain* v. *Mangal Prasad*, 46 A. 95=51 I.A. 129=21 A.L.J. 934=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500=1924 P.C. 50; *Thirunavukarasu* v. *Muthukrishnan*, 1931 M.W.N. 467; *Ramkaran* v. *Baldeo*, 1938 Pat. 44; *Lala Chatar* v. *Raja Ram*, 1938 A. 44; *Chitradhar* v. *Khidar*, 17 Pat. 238.

(h) *Sanmukh* v. *Jagarnath*, 46 A. 531=1924 A. 709=22 A.L.J. 417; *Brij Narain* v. *Mangal Prasad*, 46 A. 95=51 I.A. 129=21 A.L.J. 934=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500=1924 P.C. 50 and *Lal Bahadur* v. *Ambika*, 47 A. 795=52 I.A. 443=1925 M.W.N. 852=23 L.W. 220=30 C.W.N. 701=1925 P.C. 264; *Gopal Das* v. *Topan*, 16 L. 624=163 I.C. 706; *Jagdish* v. *Ambashankar*, 36 Bom. L.R. 625=1934 B. 324; *Subramania* v. *Swaminatha*, 40 M.L.W. 576=1935 M. 121.

ed sum,[i] and the creditor in respect of that debt and the person in whose favour the alienation impeached has been made to discharge that debt, may be different persons[j] or even be the same person.[k] A debt payable, though not demandable, at the time of the alienation questioned, may be a valid antecedent debt to support the alienation,[l] as also a debt due under an earlier mortgage bond which contained no personal covenant[m] or contained a personal covenant which had become time-barred.[n] So also an obligation undertaken by the father as usufructuary mortgagee to pay off an amount due to an earlier simple mortgagee falls within the meaning of antecedent debt in respect of a subsequent alienation by the father to discharge that obligation.[o] But a mere contingent liability, as for instance a liability to pay rent which may fall due in future in respect of a lease, will not support an alienation by way of security before the liability becomes operative, because in such a case the antecedency of a debt to the alienation in question cannot be postulated.[p] Even a renewal of a mortgage debt makes the original debt an antecedent one in respect of the new mortgage.[q] The fact that the debt is barred does not make the alienation invalid.[r] A right to receive the payment of a debt, as distinct from a right to enforce its payment, subsists even after the remedy by action has become barred by time; and if the debt exists and the debtor is willing to pay it by an alienation of the family property, such an alienation, if otherwise valid, can bind his sons and grandsons as if the debt is a live one and is sought to be recovered by the creditor by the attachment and sale of the family estate.[s] Besides, it is necessary to remember that an antecedent debt must be a *bona fide* debt, not colourably incurred for the purpose of forming a basis for the subsequent mortgage or sale in question.[t] If a father, however, agrees at the time he borrows that he will execute a mortgage in favour of the creditor

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(i) *Bal Rajaram* v. *Maneklal*, 56 B. 36 =1932 B. 136=34 Bom. L.R. 55.

(j) *Pandurang* v. *Bhagwandas*, 44 B. 341=55 I.C. 544=22 Bom. L.R. 120.

(k) *Iqbal* v. *Jasmer*, 15 L. 715=1934 L. 296; *Ram Rekha* v. *Ganga Prasad*, 49 A. 123 (F.B.); *Jagedish Prasad* v. *Ambashankar*, 36 Bom. L.R. 625=1934 B. 324.

(l) *Damodaram* v. *Bansilal*, 51 M. 711 =28 L.W. 521=1928 M. 566=55 M.L.J. 471.

(m) *Mannu Lal* v. *Bishambhar Nath*, 79 I.C. 35=1924 Oudh 378.

(n) *Gouri Shankar* v. *Sheonandan*, 46 A. 384=22 A.L.J. 369=1924 A. 543; *Satyanarayana* v. *Satyanarayanamurthi*, 50 M.L.J. 144=1926 M. 428=1926 M.W.N. 7

(o) *Chatar Sen* v. *Raja Ram*, 1937 A.W.R. 1065.

(p) *Bharatpur State* v. *Sri Krishan*, 1936 A. 327=1936 A.L.J. 236.

(q) *Ram Rekha* v. *Ganga Prasad*, 49 A 123 (F.B.).

(r) *Jagdambika* v. *Kali*, 9 P. 843 =12 P.L.T. 288 1931 P. 40; *Gajadhar* v. *Jagannath*, 46 A. 775=1924 A. 551=22 A.L.J. 601 (F.B.); *Lalji Singh* v *Muchkund*, 1934 P. 699; *Parmanand* v. *Gur Prasad*, 1935 O.W.N. 892=1935 Oudh 500; *Vishvanath* v. *Shankatgir*, 1934 N. 264.

(s) *Gajadhar* v. *Jagannath*, 46 A. 775 1924 A. 551=22 A.L.J. 601 (F.B.).

(t) *Chandraleo* v. *Mata Prasad*, 31 A. 176=6 A.L.J. 263=1 I.C. 47 (F.B.); *Ram Saroop* v. *Bharat Singh*, 43 A. 703=1921 A. 113 19 A.L.J. 744.

if and when called upon, a subsequent mortgage executed by the father to secure his debt is one for an antecedent debt and is binding as such on the sons. If, on the other hand, money is lent to the father on the express condition that a mortgage will be executed later, and a mortgage accordingly follows, the debt cannot be said to be independent of the mortgage and hence is not an antecedent debt so as to make the mortgage binding on the shares of the sons. There is a real distinction between cases in which the lender and the borrower contemplate the giving of security only as a future possibility and cases in which from the outset the parties contemplate only a mortgage loan. (t-a)

304. Who can alienate for ancestor's antecedent debts.—The power to alienate joint family property for payment of antecedent debts of any of the three immediate male ancestors is one which inheres only in the ancestor and an alienation made by an uncle of his nephew's share(u) or by a brother of his brother's share(v) for discharging an ancestor's debt is not binding upon the share of the nephew or the brother. But an alienation by a father for discharging the prior debt of a grandfather or a great-grandfather would be binding on the sons, as such debt, being binding upon the father by virtue of pious obligation, can be considered to be the antecedent debt of the father himself for purposes of binding the son's interest by his alienation for its discharge.(v-b) So also where an alienation is made by the manager of a joint family consisting of the alienor and his brothers or nephews, for the purpose of discharging the debt of a common deceased ancestor (for instance, the father in the case of brothers, and grandfather in the case of uncle and nephews) which would be binding on them on the ground of their pious obligation, the alienation should be upheld as one made for the benefit or necessity of the family by the family manager.(v-a) But an alienation by a grandfather of the grandsons' interest for the debt of their father would not be binding upon the grandsons, though if the alienation is by their father it would be binding upon them.

305. Father's alienation when not binding on the son's interest.—A father can validly sell or mortgage the family property including the son's interest either for family necessity in his capa-

(t-a) *Venkataramasami* v. *Imperial Bank*, 48 L.W. 401 (F.B.).

(u) *Chiranji Lal* v. *Bankey Lal*, 55 A. 370—1933 A. 273—1933 A.L.J. 123; But see *Ram Singh* v. *Sricharan*, 1938 A. 147 =1938 A.L.J. 12 where an alienation by a collateral for discharge of ancestor's debt was rightly upheld as one for necessity.

(v) *Anantu* v. *Ram Prasad*, 46 A. 295 —1924 A. 465=22 A.L.J. 182; *Gunni* v. *Dal Chand*, 53 A. 923=1931 A.L.J. 765= 1931 A. 717.

(v-a) *Ram Singh* v. *Sri Charan*, 1938 A. 147—1938 A.L.J. 12.

(v-b) *Sheo Ram* v. *Durga*, 3 Luck 700.

city as manager or, even in the absence of such necessity, for his own antecedent personal debts when the same are not tainted by illegality or immorality. But this rule, so far as the son's interest is concerned, is subject to the condition that the son's interest still remains under the father's control and is not taken away at the time of the alienation either by a partition between the father and the sons,[w] or by attachment of that interest in execution of a decree of Court[x] or by the son's insolvency vesting the property in the receiver in insolvency or by the son's or father's conversion prior to the alienation. Even where the son's interest remains within the father's control, if the alienation is not for family necessity or for antecedent debt, the alienation is to be treated as an ordinary coparcener's alienation and is to be set aside *in toto* except in the Presidencies of Madras and Bombay where it will be good to the extent of the alienor's share.[x-a] But if such alienation is one by way of mortgage, the mortgagee is entitled to treat the mortgage debt as a simple debt and obtain a decree on that footing and proceed to make the sons' interests also liable for the same[y] unless the sons are able to show that the debt itself was an Avyavaharika one.[z]

306. Effect of father's invalid alienation.—An alienation by a father of the joint family property neither for family necessity nor for his antecedent debt has the same effect as that of an alienation by a coparcener who is neither a manager nor a father of a joint family (see coparcener's right of alienation S. 272) and binds only his own interest in the property in Provinces other than Bengal and United Provinces where even this benefit is denied to the alienee. But in such cases, if the consideration for the alienation is untainted by illegality or immorality, the creditor is entitled to invoke to his aid the sons' pious obligation to pay the father's debts and recover the amount as a debt of the father by appropriate proceedings from the entire joint family property including the sons' interest.[a] Thus though a mortgage by the father may not be binding on the sons *qua* mortgage on the ground that it was neither for payment of antecedent debts nor for family necessity, it is open to the mortgagee, in spite of a declaration obtained by the sons that the mortgage is not binding on them, to obtain a personal decree against the father under O. 34, R. 6 of the Code of Civil

(w) *Krishnaswami* v. *Ramasami*, 22 M. 519=9 M.L.J. 127.

(x) *Subraya* v. *Nagappa*, 33 B. 264=2 I.C. 268=10 Bom. L.R. 1206; *Madho Pershad* v. *Mehrban Singh*, 18 C. 157=17 I.A. 194.

(x-a) *Asman* v. *Ganpat*, 40 Bom. L.R. 946; *Jagdish* v. *Hoshyar*, 51 A. 136=1926 A. 596.

(y) See S. 306; *Surja Prasad* v. *Golab Chand*, 27 C 762.

(z) *Bhagbut* v. *Girja*, 15 C. 717=15 I.A. 99; *Suraj Bunsi* v. *Sheo Persad*, 5 C. 148=6 I.A. 88 P.C.

(a) *Chunnilal* v. *Chakkilal*, 1937 N. 327.

Procedure and bring the entire property including the sons' interest to sale in execution of the decree, unless the sons are able to show that the debt was tainted by illegality or immorality.[b] But in the case of a sale by the father, which is not binding on the sons on the ground that it is neither for family necessity nor for discharge of antecedent debt, the vendee is not entitled, on the sale being set aside either to the extent of the sons' interest in Bombay or Madras or wholly in other provinces, to claim a refund of the consideration from the sons on the ground of their pious obligation, the reason being that the setting aside of the father's sale does not give rise to a debt against the father and in favour of the alienee till the alienee subsequently obtains a decree against the father for failure of consideration.[c]

307. Father's debts and burden of proof.—Where the question arises as to the binding nature of the father's debt or alienation on the son's shares, the following rules may be applied for determining the same.

(1) Where the question is whether a father's debt is binding on the sons' interests in the joint family property, the onus of proving that it is tainted by illegality or immorality is upon the sons and the burden is not upon the creditor to show that it is free from such taint. Mere proof of the general reckless or immoral life of the father without establishing a direct connection between immorality and his debt does not discharge the onus on the son,[d] who must prove that the debts were contracted for an immoral or illegal purpose and that the creditor had notice of it.[e] Direct evidence of the application of the debt for a specific immoral purpose is not always possible to obtain, and it will be sufficient in such cases if the evidence is such as to lead to the inference that the debt must have been incurred for an immoral purpose.[f]

(b) *Shanmukam* v *Nachu*, 1936 M.W. N. 1263—44 L.W. 738 (1937) 1 M.L.J. 278 —1937 M. 140; *Vennimal* v. *P. and O. Banking Corporation*, 1936 M.W.N 863; *Jowala Das* v. *Wazir Chand* 1933 Lah 768; *Gulamkhaja* v. *Shivlal*, 40 Bom. L.R. 381.

(c) *Srinivasa* v. *Kuppuswami*, 44 M. 801—14 L.W. 78—1921 M.W.N. 630—1921 M 447; *Daya Ram* v. *Harcharn*, 8 I. 678; *Madan* v. *Sati*, 39 A. 485 -15 A.L.J. 425 - 40 I.C. 451; See contra in *Koer Hasmat* v. *Sunder*, 11 C. 396.

(d) *Bal Rajaram* v. *Manekial*, 56 B. 36 34 Bom. L.R. 55 1932 B .136; *Bhagbut* v. *Girja*, 15 C. 717 15 I.A. 99 (P.C.); *Shyam Narayan* v. *Surej Narain*, 37 I.W. 277—1933 P.C. 38—1933 M.W.N. 138—35 Bom. L.R. 301 64 M.L. J. 148—37 C.W.N. 293; *Sri Narain* v. *Lala Raghubans*, 25 M.L.J. 27—17 C.W. N. 134; *Ganeshi Lal* v. *Bhagwan*, 1936 A.W.R 547; *Devanandan* v. *Harihar*, 1935 P. 140; *Sohan* v. *Isher*, 16 L. 320 —1934 L. 800; *Mst. Chando* v. *Radhe*, 1933 L. 363; *Raj Kishore* v. *Madan Gopal*, 13 L. 491—1932 L. 636.

(e) *Rajeshwar* v. *Mangniram*, 29 N. L.R. 107—1933 N. 89.

(f) *Sundara* v. *Arumuga*, 12 L.W. 159 -59 I.C. 390; *Gurumoorthi Iyer* v. *Subramaniam*, 107 I.C. 401; *Ram Narain* v *Harbans*, 1934 L. 685 .35 P.L.R. 661; but see *Venkayya* v. *Narasimhacharyulu*, 47 L.W. 463—(1938) 1 M.L.J. 33 which dissents from *Gurumoorthi Iyer* v. *Subramaniam*, 107 I.C. 401.

(2) Where the question is whether a sale or mortgage by the father including the sons' interests is binding upon such interests on an alleged ground that the alienation was made for discharging an antecedent debt of the father, the burden is upon the alienee to show either that there was an antecedent debt to discharge which the alienation was made, or that he used reasonable care to ascertain the existence of such circumstances as made him believe that such a debt existed.(g) If this is done, the onus is shifted to the sons to establish affirmatively that the said debts were illegal or immoral.(h) But where it is found that the alienee from the father had made reasonable inquiries as to the existence of *non-avyavaharika* antecedent debts and had acted *bona fide*, the validity of the alienation cannot be impeached by the sons on the ground that in fact the original loan which was paid off by the money raised by the father's alienation was an improper one.(i) It is not essential for the application of this doctrine that the debt should have become payable and should have been paid by the alienee, that is, the alienee can succeed even though the debt has not matured and the alienee has not paid the full consideration and discharged the antecedent debt.(j) Where the sons sue to recover joint family property alienated by their father for an antecedent debt not tainted with immorality, it is not open to the sons to plead that the family necessity might have been relieved in some other way and that it was neither the prudent nor the necessary act of the father to alienate it.(j) But even in the case of an alienation for the discharge of an antecedent debt, the alienee must show that the terms of the alienation (such as the rate of interest) were not excessive but were justified by the necessity of the case.(k)

(3) The question of burden of proof depends also on the question as to the nature of the suit instituted. If it is by a son to recover the property which had passed to the hands of an alienee, the onus is on the son to show how he is entitled to recover it. If on the other hand the suit is by an alienee either to enforce a mortgage or to recover possession of the property sold to him the burden

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(g) *Periaswami* v. *Vaidhilingam*, 1937 M. 718—47 L.W. 60; *Chandradeo* v. *Mata Prasad*, 31 A. 176—6 A.L.J. 263—1 I.C. 47; *Sahib* v. *Girdhari*, 45 A. 576=1924 A. 24; See S. 38 of the Transfer of Property Act (IV of 1882).

(h) *Suraj Bansi* v. *Sheo Proshad*, 5 C. 148—6 I A. 88 (P.C.); *Amirthalinga* v. *Arumuga*, 28 L.W. 634—1928 M. 986=1928 M.W.N. 602.

(i) *Periaswami* v. *Vaidhilingam*,=1937 M.W.N. 1313—1937 M. 718=47 L.W. 60; *Suraj Bansi* v. *Sheo Proshad*, 5 C. 148—6 I.A. 88; See also *Savumian* v. *Narayanan*, 15 M.L.T. 372.

(j) *Subbarajulu* v. *Ratnam*, 34 L.W. 982—1931 M. 615.

(k) *Bal Rajaram* v. *Maneklal*, 56 B. 36—1932 B. 136—34 Bom. L.R. 55.

is on the alienee to show how the sons' interests are also bound by the alienation.[l]

(4) The question whether a private alienation by the father or a sale in execution of a decree against him passed also the sons' interest in the property dealt with, falls to be answered with reference to the terms of the deed in the case of the private alienation[m] and the terms of the execution proceedings and the intention of the parties in the case of an execution sale[n] as, for instance the quantum of the price paid.[o] The fact that the sale certificate merely describes the property as "the right, title and interest of the judgment-debtor" is by itself no ground for holding that the sons' interests have not passed to the purchaser.[p] Nor does the description of the property in the deed of alienation as the self-acquired property of the alienor prevent the alienee from getting relief against the sons on the footing that the property is the ancestral property, if the alienee is able to show that as a matter of fact the property dealt with is the property of the joint family.[q]

(5) If the joint family property including the sons' interest is sold in execution of a decree against the father and is purchased by a stranger, the sons can recover their shares in the property sold only by establishing not only that the debt was immoral or illegal but that the stranger had notice of the illegality either actual or constructive.[r] This is based on the principle that the purchaser being a stranger, if he has no notice of the illegality of the debt, he is not bound to make enquiry beyond what appears on the face of the proceedings.[s] "Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's 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 contracted for immoral purposes, and that the purchasers had notice that they were so contracted. Purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to

(l) *Bhagbut* v. *Girja*, 15 C. 717=15 I.A. 99 (P.C.).

(m) *Simbhunath* v. *Golap Singh*, 14 C. 572=14 I.A. 77 (P.C.).

(n) *Deendyal* v. *Jugdeep Narain*, 3 C. 198=4 I.A. 247 (P.C.); *Abdul Aziz* v. *Appayasami*, 27 M. 131=31 I.A. 1=6 Bom L.R. 7=8 C.W.N. 186 (P.C.).

(o) *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21=13 I.A. 1 (P.C.).

(p) Ibid—*Mahabir Pershad* v. *Mohesh-war*, 17 C. 584=17 I.A. 11 (P.C.).

(q) *Shanmukam* v. *Nachu*, 44 M.L.W. 738=1937 M. 140 1936 M.W.N. 1263—(1937) 1 M.L.J. 278; *Daulat Ram* v. *Mehr Chand*, 15 C. 70=14 I.A. 187. But see *Balwant Singh* v. *R. Clancey*, 34 A. 296 —39 I.A. 109 considered in Shanmukam's case.

(r) *Mahabir* v. *Basdeo*, 6 A. 234.

(s) *Muddun Thakoor* v. *Kantoo Lall*, 1 I.A. 321; *Suraj Bunsi* v. *Sheo Proshad*, 5 C. 148=6 I.A. 88 (P.C.).

make enquiry beyond what appears on the face of the proceedings."[t] Such notice can be given by the sons during the execution of the decree obtained against the father[u] and if they had omitted to do so they can have their liability for the debt tried in a separate suit of their own.[u-a] These principles regarding necessity for notice in the case of a stranger execution purchaser are equally applicable where the execution sale is in respect of a mortgage decree against the father or in respect of a decree obtained on a fictitious debt by the collusion of the father with the decree-holder.[v]

308. Limitation and pious obligation.—The son being under a pious obligation to discharge the father's non-avyavaharika debt, the cause of action against him in respect of that liability must be held to arise on the date when the father's debt becomes due and payable,[w] and this view is supported by the decision of the Privy Council in *Brij Narain* v. *Mangal Prasad*,[x] which holds the son's pious duty to arise the moment the father contracted the debt. In this respect there is a departure from what the ancient texts lay down regarding the date when the pious obligation arises, namely, the death of the ancestor,[y] though a text of Yagnyavalkya may be taken as indicating the date of the commencement of the son's liability to be the exhaustion of the remedy against the father.[z] But as regards the period of limitation applicable to a suit for the enforcement of the son's pious duty, the decisions are not in accord. The High Courts of Allahabad[a] and Calcutta[b] apply Art 120 of the Limitation Act on the ground that none of the other specific articles can be said to apply to a case of pious obligation, and therefore the residuary Art 120 must be held to apply. But the question is not to be viewed in this way. A creditor in respect of a father's debt cannot sue the son alone during the father's lifetime,[c] though he can bring a suit both against the father and son,[d] or bring a suit against the son alone after the

(t) *Suraj Bunsi* v. *Sheo Proshad*, 5 C. 148=6 I.A. 88; *Periaswami* v. *Vaithilingam*, 1937 M. 718=47 L.W. 60; *Savumian* v. *Narayanan*, 15 M.L.T. 372.

(u) *Muddun Thakoor* v. *Kantoo Lall*, 1 I.A. 333; *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148=6 I.A. 88.

(u-a) *Gangaram* v. *Chapsi*, 1938 N. 431; See also *Asaram* v. *Ludheshwar*, 1938 N. 335 (F.B.) regarding Court's duty in case of signs of collusion.

(v) *Beni Parshad* v. *Puranchand*, 23 C. 262; *Ramasamayyan* v. *Virasami*, 21 M. 222=8 M.L.J. 126.

(w) *Surja* v. *Golab*, 27 C. 762; *Mallesam* v. *Jugala*, 23 M. 292.

(x) 46 A. 95=51 I.A. 129=21 A.L.J 934=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500=1924 P.C. 50.

(y) *Sahu Ram* v. *Bhup Singh*, 39 A. 437=44 I.A. 126=15 A.L.J. 437=19 Bom. L.R. 498=21 C.W.N. 698=33 M.L.J. 14=6 L.W. 213=1917 M.W.N. 439=1917 P.C. 61.

(z) *Yagnyavalkya*, ii-50.

(a) *Narsingh* v. *Lalji*, 23 A. 206; *Maharaj* v. *Balwant*, 28 A. 508=3 A.L.J. 274; *Gourishanker* v. *Sheonandan*, 46 A. 384.

(b) *Brijnandan* v. *Bidya Prasad*, 42 C. 1068=29 I.C. 629=19 C.W.N. 849; See also *Surja* v. *Golab*, 27 C. 762.

(c) *Periaami* v. *Seetharama*, 27 M. 243=14 M.L.J. 84 (F.B.).

(d) *Ramaswami* v. *Ulaganatha*, 22 M. 49=8 M.L.J. 312.

father's death. In any case the son's liability is dependent on the father's liability and is subsidiary to it. This means that the son is liable only so long as the father is liable and "where the creditor sues the son on the original cause of action the law of limitation—including the article in the schedule to the Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself. This is conclusively established by the principle of the decision of the Court of Appeal in *Beck* v. *Pierce*.[e] It was there held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and the statute of limitations had always been regarded as beginning to run in his favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. In the case of a contract, no doubt, the only person who can under the general law be ordinarily sued on it is the contracting party or his legal representative or in some cases his assign. But if a son is under the Hindu law under an obligation to fulfil the father's contract of debt, as a husband is under the English Law to fulfil his wife's ante-nuptial contract of debt, the suit against the son or the husband is a suit on the contract just as much as a suit against the legal representative of a contracting party. It may be that the liability of the contracting party himself is unlimited but that of the son or the husband or the legal representative on the same contract is limited, in the case of the son to the extent of the joint family property in his hands, in the case of the husband to the extent of his wife's property which he may have acquired, and in the case of the legal representative to the extent of the assets of the deceased which may have come to his hands. But in all these cases the cause of action on which the son, husband or legal representative is liable to be sued is that against the father, wife or person represented respectively, and the law of limitation applicable is therefore the same"[f] so that if the liability of the father is on a simple bond, the limitation is three years, but if the liability is on a registered bond it is six years from the date of the bond.[g]

CREDITOR'S RIGHTS

309. Creditor's rights against coparcenary property.—A debt secured or unsecured in respect of which the creditor may claim to

(e) L.R. 23 Q.B.D. 316.

(f) Per Bhashyam Ayyangar, J. in *Periasami* v. *Seetharama*, 27 M. 243=14 M.L.J 84 (F.B.).

(g) *Gulamkhaja* v. *Shivlal*, 40 Bom. L.R. 381.

proceed against a portion or the entire interest of the joint family property may have been incurred (1) by a coparcener, (2) by the manager, or (3) by the father.

310. Coparcener's debts and creditor's rights.—Where a coparcener, who is neither the father nor the manager of the family, incurs a debt for his own personal benefit, the creditor is entitled to recover the amount out of the debtor's interest in the joint family property by getting a decree on the debt and attaching that interest during the debtor's lifetime (See S. 289). If, on the other hand, the debt is secured, the mortgagee is entitled (except in Bengal and United Provinces) to bring the mortgagor's interest in the property to sale by getting a mortgage decree in respect of that interest either before or after the mortgagor's death (See S. 272), and the share that is liable on the mortgage is the share of the mortgagor as it stood on the date of the mortgage.(h)

311. Manager's debts and creditor's rights.—If the debt incurred by the manager, whether secured or unsecured, is for the family benefit or necessity, or the lender has entered into the transaction after making *bona fide* enquiries and satisfying himself that such necessity existed, the debt is binding upon the interests of all the coparceners in the joint property and a decree on that debt against the manager alone as such binds those interests.(i) But if the debt or mortgage by the manager cannot be justified as being within his powers as such manager, it stands on the same footing as that of an ordinary coparcener to which different considerations will apply.(j) There is a distinction between the liability of a manager and the liability of his coparceners with reference to the debts contracted by the manager for purposes of the joint family. The manager is liable not only to the extent of his share in the joint family property, but being a party to the contract, he is also liable personally, that is to say, his separate property is also liable. But as regards the other coparceners, they are liable only to the extent of their interests in the family property, unless, in the case of adult members, they have acted in a manner to justify their being treated as being also parties to the contract of loan by reason

(h) See S. 316; *Jinwaraa* v. *Gunwantrao*, 1936 N. 34.

(i) *Lingangowda* v. *Basangowda*, 51 B. 450=54 I.A. 122=52 M.L.J. 472=25 L.W. 789=25 A.L.J. 319=31 C.W.N. 570=1927 M.W.N. 352=29 Bom. L.R. 848=8 P.L.T. 462=1927 P.C. 56; *Sheo Shankar* v. *Jaddo Kunwar*, 36 A. 383=41 I.A. 216=12 A.L.J. 1173=16 Bom. L.R. 810=18 C.W. N. 968=1 L.W. 645=1914 M.W.N. 593=1914 P.C. 136; *Kishan Prasad* v. *Har Narain Singh*, 33 A. 272=38 I.A. 45=9 I.C. 739=15 C.W.N. 321=8 A.L.J. 256=21 M.L.J. 378=13 Bom. L.R. 359=(1911) 2 M.W.N. 395; *Sheo Ram* v. *Lata*, 1937 L. 6.

(j) See Ss. 272, 289 and 290.

of their conduct, whether contemporaneous or subsequent.[k] Where the karta of a joint family firm borrows on promissory notes executed in his own name and not in the name of the family firm, there is no presumption that the borrowing was for the purpose of the business and the onus of proving that it is for such purpose is on the lender.[l] But in no case can the person or personal properties of a coparcener be proceeded against by a creditor in respect of a debt incurred by the manager, unless that coparcener is a party to the debt itself[m] or has acted in a manner so as to justify his being treated as a party to the contract of loan by reason of his contemporaneous or subsequent conduct.[n]

312. Father's debts and creditor's rights.—A father's debt may also be secured or unsecured. If the debt is unsecured and is Avyavaharika, it must be treated as that of an ordinary coparcener and the creditor's rights determined accordingly.[o] If, on the other hand, it is not Avyavaharika, the creditor is entitled to get a decree against the father alone or against both the father and the son, or, if the father is dead, against the son only, and bring to sale the entire joint family property including the son's interest in execution of that decree. But in no case can the person or personal properties of the son be proceeded against for a debt incurred by the father unless the son himself is a party to the debt.[m] If the decree is only against the father, the creditor has an option, in execution of the decree, either to bring the father's interest only to sale, or to bring to sale the whole joint family property,[p] thus availing himself of the son's pious obligation.[q] But the son's pious obligation cannot be availed of by the creditor in execution of a decree against the father, if in the suit which resulted in that decree the sons had been impleaded but the suit was dismissed

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(k) *Sheo Ram* v. *Lata*, 1937 L. 6; *Ganpat* v. *Badri*, 165 I.C 921; *Jagannath* v. *Basist*, 1937 P. 195; *Punjab National Bank* v. *Jagdish*, 1936 L. 390=38 P.L.R. 733; *Official Assignee of Madras* v. *Palaniappa*, 41 M 824.=35 M.L.J 473=1919 M 690 (F.B.); *Strikant* v *Sidheshwari*, 16 Pat. 441=1937 Pat. 455.

(l) *Abdul Majid* v. *Sharaswatibai*, 61 I.A. 90=39 L.W 72=1934 A.L.J. 79=66 M.L J 65.=38 C.W.N. 201=1934 M.W.N. 4=36 Bom. L.R. 225=15 P.L.T. 99=1934 P.C. 4.

(la) *Jagannath* v. *Basist*, 1937 P 195; *Sheo Ram* v. *Lata*, 1937 L. 6.

(m) *Strikant* v. *Sidheshwari*, 16 Pat. 441=1937 Pat. 455; *Sheo Ram* v. *Lata*, 1937 Lah. 6; *Alagappa* v. *Bank of Chettinad*, 48 L.W 707; *Mam Raj* v. *Sher Singh*, 1938 L. 694.

(o) *Muthusami* v *Mytheen*, (1937) 1 M.L.J. 231 :1937 M. 344.

(p) *Mahabir Pershad* v. *Moheshwar*, 17 C. 584=17 I.A. 11 P.C.; *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21=13 I.A. 1 P.C.; *Sripat* v. *Tagore*, 44 C. 524=44 I.A. 1=15 A.L.J. 147=19 Bom. L.R. 290=21 C.W.N. 442=32 M.L.J. 133=1917 M.W.N. 193=1916 P.C. 220; *Brij Narain* v. *Mangal Prasad*, 46 A. 95=51 I.A. 129=21 A. L.J. 934=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T. 1=1924 M.W.N. 68=19 L.W. 72= 26 Bom. L.R. 500=1924 P.C. 50; *Deendyal* v. *Jugdeep Narain*, 3 C. 198=4 I.A. 247 P.C.; *Ramchandra* v. *Bhagwant*, 53 B. 777=31 Bom. L.R. 1115=1929 B. 465.

(q) *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21=13 I.A. 1 (P.C.); *Sardari Lal* v. *Bharat National Bank*, 12 L. 495=1931 L. 716.

against the sons.[r] What passes to the purchaser under an execution sale, whether it is only the interest of the father or the entire property sold including the son's interest, has to be determined on the terms of the proceedings in execution, and the mere fact that the property sold is described in the sale certificate as the "right, title and interest of the judgment-debtor" is no conclusive answer that the sale did not include the son's interest also.[s] In such cases what is to be considered is the substance and not the mere technicalities of the transaction.[t]

If the father's debt is under a mortgage deed and is justifiable either on the ground of family necessity or on the ground that it was incurred for purpose of discharging an antecedent debt neither illegal nor immoral, then the whole interest purported to be mortgaged under the deed including the interest of the son is available to be proceeded against by the creditor in execution of a decree obtained thereon. If, on the other hand, the debt secured is an Avyavaharika debt, the mortgagee has no higher rights than he may have as against an ordinary coparcener for which See S. 272. But if the mortgage is not for an Avyavaharika debt, but is not justified by family necessity or an antecedent debt, the creditor's right varies according as he makes the sons parties to the suit or not. If the suit on such a mortgage is only against the father and a decree is passed against him, the creditor is entitled to bring the entire joint family property including the son's interest to sale in execution of the personal decree obtained by the mortgagee under O. 34, R. 6 of the Civil Procedure Code.[u] But in Provinces like Bengal and United Provinces where no mortgage decree will issue on such a mortgage,[v] the creditor's right is only to obtain a money decree against the father and have the son's interest also sold in execution if the personal remedy against the father is still alive.[w] If the suit on such a mortgage is brought both against the father and sons, or against the sons only after the father's death, the proper procedure to be adopted in Provinces where such a mortgage will not be invalid even as against the father's interest, is to pass

(r) *Raja Ram* v. *Raja Baksh*, 1938 P C. 7—47 L.W. 1=1938 M.W.N. 1=42 C.W.N. 200=(1938) 1 M.L.J. 41=19 Pat. L.T. 1. But see *Periaswami* v. *Vaidhilingam*, 47 L.W 60.

(s) *Sarju Prasad* v. *Ram Saran*, 1931 A.L.J. 400=1931 A. 541; See also S. 307

Deendyal v. *Jugdeep Narain*, 3 C. 198—4 I.A. 247; *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21-13 I.A. 1.

(t) *Sripat* v. *Tagore*, 44 C. 524—44 I.A. 1=15 A.L.J. 147—19 Bom. L.R. 290—21 C.W.N. 442=32 M.L.J. 133—1917 M.W. N. 193=1916 P.C. 220.

(u) *Ramaswamayyan* v. *Virasami*, 21 M. 222 8 M.L.J. 126; *Suraj Bunsi* v. *Sheo Proshad*, 5 C. 148—6 I.A. 88 (P.C.); *Gajadhar* v *Jadubir*, 47 A. 122 =22 A.L. J. 980=1925 A. 180; *Lala* v. *Golab*, 28 C. 517—5 C.W.N. 640; See also S. 306.

(v) *Kali Shanker* v. *Nawab Singh*, 31 A 507—6 A.L.J. 762=3 I.C. 909; *Chandradeo* v. *Mata Prasad*, 31 A. 176—6 A. L.J. 263=1 I.C. 479 (F.B.); But see *Brijnandan* v. *Bidya Prasad*, 42 C. 1068= 29 I.C 629. 19 C.W.N. 849 (F.B.).

(w) *Hurmat* v. *Ganga*, 1935 A. 507=1935 A.W.R. 431; *Jowala Das* v. *Wazir Chand*, 1933 L. 768.

a mortgage decree for the sale of the father's interest in the mortgaged property and to direct the son's interest to be sold in case the proceeds of sale of the said interest of the father is insufficient to wipe off the decree amount.[x] In other provinces only a money decree is issuable, the creditor being entitled to proceed against the whole interest in execution of the decree.[y] The position will be the same even if the mortgage executed by the father is in respect of debts incurred by him for purposes of carrying on a trade newly started by him. Thus in the case of *Gulamkhaja* v. *Shivlal*,[z] a father of a joint family consisting of minors started a new business and executed a mortgage over joint family property for the debts contracted for that business. Part of the consideration of the mortgage consisted of antecedent debts incurred by the father for that business and another part of it consisted of a cash advance made at the time of the execution of the mortgage. After the death of the father, the mortgagee brought a suit to enforce the mortgage, and the suit was resisted on behalf of the sons on two grounds: (i) that the debts for which the mortgage deed was passed were debts of a new business started by the father for the first time and hence his sons were not bound by those debts under the ruling of the Privy Council in *Benares Bank Ltd.* v. *Hari Narain*;[a] (ii) that as regards the cash advance made at the time of the mortgage, though the personal liability of the father did exist under the mortgage deed at the time when the suit was brought, the son's liability under the pious obligation was not available to the creditor as the suit was brought more than three years after the date of the debt. Both these contentions were, however, rejected. As regards the first contention, the learned judges, Divatia and Sen JJ., held that there was no substance in it. The decision of the Privy Council in the *Benares Bank case*[a] expressly proceeds on the principle that the minor members of a joint family would not be bound by the new business started by the manager or the father, because the new business would mean a sort of partnership to which all the members must be partners and that implies a contractual obligation which a minor cannot incur. The argument that was sought to be urged before the Privy Council that the minor sons would be bound in execution on the principle

(x) *Kandasami* v. *Kuppu*, 43 M 421=11 L.W. 221 .38 M L.J. 203=1920 M.W.N. 181=55 I.C. 320; *Venkataramanayya* v. *Venkataramana*, 29 M. 200=16 M.L.J. 69 (F.B.); *Shanmugam* v. *Nachu*, 1936 M.W.N. 1263=44 L.W. 738=(1937) 1 M L.J. 278=1937 M. 140; *Vennimal* v. P. and O. *Banking Corporation*, 1936 M.W.N. 863. But see *Dattatraya* v. *Vishnu*, 36 B 68=12 I.C. 949=13 Bom. L.R. 1161; *Shamsher* v. *Suraj*, 8 Oudh. W.N. 1021=135 I.C. 891; See also S. 306.

(y) *Chundradeo* v. *Mata Prasad*, 31 A. 176=6 A.L.J. 263=1 I.C. 479 (F.B.).

(z) 40 Bom. L.R. 381.

(a) 54 A. 564=59 I.A. 300=34 Bom. L. R. 1079=36 C.W.N. 826=1932 A.L.J. 714=63 M.L.J. 92=36 L.W. 56=1932 M. W.N. 788=12 P.L.T. 491=1932 P.C. 182.

enunciated in the second of the five propositions laid down by the Board in *Brij Narain's case,* (51 I.A. 129), viz., that there was a pious obligation on the part of the sons to pay their father's debts, was not allowed to be raised by the Privy Council in the *Benares Bank case* on the ground that it was not taken in the Courts below and might involve questions of fact. Hence the Privy Council decision in the *Benares Bank case* cannot be said to have overruled the argument that the sons' interest would be bound even in the case of a new business started by the father on the ground of the sons' pious obligation. Then coming to the second contention that the suit having been brought more than three years after the debt, the pious liability of the sons was barred by limitation, the learned Judges held that the period of limitation for enforcing the personal liability under the registered mortgage being six years against the father, the same period was available even as against the sons, and hence the suit was not barred by limitation under Art. 116 of the Limitation Act. Then they decreed that with regard to the debts antecedent to the mortgage, the mortgage was to have effect on the minor sons' interest in the property, but that with regard to the cash advance, they would not be bound by the debt as a mortgage debt, but their interests in the property could be proceeded against in execution of a money decree in respect of that debt.

313. What passes to an execution purchaser in respect of father's debt.—"Where it is clear from the proceedings, that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure if he had taken proper steps to do so, or although the purchaser may have obtained possession of the whole tenure under the sale. But if, on the other hand, it appears that the judgment-debtor has been sued as representing the ownership of the entire tenure, and that the sale, although purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as, a sale of the tenure, the whole tenure then must be considered as having passed by the sale. And if the question is a doubtful one on the face of the proceedings, or where one part of the proceedings appears inconsistent with another, the Court must look to the substance of the matter, and not the mere form or language of the proceedings".[b] On this question the following propositions may be gathered from the decided cases:—

(1) It is not absolutely necessary for the creditor desiring to proceed against the whole of the interest to make the sons parties

(b) Per Garth, C.J. in *Jeo Lal* v. *Gunga Pershad,* 10 C. 996.

to the suit or execution proceedings against the father in respect of his personal debts which are not Avyavaharika.[c]

(2) The same rule applies even in the case of a mortgage by the father for his antecedent debt which is not Avyavaharika.[d]

(3) That the sons' interest has also been transferred by the father or proceeded against by the creditor in execution against him has to be established by the person setting it up.[e]

(4) The words "Right, title and interest" used in the decree or execution proceedings against the father are ambiguous and susceptible of application either to the entirety of the joint family interest or to the father's coparcenary interest alone.[e]

(5) The creditor's omission of the sons from the proceedings is a material circumstance to be considered against the contention that the sons' interest has also been proceeded against.[e]

(6) The question whether the sons' interest has also been transferred is a question to be decided with reference to the facts of each case like the form of the suit, the sale proclamation etc. (*Ibid.*)[f] If it appears from the circumstances, the conduct of the sons and the price paid by the execution purchaser that the intention was to sell the whole property over which the father had a disposing power, the entire property should be held to have passed to the purchaser, as in all these cases the substance and not the technicalities of the transaction should be considered;[g] and in a suit for sale upon a mortgage executed by the father, a prior auction-purchaser in execution of a simple money decree against the father, is entitled to put the mortgagee to proof of the validity of the mortgage, on grounds which might have been and could be taken by the sons.[h] Where a suit against sons and grandsons on a mortgage executed by the father was decreed only against the estate of the father in the sons's hands but was dismissed as against

(c) *Nanomi Babuasin* v *Modhun Mohun*, 13 C 21=13 I.A. 1 P C . *Girdharee Lall* v *Kantoo Lall*, 1 I A. 321 ; *Sat Narain* v. *Behari*, 6 Lah. 1=52 I.A. 22=47 M.L.J 857. 1925 M.W.N 1=23 A.L.J. 85=21 L.W. 375=27 Bom. L.R. 135 29 C.W N. 797= 1925 P.C. 18 ; *Mohan* v *Bala*, 44 A. 649= 1922 A. 310 ; *Sabha Ram* v. *Kishan*, 52 A. 1027· 1930 A.L J. 1599=1931 A. 112 ; *Gunnan Naidu* v. *Chendri*, 1933 M. 839=65 M.L.J. 752=1933 M.W.N. 139=38 L.W. 803.

(d) *Girdharee Lall* v. *Kantoo Lall*, 1 I A. 321.

(e) *Simbhunath* v. *Golab Singh*, 14 I A. 77=14 C. 572 (P.C.) ; *Deendyal* v. *Jugdeep Narain*, 3 C 198=4 I.A. 247 (P. C.) ; *Nanomi Babuasin* v. *Modhun Mohun* 13 C. 21 13 I.A. 1 (P.C.) ; *Hurdey Narain* v. *Rooder Perkash*, 10 C. 626=11 I.A 26 (P.C.).

(f) *Daulat Ram* v. *Mehr Chand*, 15 C. 70 14 I.A. 187 ; *Ajodhia Prasad* v. *Data Ram*, 1931 A L.J. 104 1931 A. 131, where it was held that the son's interest did not pass.

(g) *Sripat* v. *Tagore*, 44 C. 524=44 I.A. 1=15 A.L J 147=19 Bom. L.R. 290=21 C.W N. 442 =32 M L.J. 133=1917 M.W.N. 193=1916 P.C. 220.

(h) *Bharatpur State* v. *Sri Krishan*, 1936 A. 327=1936 A.L.J. 236 ; *Madan Lal* v. *Chiddu*, 1930 A. 852=1930 A.L.J. 1528 .53 A. 21. See also *Jagannath* v. *Chunnilal*, 1932 A.L.J. 1110=1933 A. 180 negativing this right in the case of a private purchaser. See also *Govind* v. *Deekappa*, 40 Bom. L.R. 839.

the grandsons, the decree-holder could not proceed for the realisation of his decree against the interests of the grandsons. (i)

314. Son's remedies under the Civil Procedure Code.—Where in execution of a simple decree against the father alone, the son's interest is attached, the son is entitled to object to the sale of his interest under O. 21, R. 58 of the Civil Procedure Code on the ground that the debt of the father was Avyavaharika. If the objection is upheld, the creditor has to bring a suit to contest that order within one year from its date, and if it is rejected, the son has to bring a similar suit within that period, under O. 21, R. 63. If the decree is a mortgage decree and, therefore, there is no attachment before sale, the son can still notify the illegality of the debt to all the intending purchasers after sale proclamation, and thus establish in his subsequent suit for recovery of his interest the purchaser's notice of the illegality of the debt which the son has to show before he is entitled to relief. (j) If the son's suit is brought before the sale of the mortgaged property, the son is entitled to get the decree on the father's mortgage set aside on the mortgagee's failure to justify the mortgage either by family necessity or the father's antecedent debt. (k)

315. Setting aside alienations and alienee's equities.—An alienation made by a coparcener, a manager or a father in excess of his powers mentioned in Ss. 272, 283 and 302 respectively, is liable to be set aside at the instance of the other coparceners to the extent that it is not binding on their interests. (l) A suit brought by some of the sons during the father's lifetime for the purpose of setting aside the father's alienation, within three years of their attainment of majority, is not barred though another son had long before three years attained majority. (m) But it will be otherwise if such suit is brought after the father's lifetime. (n) The reason for this distinction between a suit brought during the father's life-time and a suit brought after his death is, that the

(i) *Raja Ram* v. *Raja Baksh*, 1938 P. C. 7=47 L.W. 1=42 C.W.N. 200=1938 M.W.N. 1=(1938) 1 M.L.J. 41=19 Pat. L.T. 1. But see *Periaswami* v. *Vaidhilingam*, 47 L.W. 60.

(j) *Maddun Thakoor* v. *Kantoo Lall*, 1 I.A. 333; *Suraj Bunsi* v. *Sheo Proshad*, 5 C. 148=6 I.A. 88 P.C.

(k) *Jagdish* v. *Hoshyar*, 51 A. 136=1928 A 596=26 A.L.J. 1289.

(l) *Ramappa* v. *Yellappa*, 52 B. 307 = 1928 B. 150=30 Bom. L.R. 427.

(m) *Jawahir* v. *Udai Parkash*, 48 A. 152=53 I.A. 36=24 A.L.J. 97=1926 M.W. N. 197=50 M.L.J. 344=28 Bom. L.R. 851=30 C.W.N. 698=1926 P.C. 16; *Kamta Rai* v. *Rani Jaduraj*, 1931 A. 398 (a case of Manager or Guardian of minors); *Harnam* v. *Aziz*, 1938 L. 1; See also S. 270; *Sureshchandra* v. *Bai Ishwari*, 1938 B. 206; *Shantaya* v. *Mallappa*, 40 Bom. L.R 1029.

(n) *Doraisami* v. *Nondisami*, 38 M. 118=21 I.C. 410=25 M.L.J. 405 (F.B.) followed in *Jadu* v. *Jayannatham*, 39 L. W. 795=1934 M.W.N. 635=67 M.L.J. 27 =1934 M. 469 where *Jawahir's case* is explained; See also *Ganga Dayal* v. *Mani Ram*, 31 A. 156 and *Bapu* v. *Bala*, 45 B. 466=22 Bom. L.R. 1383 considered in *Shantaya* v. *Mallappa*, 40 Bom. L.R. 1029.

non-suing brother who had attained majority more than three years prior to the suit instituted by his younger brother is in a position under S. 7 of the Limitation Act to give a valid discharge as the manager of the family after the father's death, which position he does not occupy so long as his father is alive. On the setting aside of such an alienation the alienee is not entitled to claim a refund of the proportionate part of the consideration in respect of the interest held not bound by the alienation. (o) This will be so even when the father's alienation by way of sale which is neither for necessity nor for discharge of an antecedent debt is set aside at the instance of the sons, and the alienee cannot in such a case rely upon the son's pious obligation and claim a refund of the purchase money as a condition to setting aside the sale, the reason being that the consideration received by the father does not become the debt of the father till the sale is set aside and that the pious obligation attaches only to a debt which exists at the date the suit is instituted. (p) But on the sale being set aside, the purchaser is entitled to get a decree against the father for failure of consideration and proceed to make the son's interests also liable thereunder if the consideration is binding upon the sons as not having been used for immoral purposes. (p) Where, however, in a suit by a son to set aside his father's alienation, it is proved that part of the purchase money was applied for payment of the father's antecedent debts, and the sale is set aside conditionally upon the payment of the sum so applied, mesne profits are not recoverable from the alienee because the alience is to be regarded as being lawfully in possession until the sale is set aside. (q) But if the sale is set aside unconditionally at the son's instance on the ground that no part of the consideration is binding on the son, the son is entitled to claim mesne profits from the purchaser. (q) A coparcener who has repudiated another's alienation is entitled to claim mesne profits from the alienee from the date of repudiation, but not from the date of the alienation when the alienee was shown to have had no notice of the incompetency of the alienor to make the impugned sale. (r) In Provinces where an alienation by a coparcener is wholly void and is set aside in its entirety, the alienee is not entitled to claim for his money a charge even in respect of his alienor's

(o) *Vitabhadra* v. *Guruvenkata*, 22 *M.* 312.

(p) *Srinivasa* v. *Kuppuswami*, 44 M. 901=14 L.W. 78=1921 M.W.N. 630=1921 M. 447; *Madan Gopal* v. *Sati Prasad*, 39 A. 485.=15 A.L.J. 425=40 I.C. 451; *Daya Ram* v. *Harcharn*, 8 Lah. 673; See contra in *Hazmat Rai* v. *Sunder Das*, 11 C. 398.

(q) *Banwari* v. *Mahesh*, 41 A. 63=45 I.A. 284=23 C.W.N. 577=1919 M.W.N. 490=1918 P.C. 118.

(r) *Bhirgu* v. *Narsingh*, 39 A. 61=4 A. L.J. 1161=35 I.C. 475 (case of a father); See also *Dakhina* v. *Saroda*, 21 C. 142; *Grish Chunder* v. *Shoshi*, 27 C. 951=27 I.A. 110=10 M.L.J. 356=4 C.W.N. 631= 2 Bom. L.R. 709.

share. [s] But an involuntary alienation such as the sale of a coparcener's interest in execution of a decree against him is valid so as to pass that interest to the purchaser in spite of an agreement between the coparceners not to make any alienation in favour of a stranger. [t] There are three possible cases where the consideration for a coparcener's alienation may be found binding on the whole family and where the question of the vendee's equity in favour of refunding any portion of the purchase money may arise: (1) where the whole of the consideration, even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction may have to be set aside making the consideration proved a charge on the family property: (2) where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only, and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity. In such a case if the members are divided and the alienor is alive or leaves other heirs than the members who question the transaction, he or his heirs may have a right to contribution: and (3) where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as a sale of the alienor's share only and for the excess a charge may be given in favour of the vendee over the shares of the other members. [u]

Son's right to set aside alienations made before his birth.—An alienation made by a father before the birth of a son to him cannot be impeached by his son unless he was at the time in his mother's womb, the reason being that at the time of the alienation, the son had no interest in the property, he not having been begotten. [v] But an alienation made by a father which is not binding on the sons living at the time of the alienation and which they have not ratified is not binding even on the son born subsequent to

(s) *Chandradeo* v. *Mata Prasad*, 31 A. 176=6 A.L.J. 263=1 I.C. 479 (F.B.); *Lachhman Prasad* v. *Sarnam Singh*, 39 A. 500 =44 I.A. 163=15 A.L.J. 584=19 Bom. L.R. 646=21 C.W.N. 990=33 M.L.J. 39= 6 L.W. 334=1917 M.W.N. 516=1917 P.C. 41 *Daya Ram* v. *Harcharn Das*, 8 Lah. 678; *Anant Ram* v. *Collector of Etah* 40 A. 171=7 L.W. 323=16 A.L.J. 245=20 Bom. L.R. 524=22 C.W.N. 484=34 M.L.J. 291 =1918 M.W.N. 446=1917 P.C. 188.

(t) *Golak* v. *Mathura*, 20 C. 273—See *Lakhmi* v. *Tori*, 1 A. 618 holding that such an agreement invalidates a voluntary alienation by a coparcener.

(u) *Venkatapathi* v. *Pappla*, 51 M. 824 =28 L.W. 228=1928 M.W.N. 410=55 M L.J. 489=1928 M 788; See also *Vadivelan* v. *Natesam*, 37 M. 435=23 M.L.J. 256=1912 M.W.N. 851=16 I.C. 835; *Bhagwat Deyal* v. *Debi Dayal*, 35 C. 420 =35 I.A. 48=5 A.L.J. 184=10 Bom. L.R. 230=12 C.W.N. 393=18 M.L.J. 100 (P.C.).

(v) *Bholanath* v. *Kartick*, 34 C. 372= =11 C.W.N. 482, *Chuttan* v. *Kallu*, 33 A. 283=8 A.L.J. 15=8 I.C. 719.

the alienation.(w) Such ratification by the sons living at the time of the alienation may be presumed from their taking and enjoying the new property purchased from the proceeds of the sale of the ancestral property (x) or from some other similar conduct. (y) See also S. 270.

316. Rights of a purchaser of a coparcener's interest.—The purchaser of the undivided interest of a coparcener either under a valid private sale from, or in execution of a decree against, the coparcener gets only an equity to enforce the coparcener's rights as against the other coparceners by a suit for a general partition (z) and hence is not entitled to be put into possession of any specific property (a) or to be in joint possession of the property with the other coparceners (b) or to claim mesne profits. (c) Merely because a coparcener has validly parted with his interest in the coparcenary property by means of an alienation, he does not cease to be a member of the coparcenary so as to forfeit his right of survivorship on the death of another coparcener. (d) The alienee's share is fixed with reference to the alienor's share at the time of the alienation, and if subsequently the alienor 's share gets enlarged by reason of reduction by death in the number of coparceners in the alienor's family, the alienee does not stand to get the additional share which is to go only to the alienor. It will thus be seen that the alience is not in the same position as the alienor in all respects and the alienor's right to joint possession with his own coparceners cannot also be claimed by the alience. But where the alienating coparcener had become divided in status, though the property had not been

(w) *Chandarmani* v. *Jambeswara* 34 L.W. 598=1931 M.W.N. 263=1931 M. 550 ; *Tulsi Ram* v. *Babu*, 33 A. 654=8 A. L.J. 733=10 I.C. 908 ; *Lachmi Narain* v. *Kishan*, 38 A 126=14 A L.J. 25=33 I.C. 913. But see *Shantaya* v. *Mallappa*, 40 Bom L.R 1029 holding that the only sons who can question the alienation are those who were in existence at the time of the father's alienation, and not the sons who came into existence subsequently and that the impugnment should be confined to the shares of the former sons at the time of the transaction impugned.

(x) *Gangabai* v. *Vamanaji*, 2 Bom. H C.R. 318.

(y) *Palaniappa* v. *Subramania*, 39 L. W. 131=1934 M W.N. 682—1934 Mad 185. But see *Pangudaya* v. *Uthandiyn*, 48 L.W. 251.

(z) *Ishrappa* v. *Krishna*, 46 B. 925=1922 B. 413—24 Bom. L.R. 428 ; *Shanmugam* v. *Panchali*, 49 M. 596=23 L.W. 551=50 M.L.J. 681=1926 M. 683 ; *Brij Lal* v. *Durga*, 1 Lah. 134—56 I.C. 254 ; *Manjaya* v. *Shanmuga*, 38 M. 684=1914 M.W.N 356=26 M.L.J. 576=22 I.C. 555 , *Subba Goundan* v. *Krishnamachari*, 45 M. 449=15 L W 537—1922 M.W.N. 269=42 M.L.J. 373=1922 M. 112 ; *Velumalai* v. *Sreeniwasa*, 29 M. 294 ; *Muthu Kumara* v. *Sivanarayana*, 37 L.W. 19=1933 Mad. 158 .64 M.L.J. 66—1933 M.W. N 190—56 M. 534 ; *Suraj Bunsi* v. *Sheo Persad*, 5 C. 148=6 I A. 88 P.C. . *Hardi Narain* v. *Ruder*, 10 C. 626

(a) *Pandu* v. *Goma*, 43 B 472 50 I.C. 765=21 Bom L R 213 ; *Shanmugam* v. *Panchali*, 49 M 596=1926 M. 683=23 L.W 551=50 M.L.J. 681.

(b) *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265=27 M.L.J. 409=25 I.C. 585 ; *Kandasamy* v. *Velayutha*, 50 M 320=24 L.W. 367=51 M.L.J. 99=1926 M. 774 .1926 M.W.N. 399.

(c) *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265=25 I.C. 585=27 M. L.J. 409 ; *Krishnaswami* v. *Venkatamma*, 14 Mys L.J. 16=40 Mys. H.C.R. 415.

(d) *Manjaya* v. *Shanmuga*, 38 M. 684 .22 I.C. 555 ; *Gurlingappa* v. *Nandapa*, 21 B. 797 ; But see *Naro Gopal* v. *Paragauda*, 41 B. 347=39 I.C. 23=19 Bom. L.R. 69.

divided by metes and bounds, a decree for mesne profis may be given to the purchaser against the coparceners in possession. (e) Where the alienee is entitled to recover the share to which the alienor would be entitled on partition, it is permissible to the alienee, in a suit brought by the other coparceners for restitution of the specific property alienated, to insist that the relief to the plaintiffs should be granted on condition that they assent to a partition of the alienor's interest in the joint estate so as to give effect to his right. (f) Thus where the purchaser has obtained possession in pursuance of his purchase, the other coparceners are entitled to a decree for recovery of possession of the entire property from the purchaser, who, however, will be given the benefit of a stay of execution of that decree for a reasonable period to enable him to bring a suit for a general partition, coupled with a declaration that he is entitled to the undivided interest of his vendor. (g) But if partition can be conveniently granted even in the suit by the coparceners for recovery of possession of the property, as for instance, where all the facts are before the Court, (h) the alienee is entitled to claim it. (i) But the Bombay High Court, on the view that the purchaser is a tenant-in-common with the non-alienating coparceners, (j) lays down that though the purchaser is not entitled to be given such joint possession when he has not already obtained possession of the property (k) yet in a suit for recovery of possession by the other coparceners against the purchaser in possession, the Court has a discretion to allow him to be in joint possession of the property along with the plaintiffs-coparceners and each case as to the propriety or otherwise of allowing the purchaser to retain possession should be decided on its own facts. (l) In a suit for partition to which the alienee from a coparcener is a party, the property purchased by him is to be given to him if possible (m)

(e) *Sivaramamurthi* v. *Venkayya*, 57 M 667=1934 M.W N 340=66 M L.J. 561 = 1934 M. 364 39 L.W. 198; *Palanikkal* v *Ramana*, 7 I C. 695.

(f) *Ramkishore* v. *Jainarain*, 40 C. 966 = 40 I.A 213=20 I C 958 (P.C).

(g) *Ramkishore* v. *Jainarain*, 40 C. 966=40 I.A. 213=15 Bom. L.R. 867 11 A.L J. 865=17 C W.N. 1189=25 M.L.J. 512=20 I.C. 958 (P.C.); *Kondasamy* v *Velayutha*, 50 M 320 24 L.W. 367=1926 M. 774=1926 M.W.N. 399=51 M.L.J. 99; *Hanmandas* v. *Valabhdas*, 43 B. 17=46 I.C. 133 20 Bom. L.R. 472; and *Subba Goundan* v. *Krishnamachari*, 45 M. 449=15 L.W. 537=1922 M. 112=1922 M.W.N. 269=42 M.L.J. 372; *Hardi Narain* v. *Ruder Perkash*, 10 C. 626 at 637.

(h) *Kandaswamy* v. *Velayutha*, 50 M. 320=24 L.W. 367=1926 M.W.N. 399=51 M.L J. 99=1926 M. 774.

(i) *Ramaswamy* v. *Venkatarama*, 46 M. 815 18 L.W. 183=45 M.L.J 203=1923 M W N 786=1924 M. 81.

(j) *Naro Gopal* v *Parayanda*, 41 B. 347 39 I C. 23. 19 Bom. L.R. 69.

(k) *Ishrappa* v *Krishna*, 46 B. 925=1922 B 413=24 Bom. L.R. 428

(l) *Bhau* v. *Budha*, 50 B. 204=28 Bom. L R. 765=1926 B. 399; But see *Pandu* v. *Goma*, 43 B. 472=50 I.C. 765=21 Bom. L.R. 213; *Achut Sitaram* v. *Shivaji*, 39 Bom. L.R 224=1937 B. 244.

(m) *Dhulabhai* v *Lala*, 46 B. 28=23 Bom. L.R 777=1922 B. 137; *Chinnu* v. *Kalimuthu*, 35 M. 47=9 I.C. 596=21 M. L.J. 246=(1911) 1 M.W.N 238; *Gurlingappa* v. *Sabu*, 33 Bom. L.R. 141=1931 B. 218; *Daud* v *Radhakrishna*, 17 L. W. 332=44 M.L.J 309=1923 M. 467=1923 M.W N. 202.

and, if that be not possible consistent with the equities, then some other property falling to the alienor but which is equal in value to the property alienated should be given to him. [n] The purchaser of a coparcener's interest takes it subject to all the liabilities affecting that interest, such as the vendor's pious obligation to discharge his father's debts, [o] and where that interest, which is to be ascertained with reference to the alienor's share at the time of the alienation, [p] has to be worked out in a later suit for partition, it can be done only by taking the properties existing at the date of the partition suit and not with reference to the properties as they existed at the date of the alienation, [q] without any equity in favour of the purchaser for mesne profits prior to suit. [r]

317. New business and debts.—A new business started by the father as manager of joint family cannot be regarded as ancestral so as to render the interest of a minor in the joint family property liable for a debt incurred for the business. A manager has no power to impose upon a minor member the risk and liability of a new business started by him and it does not make any difference that the manager is also the father. There is no distinction in principle on this subject between a case under the Dayabhaga [s] and one under the Mitakshara [t] and a mortgage executed by the manager for debts incurred in such a new business will not be binding upon the other members. [t] The distinction between an ancestral business and one started after the death of the ancestor is this, that in the former case the relations between the members result by operation of law from a succession on the death of an ancestor to an established business with its benefits and obligations, while in the other they result ultimately on contractual relations between the parties which are not possible in the case of minors (*Ibid*). Such a new business will not be binding upon the adult members unless they have also consented. [u] In the case

(n) *Dawud* v *Radhakrishna*, 17 L.W. 332=1923 M. 467=44 M L J. 309=1923 M. W N. 202.

(o) *Venkureddi* v. *Venku Reddi*, 50 M 535=25 L W 784=52 M L.J 387=1927 M.W.N. 267=1927 M 471 (F.B.), *Chidambara* v. *Nachiappa*, 48 L.W 485.

(p) *Naro Gopal* v *Paraganda*, 41 B. 247=39 I.C. 23=19 Bom. L.R 69; *Chinnu* v. *Kalimuthu*, 35 M. 47=9 I.C. 596=21 M.L.J. 246=(1911) 1 M.W.N. 238 (F.B.); *Viswesra* v. *Varahanarasimhan* 1937 M W.N. 296=1937 M. 631.

(q) *Muthukumara* v. *Sivanarayana*, 56 M. 534=37 L.W. 19=64 M L.J. 66=1933 M.W.N. 199=1933 M. 158. See also Ss. 358 and 359.

(r) *Trimbak* v. *Pandurang*, 44 B. 621 57 I.C. 582=22 Bom. L.R. 812; *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265=25 I.C. 585=27 M.L J. 409.

(s) *Sanyasi Charan* v. *Krishnadhan*, 49 C 560 49 I A. 108=1922 P.C. 237=20 A.L.J. 409=24 Bom. L.R. 700=43 M.L. J. 41=1922 M.W.N. 364. 26 C.W.N. 954 =16 L.W. 536.

(t) *Benares Bank* v. *Hari Narain*, 54 A. 564=59 I.A. 300=34 Bom. L.R. 1079=36 C.W N. 826=1932 A.L.J. 714=63 M.L.J. 92 36 L.W. 56=1932 M.W.N. 788=13 P.L. T 491=1932 P.C. 182; *Gurmukh* v. *Shiveram*, 17 L. 53=1935 L. 482; *Sabhachand* v. *Sambhoo*, 39 Bom. L.R. 118=1937 B. 182; *Ganesh* v. *Sheo gobind*, 1938 Pat. 40.

(u) *Mahabir* v. *Amla*, 46 A. 364=1924 A. 379=22 A.L.J. 295; *Tammi Reddi* v. *Gangi Reddi*, 45 M. 281=16 L.W. 55=1922 M. 236(2)=42 M.L.J. 570; *Abdur Rahman* v. *Hussain*, 37 M.L.J. 318=42 Mad. 761=10 L.W. 204=1919 M.W.N. 600.

of such a newly started business, the minor members or those adults who have not consented to or acquiesced in the business being carried on are not entitled to claim a share in the profits unless the business is financed out of joint family funds. But these propositions cannot be taken to mean that the liability of the sons, whether minors or adults, under the pious doctrine, to discharge their father's debts is excluded simply because those debts were incurred by the father in starting and carrying on a new business (v) which cannot be justified either by the kulachara or the consent of the members of the coparcenary, and the ruling of the Privy Council in the *Benares Bank case* (w) cannot be said to have declared against the liability of the sons in respect of such debts or the father's power to alienate the family properties for their discharge so as to make the alienation binding on the sons' shares as an alienation for the discharge of antecedent debts.(x)

318. Insolvency in joint family.—When any coparcener, whether he be the father, the manager or an ordinary member of the joint family, is adjudicated insolvent, what vest in the Official Assignee or Receiver in addition to his separate property are only the coparcener's undivided interst in the joint property (y) and the power which he may exercise over the interests of the other coparceners as in the case of a father or manager. (z) Thus on the father's insolvency, his sons' shares do not vest in the Official Receiver, but only the father's power to sell the entire joint family property including the sons' shares for his personal Vyavaharika debts, (a) and the said power cannot be exercised by the Official Receiver so as to convey even the sons' interests after such

(v) *Annabhat* v. *Shivappa*, 52 B. 376 —30 Bom. L.R. 539=1928 B. 232 ; *Venkatasami* v. *Palaniappa*, 56 M.L.J. 380=52 M. 227=28 L.W. 762=1929 M. 153 ; To the same effect is the decision in Appeal No. 292 of 1932 short-noted in 46 L.W. Summary of Recent Cases, Page 63 ; *Pirthi Singh* v. *Mam Chand*, 16 L. 1077—1935 L. 761 ; *Bai Rajaram* v. *Manekial*, 56 B. 36—34 Bom. L.R. 55=1932 B. 136 ; *Jagadishprasad* v. *Ambashankar*, 36 Bom L.R. 625=1934 B. 324 ; *Ambalal* v. *Behar Hosiery Mills*, 1937 Pat. 657=16 Pat. 649 .18 Pat. L.T. 848 ; *Gulamkhaja* v. *Shivlal*, 40 Bom. L.R. 381.

(w) 54 A. 564=59 I.A. 300=34 Bom. L.R. 1079=36 C.W.N. 826=1932 A.L.J. 714=63 M.L.J. 92=36 L.W. 56=1932 M. W.N. 788=13 P.L.T. 491=1932 P.C. 182.

(x) *Gulamkhaja* v. *Shivlal*, 40 Bom. L.R. 381 ; *Jagadishprasad* v. *Ambashankar*, 36 Bom. L.R. 625=1934 B. 324 ; See also S. 312. See also *Ram Nath* v. *Chiranji Lal*, 57 A. 605=1935 A.L.J. 177=1935 A. 221 (F.B.) on the question of validity of an alienation in respect of a new business on the ground of benefit to the family.

(y) *Nathu Mal* v. *Dinanath*, 146 I.C. 840—1933 Lah. 651.

(z) *Khemchand* v. *Narain Das*, 6 Lah. 493—1926 L. 41 ; *Sat Narain* v. *Behari*, 6 Lah. 1—52 I.A. 22—47 M.L.J. 857=1925 M.W.N. 1—23 A.L.J. 85=21 L.W. 375=27 Bom. L.R. 135—29 C.W.N. 797=1925 P.C. 18 ; *Official Receiver* v. *Ramachandrappa*, 52 M. 246=28 L.W. 603=1929 M. 166—55 M.L.J. 721.

(a) *Sat Narain* v. *Behari Lal*, 6 Lah. 1=52 I.A. 22—47 M.L.J. 857=1925 M.W. N. 1—23 A.L.J. 85=21 L.W. 375=27 Bom. L.R. 135—29 C.W.N. 797=1925 P. C. 18 ; *Sat Narain* v. *Sri Kishen Das*, 44 M.L.W. 417=40 C.W.N. 1382=38 Bom. L.R. 1228—17 L. 644—63 I.A. 384=1936 P.C. 277—71 M.L.J. 812=1936 M.W.N. 1204 ; *Scetharama* v. *Official Receiver*, 49 M. 849=24 L.W. 345=1926 M. 994=51 M.L.J. 269=1926 M.W.N. 743 (F.B.).

interests have been attached by Court, [b] or after the sons become divided in status from their father by instituting a suit for partition though during the pendency of the insolvency proceedings, [c] or by the conversion of the son to some other religion. The same principle will apply even in the case of the insolvency of the manager of a joint family. [d] The fact that the father dies pending the insolvency proceedings does not put an end to the Receiver's power to sell the interests of the sons. [e] Even the separation in status between the insolvent father and his sons during the insolvency proceedings, though it prevents the Official Receiver from exercising his powers of private sale in respect of the sons' shares, does not put an end to the sons' liability for the father's debts in the insolvency, and the Official Receiver can work out that liability by suitable proceedings, either by getting himself impleaded as a party to the sons' partition suit [c] or by instituting regular suits against the sons for realising the amounts due to the father's creditors. [f] As their Lordships of the Privy Council observed in the case of *Sat Narain* v. *Sri Kishen Das* [g]:—

"Under S. 52 (2) (*b*) (of the Presidency Towns Insolvency Act) the capacity to exercise the insolvent's power to sell the joint family properties for his antecedent debts, these not having been incurred for immoral or illegal purposes, vested in the Official Assignee ..... But if, as their Lordships hold, S. 52 (2) (*b*) entitles the Official Assignee to exercise the power in question, it is clear that such power must be exercised subject to its limitations..... The father's power of sale for his debts exists only so long as the joint family property is undivided, and the capacity of the Official Assignee must be similarly limited. When the family estate is divided, it is necessary to take account of both the assets and the debts for which the undivided estate is liable. The appellants maintained that the pious obligation of the sons was an obligation not to object to the alienation of the joint estate by the father for his antecedent debts unless they were immoral or illegal, but that these debts were not a liability of the joint estate for which provision required to be made before partition. This argument was sought to be supported by the judgment of

(b) Official Receiver v. *Arunachalam*, 33 L.W. 607=1931 M. 118; Official Receiver v. Imperial Bank, 43 M.L.W. 35 =1936 M. 193=69 M.L.J 898=59 M 296 .1936 M.W.N. 510; *Gopalakrishnayya* v. *Gopalan*, 51 M. 342=54 M.L.J. 674= 1928 M. 479=27 L.W 430; *Subba Rao* v. *Official Receiver*, 1935 M. 427=42 M. L.W. 295=1935 M.W.N. 1029

(c) *Sat Narain* v. *Sri Kishen Das*, 44 M.L.W. 417=40 C.W.N. 1382=38 Bom. L.R. 1228=17 L. 644=63 I.A. 384=1936 P.C. 277=71 M.L.J. 812=1936 M.W.N. 1204. *Balusami Ayyar*, In re. 51 M. 417 =28 L.W. 109=1928 M. 735=1928 M.W. N. 294=55 M.L.J. 175 (F.B.).

(d) *Official Receiver* v. *Ramachandrappa*, 52 M. 246=28 L.W. 603=1929 M. 166=55 M.L.J. 721; *Varadarajan* v. *Srinivasa Rao*, 75 I.C 471=1924 M. 792; Mt Champa v. Official Receiver, 15 Lah. 9; Kanhaiya v. Dabha, 1933 N. 150; See also *Shripad* v. *Basappa*, 49 B. 785.

(e) *Seetharama* v. *Official Receiver*, 49 M. 849=24 L.W. 345=1926 M. 994=51 M. L.J. 269=1926 M.W.N. 743 (F.B.).

(f) *Balusami Ayyar*, In re. 51 M. 417= 28 L.W. 109=1928 M.W.N. 294=55 M.L.J. 175=1928 M. 735 (F.B.); *Krishnamurthy* v. *Sundaramurthy*, 55 M. 558=35 L.W. 592=63 M.L.J. 37=1932 M. 381; But see Bankey Lal v. *Durga Prasad*, 53 A. 863= 1931 A. 512=1931 A.L.J. 917 (F.B.).

(g) 44 M.L.W. 417=17 L. 644=63 I.A. 384=40 C.W.N. 1382=38 Bom. L.R. 1228 =71 M.L.J. 812=1936 P.C. 277=1936 M. W.N. 1204.

this Board delivered by Lord Dunedin in *Brij Narain* v. *Mangal Prasad*, 51 I.A. 129 = 46 A. 95 = 21 A.L.J. 934 = 28 C.W.N. 253 = 46 M.L.J. 23 = 5 P. L.T. 1=1924 M.W.N. 68=19 L.W. 72=26 Bom. L.R. 500=1924 P.C. 50, which was a case dealing with the rights of the father's mortgagee or creditor against the joint estate in the hands of the sons. That decision was important in that it corrected certain *obiter dicta* in the earlier decision of this Board in *Sahu Ram Chandra* v. *Bhup Singh*, 44 I.A. 126 = 39 A. 437 = 15 A.L.J. 437 = 19 Bom. L.R. 498 = 21 C.W.N. 698 = 33 M.L.J. 14=6 L.W. 213=1917 M.W.N. 439=1917 P.C. 61 and made clear, *inter alia*, that the doctrine was not based on any necessity for the protection of third parties, but was based on the pious obligation of the sons to see their father's debts paid, and also that it was immaterial to the liability of the family estate whether the father was alive or dead. There can be no doubt that it is a liability of the joint estate and, in the opinion of their Lordships, it follows that it is right to make provision for the discharge of this liability on partition of the joint estate. It was so decided in *Bawan Das* v. *Chiene*, 44 A. 316 = 20 A.L.J. 155=1922 A. 79; reference may also be made to *Venku Reddi* v. *Venku Reddi*, 50 M. 535 = 25 L.W. 784 = 52 M.L.J. 387 = 1927 M.W.N. 267 = 1927 M. 471 (F.B.)."

Though on the insolvency of a Hindu father, the shares of his undivided sons do not vest in the Official Receiver, the Official Receiver is still entitled to be in joint possession with the sons of all the family properties, and, in the exercise of the rights of the manager which accrued to him on account of their father's insolvency, excepting, of course, those rights such as the right to live in the family house or to share in the family meals, which on account of their personal nature, the official Receiver cannot exercise, he has a right to grant leases and collect the rents even in respect of the sons' shares for the purpose of paying off the father's debts not tainted by illegality or immorality.(h) This principle is based upon the ruling in *Official Assignee of Madras* v. *Ramachandra Aiyar*,(i) wherein the following propositions have been laid down. "It can be taken as established law that the Official Assignee, on the insolvency of the managing member of a joint Hindu family, succeeds to two things (1) the undivided interest of the insolvent in the joint property and (2) his rights as managing member so far as they can be exercised for his own benefit. It is also established that he is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency."

319. Adjudication of son for father's debts.—In the absence of special circumstances which would render a son personally liable for the debt, he cannot be adjudged insolvent on account of his liability to pay his deceased father's debts out of the family

(h) *Shankaranarain* v. *Official Receiver*, 36 L.W. 581=1933 M. 73=1932 M.W.N. 1189.

(i) 46 M. 54=16 L.W. 559=68 I.C. 898 =1923 M. 55=1922 M.W.N. 653=43 M. L.J. 569.

properties. Such special circumstances justifying the adjudication of the son for the father's debt may exist when they are members of a partnership and the debt was incurred for its purposes or when the son by obtaining time for payment of the father's debt impliedly agreed to become personally liable.(j) In a Madras case(j) occur the following observations :—

"The question in this petition is whether the son of a Hindu father who died after incurring debts on promissory notes can be adjudged insolvent on account of his liability as a member of the family to pay those debts out of the family properties. The Subordinate Judge held that he could be, but the learned District Judge held that he could not be so adjudged.

The learned Advocate for the petitioner (creditor) argues that the District Judge's decision is not correct and relies upon the decision in *Muthu Veerappa Chettiar* v. *Sivagurnatha* Pillai,(k) which followed an unreported decision in C.M.A. No. 47 of 1916. The unreported decision goes to the full length of holding that members of joint families liable as such for a family debt but not otherwise, are debtors within the meaning of the Insolvency Act and therefore can be adjudged insolvent on those debts. The decision in *Muthu Veerappa Chettiar* v. *Shivagurunatha Pillai*(k) did not fully follow this, because the learned Judges say that each case must depend on its own circumstances and that if the petitioner makes necessary allegations and proves them then the Court would be justified in adjudging the members of the joint family as insolvents. All that the decision amounts to in my opinion, is that the fact of persons being members of an undivided family does not prevent their being adjudicated insolvents. This is obvious enough, if there be other circumstances which make them personally liable for the debt, such as that they were members of a trading firm and that the debts were incurred for trading purposes in which case the inference is drawn that all those who are or hold themselves out as partners make themselves personally liable as such; or there may be a case in which a member by obtaining time for payment may be implied to have agreed to become personally liable. These of course are facts quite distinct from being a member of the undivided family. But apart from some such special circumstance which would make a member personally liable for the family debt I am not able to see how a member's liability to pay the debt of his family which involves only liability to satisfy it to the extent to which that family property will go can be held to be a personal liability involving liability of his separate or self-acquired property which is a necessary foundation for adjudication, and this has been so held in *Nayasubramania Mudaliar* v. *Krishnamachariar*.(l) The learned Advocate relied upon a decision in *Somasundaram Chettiar* v. *Raja Kannoo Chettiar*,(m) but that is of no use to him because that was a case of a trade debt. He also relied upon a decision of the Lahore High Court, *Pars Ram* v. *Amir Chand*,(n) with which I am not able to agree."—34 L.W. 761 to 763.

320. Adjudication of a minor.—A minor member of a joint family can never be adjudicatd an insolvent even as a member of

(j) *Purnayya* v. *Kotayya*, 34 L.W. 761 =1931 M. 788=61 M.L.J. 518.

(k) 49 M. 217=22 L.W. 617=49 M.L.J. 697=1926 M.W.N. 63=1926 M. 133(1).

(l) 50 M. 981=26 L.W. 400=53 M.L.J. 403=1927 M. 922.

(m) 118 I.C. 494=1929 M.W.N. 262=1929 M. 573.

(n) 109 I.C. 464=1928 L. 354.

a joint family carrying on an ancestral business.[o] But on the firm becoming unable to pay its debts, the adult members who have taken active part in the business may be adjudicated as insolvents, and the Official Assignee in whom their power of management will vest will be entitled to realise the minor's interests in the joint family property for the purpose of paying off the firm's debts if the business is an ancestral one. If, on the other hand, the business carried on by the adult members of a joint Hindu family is not an ancestral one but a business started only by themselves, then the only minors in the family whose interests in the joint family property can be sold by the Official Receiver on the adjudication of the adult members are those who are the sons or grandsons or great-grandsons of such adult members and not the minor brothers or minor nephews of the insolvents.[p]

321. Wife's authority to incur debts.—A wife has an implied authority to pledge the credit of her husband[q] which, however, is limited to the household necessaries.[r] This authority is not taken away by the husband's insanity,[s] but does not include a power to acknowledge a debt due from her husband,[s] or to bind him by her misappropriations.[t]

322. Rule of Damdupat.—The texts of Hindu Law, under which there is no period of limitation prescribed for recovering debts, have enunciated a rule, known as the rule of Damdupat, in order to prevent usury and operate as a restriction against accumulation of interest. The rule which is applicable both to unsecured and secured debts[u] simply means that the creditor is not entitled to recover at any given time an amount by way of interest which is in excess of the amount of principal due at that time.[v] The question whether the interest is in excess of the principal or not is to be determined with reference to the principal due on the bond governing their relationship at the time the question arises and not with reference to the principal due on a prior bond

(o) *Chidambaram* v *Mutaya*, 1936 R. 160=14 R. 122; *Lovell* v. *Beauchamp*, (1894) A.C. 607; *Joykisto* v. *Nittyanand*, 3 C. 738; *Ram Partab* v. *Foolibai*, 20 B 787.

(p) *Bhola Prasad* v. *Ram Kumar*, 11 P. 399=14 P.L.T. 63=1932 P. 231; *Sanyasi Charan* v. *Asutosh*, 42 C. 225=26 I.C. 836; *Official Receiver* v. *Ramachandrappa*, 52 M. 246=28 L.W. 603=1929 M. 166=55 M.L.J. 721; *Nunna* v. *Chidaraboyina*, 26 M. 214; *Mt. Champa* v. *Official Receiver*, 15 L. 9=36 P.L.R. 450=1933 L. 901.

(q) *Viraswami* v. *Appaswami*, 1 M.H.C.R. 375; *Nathubai* v. *Javher*, 1 B. 121; *Pusi* v *Mahadeo*, 3 A. 122.

(r) *Narada*, 111—19.

(s) *Gomathi Ammal* v. *Avu Ammal*, 56 M. 964=1933 M. 686=38 L.W. 321=1933 M.W.N. 365=65 M.L.J. 355.

(t) *Simpson* v. *Bachman*, 27 I.C. 622(1) =13 A.L.J 55.

(u) *Nathubhai* v. *Mulchand*, 5 Bom. H.C.R. 196; *Sundrabai* v. *Jayavant*, 24 B. 114; *Nanda Lal* v. *Dhirendra*, 40 C. 710=21 I.C. 974.

(v) *Nobin Chunder* v. *Romesh Chunder*, 14 C. 781 (F.B.); *Nanda Lal* v. *Dhirendra*, 40 C. 710=21 I.C. 974

which has been superseded.[w] In other words, the rule does not operate as a prohibition against the creditor receiving an amount of interest in excess of the amount originally lent, but only prevents the creditor from claiming to recover more than double the amount of principal due under the bond sued on though that bond has been taken for the aggregate amount of principal and interest under a prior bond. This rule does not apply (1) after suit,[x] (2) where the original debtor is not a Hindu,[y] (3) where the creditor is under a liability to account to his debtor for the rents and profits of the property of which the creditor is in possession under a possessory mortgage[z] or (4) after the debt is assigned to a non-Hindu.[a] But if the loan is made on the joint account of a Hindu borrower and a non-Hindu borrower, the rule applies so far as the Hindu borrower is concerned. This, however, does not prevent the non-Hindu joint borrower from claiming contribution from the Hindu borrower on the basis of the sum he has actually paid to the creditor, even though by reason of this rule that sum is in excess of what the lender could have recovered from the Hindu joint borrower.[b]

323. Extent of its operation.—The rule of Damdupat is inapplicable in the Madras Presidency[c] and in Bengal[d] except in the Town of Calcutta.[e] It has been held to be in force in the Presidency of Bombay.[f]

324. Benami transactions.—A benami transaction is one whereby a person purchases property in the name of another or transfers his own property to another without any intention that that other should have any beneficial interest in the property so purchased or transferred. The essence of a benami transfer is to give it the appearance of reality, to cloak a fictitious transfer with all the appearance of a genuine one.[g] The presumption is that every ostensible owner is the real owner also and the onus is upon the person alleging a transaction to be benami to make out the

(w) *Suk Lal* v. *Bapu*, 24 B. 305.

(x) *Nanda Lal* v. *Dhirendra*, 40 C. 710 —21 I.C. 974; *Hiralal* v. *Narsilal*, 37 B. 326=40 I.A. 68=25 M.L.J. 101=15 Bom. L.R. 483=11 A.L.J. 342=1913 M.W.N. 428=17 C.W.N. 573=18 I.C. 909 (P.C.); See also *Marotirao* v. *Mankuerbai*, 1931 N. 161=14 N.L.J. 109.

(y) *Dawood* v. *Vullubhdas*, 18 B. 227; *Harilal* v. *Nagar*, 21 B. 38; *Narayan* v. *Purushottam*, 1931 N. 144=27 N.L.R. 144.

(z) *Nathubai* v. *Mulchand*, 5 Bom. H. C. R. 196.

(a) *Ali Saheb* v. *Shabji*, 21 B. 85; *Narayan* v. *Purushottam*, 1931 N. 144=27 N.L.R. 144.

(b) *Maha Maya* v. *Abdur Rahim*, I.L. R. (1937) 1 C. 450=1937 C. 752.

(c) *Annaji* v. *Raghubai*, 6 M.H.C.R. 400.

(d) *Het Narain* v. *Ram Dein*, 9 C. 871.

(e) *Nobin Chunder* v. *Romesh Chunder*, 14 C. 781 (F.B.).

(f) *Narayan* v. *Satvaji*, 9 Bom. H.C.R. 83.

(g) *Amrit* v. *Gur Charan*, 1934 A. 226.

allegation.[h] The criterion in an alleged case of benami is to consider from what source the money came with which the purchase was made[i] and what was the intention of the parties in effecting the transfer in the name of the person other than the one who furnished the money for the transaction, that is, whether the beneficial interest was intended to pass to the ostensible transferee or not.[j] But the mere proof of the benami nature of a transaction does not enable the real owner to recover the property in all cases from the benamidar. If the transaction is entered into with a view to commit a fraud upon others and the fraud has been carried out, or if the benamidar has transferred the property for consideration to another without notice of the benami nature of the transaction, or if the transaction is against public policy or statute,[k] the property cannot be recovered by the real owner. A person who has conveyed property benami to another for the purpose of effecting a fraud, cannot, where the fraud has been carried out, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance even though the plaintiff might have been a party to the fraud. The maxim *in pari delicto potior est conditio possidentis* does not apply to such a case, the true principle applicable being that that party must fail who first has to allege the fraud in which he participated.[l] But if the fraud has not been carried out the executant is entitled to raise the plea that the transfer was only nominal.[m] A purchase in India by a Hindu of property in the name of his wife, unexplained by other proved or admitted facts, is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of law in England that such a purchase by a husband is to be assumed to be a purchase for the advancement of the wife does not apply in India.[n] But the mere

(h) *Mohammad Sadiq* v. *Fakhir Jahan*, 59 I.A. 1=6 Luck. 556=36 C.W.N. 137=35 L.W. 118=62 M.L.J. 320=1932 A.L.J. 663=1932 P.C. 13; *Nirmal Chunder* v. *Mahomed*, 26 C. 11=25 I.A. 225 P.C.; *Sreemanchunder* v. *Gopal Chunder*, 11 M.I.A. 28; *Uman Pershad* v. *Ghandarp*, 15 C. 20=14 I.A. 127.

(i) *Dhurm Das* v. *Shama Soondri*, 3 M.I.A. 229; *Bilas Kunwar* v. *Desraj*, 42 I.A. 202=37 A. 557=13 A.L.J. 991=17 Bom. L.R. 1006=19 C.W.N. 1207=29 M.L.J. 335=2 L.W. 830=1915 M.W.N. 757=1915 P.C. 96.

(j) *Mohamed* v. *Vednath*, 1938 R. 26: *Sitamma* v. *Sitapati*, 46 L.W. 651=1938 M. 8=(1937) 2 M.L.J. 606: *Thulasi Ammal* v. *Official Receiver*, 67 M.L.J. 541=40 L.W. 633=1934 M. 671=1934 M. W.N. 580.

(k) *Sundrabai* v. *Manohar*, 1933 B. 262=35 Bom. L.R. 404.

(l) *Kotayya* v. *Mahalakshmamma*, 56 M. 646=37 L.W. 645=64 M.L.J. 719=1933 M.W.N. 652=1933 M. 457.

(m) *Subbaraya* v. *Venkatesa*, 39 L.W. 357=1934 M. 252; *Petherperumal* v. *Muniandy*, 35 I.A. 98=35 C. 551=10 Bom. L.R. 590=5 A.L.J. 290=12 C.W.N. 562=18 M.L.J. 277 (P.C.).

(n) *Lakshmiah* v. *Kothandarama*, 48 M. 605=52 I.A. 286=23 L.W. 138=23 A.L.J. 662=49 M.L.J. 109=27 Bom. L.R. 1076=29 C.W.N. 1013=1925 M.W.N. 717=1925 P.C. 181; But see *Sitamma* v. *Sitapati*, 46 L.W. 651=1938 M. 8=(1937) 2 M.L.J. 606; *Bilas Kunwar* v. *Desraj*, 37 A. 557 at 564=42 I.A. 202=13 A.L.J.

fact of marriage does not raise a presumption that in the case of property standing in the name of the wife the beneficial interest is in the husband.(o)

LAW OF JOINT FAMILY UNDER THE DAYABHAGA

325. The Dayabhaga Family and its incidents.—*"The sons have no right of ownership in the wealth of the living parents, but the estate of both when deceased."* (Dayabhaga i-30).

Under the Dayabhaga there can be no coparcenary between a father and his son.(p) So long as the father is alive, the son does not take any interest in the ancestral property in the father's hands, and the right by birth in the said property accorded to the son under the Mitakshara does not exist under the Dayabhaga.(q) As a corollary, the son cannot claim partition against father, and the father, as the absolute owner, is entitled to dispose of the property in any way he likes by way of gift, will, sale etc.(r) What is known as the coparcenary under the Dayabhaga springs up only on *the death of the father* while the Mitakshara coparcenary is founded *on the birth of a son.* The Dayabhaga coparceners are in the position of tenants-in-common, with the result that on the death of any of them, his own heirs, even though they be females, step into the shoes of the deceased and become coparceners with his surviving coparceners. Thus while a Mitakshara coparcenary can never consist of females, it is not rare to find a Dayabhaga coparcenary consisting of both males and females, the females being the widows or daughters of a coparcener who had died without male issue. In short, on the death of a coparcener, his interest will descend to his own heirs, though they be his widows or daughters and will not survive to the other coparceners,(s) the reason being that, though the coparceners under the Dayabhaga have unity of possession as distinguished from the unity of ownership existing as between coparceners under the Mitakshara each coparcener takes a defined share in the coparcenary property and can transmit it to his own heirs.(t) This being the true nature and extent of a coparcener's right under the Dayabhaga, it follows that his powers of alienation are absolute and unfettered unlike those of his confrere governed

991—17 Bom L R. 1006—19 C W.N. 1207 =29 M.L.J. 335—2 L.W. 830=1915 M. W.N. 757—1915 P C 96; *Thulasi Ammal* v. *Official Receiver*, 67 M L J. 541= 40 L.W. 633=1934 M.W.N. 580=1934 M. 671: *Ismail* v. *Hafiz*, 33 C. 773 at 784 (P.C.)=33 I.A. 86 -8 Bom. L.R. 379=3 A.L.J 353—16 M.L.J. 166—10 C.W.N. 570 (P.C.).

(o) *Shib Kumari* v. *Subudhi*, 1932 C. 829.

(p) *Hemchandra* v. *Mati Lal*, 60 C 1253—1934 C. 68=37 C.W.N. 1174.

(q) *Gouranga* v. *Mohendra*, 1927 C. 776.

(r) *Juggo* v. *Neemoo, Morton* 90; *Debendra* v. *Brojendro*, 17 C. 886.

(s) *Durga Nath* v. *Chintamoni*, 31 C. 214—8 C.W.N. 11.

(t) *Soorjeemoney* v. *Denobundoo*, 6 M.I.A. 526 at 553.

by the Mitakshara law, and can be exercised even by way of gift or will. He can call for a partition at any time he likes and can pass this right to his transferee as well as the right to be in joint possession with the other coparceners.(u)

326. Self-acquisitions and presumptions.—A Dayabhaga coparcener can acquire fresh property either with or without the aid of joint funds. Under the Dayabhaga School of Hindu Law there can be no joint family of father and sons in the sense known to the Mitakshara. The sons may acquire separate property having no concern with the joint family property. Also, brothers living in commensality cannot claim the self-acquisition of a brother as acquisition of the joint family unless they prove that they also have contributed to that acquisition. But there is nothing to prevent a member from throwing his self-acquired property into the joint stock(v) but this can be established only by clear proof of intention to waive separate rights in the property by the member acquiring it.(w) But if there be joint funds or joint nucleus from which such acquisition could have been made, the presumption is that the acquisition is for the benefit of the whole coparcenary.(x) If, on the other hand, it is shown that the means of acquisition drawn from the joint funds is of little consideration and the personal exertion of the acquirer considerable, the acquirer is entitled to an additional share therein.(y) But if it is proved that the acquisition is made without the aid from the joint property, the acquirer is entitled to the whole of it. But a property purchased in the name of the son even during his father's lifetime is presumed to be that of the son since under the Dayabhaga there can be no coparcenary between a father and son so as to attract the presumption against the son which under the circumstances may arise under the Mitakshara.(z)

327. Debts.—The nature and extent of the rights of a father or a coparcener under the Dayabhaga being as already described, it follows that his interest can be sold or mortgaged by him for the discharge of his debts and that the said interest is liable to be proceeded against even after his death as assets in the hands of his

(u) *Rajanikanth* v. *Ram Nath*, 10 C. 244.

(v) *Rajani Kanta* v. *Jaga Mohan*, 50 C. 439=50 I.A. 173=44 M.L.J. 561=25 Bom. L.R. 683=1923 M.W.N. 438=18 L.W. 387=27 C.W.N. 997=1923 P.C. 57.

(w) *Hemchandra* v. *Mati Lal*, 60 C. 1253=37 C.W.N. 1174=1934 C. 68; *Rajani Kanta* v. *Jaga Mohan*, 50 I.A. 173=50 C. 439=44 M.L.J. 561=25 Bom. L.R. 683=1923 M.W.N. 438=18 L.W. 387=27 C.W.N. 997=1923 P.C. 57, *Nanilal* v. *Nutbehari*, 38 C.W.N. 861; See also S. 249.

(x) *Haragouri* v. *Ashutosh*, 1937 C. 418. See also S. 263.

(y) *Lala* v. *Swarna*, 13 C.W.N. 1133=3 I.C. 102.

(z) *Jasoda* v. *Lal Mohun*, 1926 C. 361; *Sarada* v. *Mahananda*, 31 C. 448; *Govind* v. *Radha*, 31 A. 477=3 I.C. 563=6 A.L.J. 591; *Nibaran* v. *Sashi*, 60 C. 729=1933 C. 640.

heirs by his creditor. In the case of the managing member of a Dayabhaga family, an implied consent of the other members to incur a debt on behalf of the joint family may be presumed from the very fact of their entrusting the management to the managing member, and all of them may be made liable for the debt so incurred by the manager.[a] But the manager has no power to impose on a minor member the risks and liabilities of a new business started by himself.[b]

(a) *Sukhadakanta* v. *Jogineekanta*, 60 C. 1197=1934 C. 73=37 C.W.N. 1087; *Miller* v. *Ranga Nath*, 12 C. 389; *Dwarka Nath* v. *Bungshi*, 9 C.W.N. 879.

(b) *Sanyasi Charan* v. *Krishnadhan*, 49 C. 560=49 I.A. 108=20 A.L.J. 402=24 Bom. L.R. 700=43 M.L.J. 41=1922 M.W.N. 364=26 C.W.N. 954=16 L.W. 536=1922 P.C. 237.

CHAPTER X

PARTITION

328. Right to partition—Its origin and development.—In the archaic tribal society, the right to partition was unknown as is borne out by the text of Usanas which declares that land was "indivisible among kinsmen even to the thousandth degree".[a] But in course of time, due to the tribal group becoming more and more unwieldy, the family began to emerge as a distinct entity, its rights being yielded to by the rights of the community. With the reign of better order and peace in society, the economic laws forced a recognition by the family of individual rights and self-acquisition on the part of its members, and this stage is referred to in the text of Brihaspati "He among them who has made an acquisition, may take a double portion of it." It is but natural that he who is more lucky or more clever than others in his family in the matter of earning wealth should desire to be freed from their claims and transmit it intact to his own descendants. In this endeavour on the part of the individual member to emancipate himself from the shackles and restraints imposed upon him by those who along with him constituted the family, the Brahmins, who saw in the disintegration of the family an opportunity to increase their emoluments by the multiplication of ceremonies in the divided families, stood by his side with the sacred texts making division not only legal, but even laudable. Manu's text "Since religious duties are multiplied in separate houses, their separation is therefore legal and even laudable"[b] as well as Gautama's text[c] "If a division takes place, more spiritual merit is acquired" marks this final stage when partition became not only legal but meritorious. But the right to partition as it obtains to-day has been evolved by very slow steps. Originally the sons could not obtain partition unless their father chose to distribute the property.[d] In the next stage, the necessity for consent of the father was dispensed with if he happened to be unfit to wield his patriarchal authority by age, sickness etc.[e] But the sons could not claim partition so long as their mother was alive.[f] But all these restrictions and many others had passed away by the time the commentaries came to be written and Vijnaneswara clearly lays down in his commentary the sons' co-ownership with the father and the concomitant right to demand partition,

(a) *Cited in the Mitakshara*, I-4-36.
(b) ix—111.
(c) xxviii—4.
(d) *Manu* ix. S. 104; *Baudhayana*, ii.
(e) *Sankha cited in Mitak*, I-2-7.
(f) *Narada*, iii. Ss. 38 and 40; *Manu*, ix, S. 104.

though this co-ownership of the sons with the father is not admitted by the Bengal School. To-day partition is favourably viewed by the Hindu religion and law.(g) But the vestiges of the several stages in the evolution of this right still remain: the communal right of pre-emption which obtains in the Punjab is the survival of the original rights of the community; the obligation of the sons to discharge the father's debts and his right to divide his sons may be traceable to the supreme power which the father once enjoyed.

329. What is partition.—In Hindu Law "partition" does not mean simply division of property into specific shares. It covers both division of title and division of property. Vignaneswara defines the word "Vibhaga," which is usually rendered into English by the word "partition," as the "adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate".(h) Mitra Misra explains in the Viramitrodaya the meaning of this passage; he shows that the definition of Vignaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals who claim the heritage jointly. He says: "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as the means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares."(i) Nowhere in the Mitakshara is it stated that an agreement between all the coparceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until all of them attained majority, a position which is expressly combated and negatived in the Viramitrodaya. In fact later writers leave no room for doubt that "separation," which means the severance of status of jointness, is a matter of individual volition. For example, Nilakanta, the author of the Vyavahara Mayukha, expressly lays down that "even where there is a total absence of common property, partition is effected by the mere declaration, "I am separate from thee," for, partition is a particular condition of the mind, and the declaration is the indication of the same." The following gloss in the Viramitrodaya appears to be conclusive on the rule of law under the Mitakshara. "Here again" it says "partition at the desire of the sons" which expression includes grandsons and great-grandsons "whether

(g) *Juggut Mohinee* v. *Mt. Sookheemoney*, 14 M.I.A. 289.

(h) *Mitak.*, 1-1-4.

(i) *Viramitrodaya*, 1-36.

in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction".(j) Separation from the joint family involving the severance of the joint status so far as the separating member is concerned with all the legal consequences resulting therefrom is quite distinct from the *de facto* division into specific shares of the property held until then jointly. The first is a matter of individual decision whilst the other is the natural resultant from that decision. Thus an unequivocal and unmistakable manifestation by a member of a joint family by his words or conduct of a fixed and determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place or though there is no separation in food and dwelling.(k) Once there is a definite and unmistakable indication of a member to separate, his right to obtain and possess his share is unimpeachable, and neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient.(l)

Thus for severance in status:

(1) there must be an unmistakable manifestation of intention to be divided;

(2) no division by metes and bounds is necessary;

(3) existence of property is not essential;

(4) the reasons for the severance are immaterial;

and (5) the existence of minors is no bar.

In the absence of intention to separate, the mere fact that the shares of the coparceners have been ascertained does not lead to the inference that the family has separated.(m) Even where an un-

(j) Observations of *Amir Ali* in *Girja Bai* v. *Sadashiv*, 43 I.A. 151=37 I.C. 321=43 C. 1031 at 1045-7 =14 A.L.J. 822=18 Bom. L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=1916 P.C. 104.

(k) *Amritrao* v. *Mukundrao*, 13 L.W. 112=1919 P.C. 91; *Yadao* v. *Namdeo*, 49 C. 1=48 I.A. 518=20 A.L.J. 481=42 M.L.J. 219=15 L.W. 565=26 C.W.N. 393=24 Bom. L.R. 609=1922 P.C. 216; *Syed Kasim* v. *Jorawar Singh*, 50 C. 84=49 I.A. 358=16 L.W. 223=43 M.L.J. 676=25 Bom. L.R. 1=21 A.L.J. 57=27 C.W.N. 179=1922 P.C. 353; *Ramalinga Annavi* v. *Narayana Annavi*, 45 M. 489=49 I.A. 168=1922 M.W.N. 399=26 C.W.N. 929=43 M.L.J. 428=20 A.L.J. 839=24 Bom. L.R. 1209=16 L.W. 639=1922 P.C. 201; *Girja Bai* v. *Sadashiv*, 43 C. 1031=43 I.A. 151=14 A.L.J. 822=18 Bom. L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=1916 P.C. 104; *Suraj Narain* v. *Iqbal Narain*, 35 A. 80=40 I.A. 40=15 Bom. L.R. 456=17 C.W.N. 333=11 A.L.J. 172=1913 M.W.N. 183=24 M.L.J. 345=18 I.C. 30 (P.C.); *Kanai Nain* v. *Budh Singh*, 39 A. 496=44 I.A. 159=15 A.L.J. 581=19 Bom. L.R. 642=21 C.W.N. 986=33 M.L.J. 42=6 L.W. 330=1917 M.W.N. 514=1917 P.C. 39.

(l) *Girja Bai* v. *Sadashiv*, 43 C. 1031=43 I.A. 151=14 A.L.J. 822=18 Bom. L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=1916 P.C. 104.

(m) *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254=52 I.A. 83=48 M.L.J. 83=6 P.L.T. 133=21 L.W. 439=1925 M.W.N. 330=27 Bom. L.R. 735=23 A.L.J. 746=29 C.W.N. 846=1925 P.C. 49.

equivocal wish to separate was once declared by notice, a separation would not be effected in law, if it be found as a fact that the intention was given up and the notice expressly or impliedly withdrawn owing to a subsequent agreement between all the parties.[n]

330. Position of members after severance in status.—After a division of right and interest among the coparceners and before an actual division by metes and bounds, their position is that of tenants-in-common[o] and the interest of such a divided coparcener does not go to the other coparceners by right of survivorship.

PARTITION HOW EFFECTED

331. Partition by father.—"According to Hindu Law it is competent to a father to make a partition during his life, and the partition so made by him binds his sons,[p] not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him, though subject to certain restrictions imposed in the interests of the family. In cases like this the question is not whether such partition is a contract, like a partition made among brothers after their father's decease, but whether it is a legal transaction, concluded in conformity to the Hindu Law."[q] Thus the father is in his lifetime competent to effect a separation in the family even without the consent of his sons provided the shares allotted to himself and the sons are equal[q] and the mere fact that the share of one son is not separated by metes and bounds does not affect the status split up by the father by a deed of partition giving separate shares to the sons.[r] But a partition by a father giving unequal shares to the sons, or a share to an absolute stranger except when it could be supported as a *bona fide* compromise of a disputed claim,[s] or when it is effected under his will is invalid unless assented to by the sons.[t] The father's power to effect a severance in his joint family both as between himself

(n) *Banker Behari* v. *Brij Behari*, 51 A. 519 :1929 A.L.J. 115 :1929 A. 170 · *Phangan Singh* v. *Hukam Singh*. 1933 L. 588 ; *Palani Ammal* v. *Muthuvenkatachala*. 48 M. 254—52 I.A. 83—48 M.L.J. 83—6 P.L.T. 133—21 L.W 439—1925 M.W.N. 350—27 Bom. L.R 735=23 A.L.J. 746—29 C.W.N. 846—1925 P.C. 49 ; *Bal Krishna* v. *Ram Krishna*, 58 I.A. 220=53 A 300—1931 P.C. 154=1931 A.L.J. 499—35 C.W.N. 815—34 L.W. 13—1931 M.W.N. 793- 61 M.L.J. 382=33 Bom. L.R. 1280.

(o) *Ram Kissen Singh* v. *Sheomundan*, 3 Suth. 151 ; *Balkishen Das* v. *Ram Narain*, 30 C. 738=30 I.A. 139=5 Bom. L.R. 461=7 C.W.N. 578 (P.C.).

(p) *Venkatapathi* v. *Venkatanarasimha*. 1936 P.C. 264—63 I.A. 397=71 M.L.J. 558 =41 C.W.N. 7—44 M.L.W. 408—38 Bom. L.R 1238.—17 P.L.T. 881 :—1936 A.L.J. 1039.

(q) *Kandasami* v. *Doraisami*, 2 M. 317 ; *Shiv Dyal* v. *Ram Jivaya*, 12 L. 574—32 P.L.R. 376—1931 L. 603 ; *Muruyayya* v. *Palaniyandi*, 31 M.L.J. 147. *Mit.* 1-2-2.

(r) *Nirmon* v. *Fateh*, 52 A. 178=1929 A. 963—1929 A.L.J. 1233.

(s) *Ramkishore Kedarnath* v. *Jatnarayan*, 40 C. 966—40 I.A. 213=15 Bom. L.R. 867—11 A.L.J. 865—17 C.W.N. 1189=25 M.L.J. 513—20 I.C. 958.

(t) *Brijraj* v. *Sheodan*, 35 A. 337=40 I.A. 161—25 M.L.J. 188—15 Bom. L.R. 652—11 A.L.J. 688=1913 M.W.N. 515—17 C.W.N. 949—19 I.C. 826 (P.C.); *Harkesh* v. *Hardevi*, 49 A. 763=1927 A. 454.

and his sons and as between the sons *inter se*[u] is a right inherent only in the father as a survival of the *patria potestas* and is not exercisable by any other ancestor as for instance a grandfather with reference to his grandsons.[u-a] But so far as the separate property of the father is concerned, he is at perfect liberty, being its absolute owner, to divide it among the sons i.e. unequal shares or even deny to some of the sons any interest therein.

332. Partition by individual volition.—Since every coparcener, (except in Bombay when he happens to be living joint with his father who himself remains joint with his own father or collaterals) has an inherent right to become separate without the consent and even against the will of his coparceners,[v] a definite and unambiguous expression or indication by one member of his intention to separate himself and to enjoy his share in severalty amounts to a disruption of the status of jointness,[w] although division of possession or partition by metes and bounds does not take place or though there be no separation in food and dwelling,[x] and even though the other sharers do not agree to the separation,[y] or happen to be minors.[z] In other words, a division of right or a severance of the joint status may result not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate though it may not physically partition the estate.[za] But mere renunciation by one member of his interest in the estate does not affect the joint status of the other members.[w] What may amount to a separation or what conduct on the part of some of the members may lead to

(u) *Venkatapathi* v. *Venkatanarasimha*, 63 I.A. 397=44 M.L.W. 408=71 M.L.J 558 =41 C.W.N. 7=1936 P.C. 264=3S Bom. L.R. 1238=17 P.L.T. 881=1936 A.L.J. 1039; *Venkateswar* v. *Mankayammal*, 69 M.L.J. 410=42 M.L.W. 955=1935 M.W.N. 1271=1935 M 775 (case of father and a lunatic son)

(u-a) But a grandfather may have this right if the family consists of only himself and his grandsons by his predecessed son: *Aiyavier* v. *Subramania*, 32 M L J 439.

(v) *Appovier* v. *Rama Subba Aiyan*, 11 M.I.A. 75; *Dhanabati* v. *Protapmull*, 61 C. 1056=38 C.W.N. 1045=1935 C. 131.

(w) *Girja Bai* v. *Sadashiv*, 43 I.A. 151 =43 C. 1031 -14 A.L.J. 822=18 Bom. L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=1916 P.C. 104; *Suraj Narain* v. *Iqbal Narain*, 40 I.A. 40=18 I.C. 30=35 A. 80 (P.C.)=15 Bom. L.R. 456=17 C.W.N. 333=11 A.L.J. 172=1913 M.W.N. 183=24 M.L.J. 345.

(x) *Syed Kasam* v. *Jorawar*, 50 C. 84 =49 I.A. 358=16 L.W. 223=43 M.L.J. 676 =25 Bom L R 1 21 A.L.J 57 27 C W.N. 179=1922 P.C 353; *Amritrao* v *Mukundrao*, 13 L.W. 112=1919 P.C. 91; *Bai Krishna* v. *Ram Krishna*, 53 A. 300=58 I A 220=1931 P.C. 154 61 M L J. 362. 1931 A.I.J 499 .35 C W N. 815=33 Bom L R 1280=34 M.L.W. 13 1931 M W N 793; *Babu Ramasray* v. *Radhika*, 40 C.W N. 385. 38 Bom. L R 120=43 M L W. 172=1936 A.L.J. 20=159 I.C. 335; *Mt Anurago* v. *Darshan*, 47 L.W. 225=1938 P.C. 65.

(y) *Girja Bai* v. *Sadashiv*, 43 C. 1031 =43 I A 151=14 A.L.J. 822=18 Bom L R 621=20 C W N 1085=31 M.L.J. 455=4 L.W 114=(1916) 2 M.W.N. 65=1916 P.C. 104; *Babu Ramasray* v. *Radhika Devi*, 43 M L.W. 172 P.C.; *Dhanabati* v. *Protapmull*, 61 C 1056=38 C W N. 1045=1935 C. 131.

(z) *Dnyaneshwar* v. *Anant*, 1936 B. 290 =38 Bom. L R 579=60 B. 736; *Girja Bai* v. *Sadashiv*, 43 C. 1031=14 A.L.J. 822=18 Bom L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=43 I.A. 151=1916 P.C. 104.

such disruption of status and convert a joint tenancy into a tenancy-in-common must depend upon the facts of each case.[a] But the conclusion whether the intention to separate derivable from conduct is unequivocal and explicit must be based on the inference of intention derivable from the acts and declaration of the member who is alleged to have separated himself and not from the conduct or attitude of another party.[y] A mere notice of intention to separate which is only in the nature of a threat and where the intention is not real or is soon after abandoned, is not sufficient to effect a severance in status.[b] Nor is such an intention to separate having the effect of a severance in status to be derived from the fact that a coparcener has filed a petition for being adjudicated as an insolvent and has been so adjudicated thereon[c] or from the fact that he has alienated his entire interest in the joint family property in favour of a stranger.[d] A demand by a coparcener for his share with the intention of holding it in severalty made by instituting a suit for partition amounts to a declaration of intention having the effect of severing his joint status.[e] Mere separate residence owing to convenience or exigencies of avocation does not effect a severance in status. If a document clearly shows a division of right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties in question. But mere statements as to their divided status made by individual members of a coparcenary with a view to serve their purpose for the time being or proceeding upon ignorance of their true position would not have the effect of a division in status, if their relations with the estate and the real nature of the interest which they have in the estate do not indicate any such division.[f]

(a) *Suraj Narain* v. *Iqbal Narain*, 40 I.A. 40=15 Bom. L.R. 456=17 C.W.N. 333 =11 A.L.J. 172=1913 M.W.N. 183=24 M.L.J. 345=18 I.C. 30=35 A 80 (P.C.).

(y) See p. 341, footnote (v).

(b) *Phangan Singh* v. *Hukam Singh*, 1933 L. 588=34 P.L.R. 293 ; *Banke Behari* v *Brij Behari*, 51 A. 519.

(c) *Venkatarayudu* v *Sivaramakrishnayya*, 58 M. 128=40 M.L.W. 552=1934 M.W.N. 864=67 M.L.J. 486=1934 M. 676.

(d) *Aiyyagari* v. *Aiyyagari*, 25 M. 690 ; *Manjnya* v. *Shanmuga*, 38 M. 684=26 M.L.J. 576 · 1914 M.W.N. 356=22 I.C. 555 ; *Gurlingapa* v. *Nandapa*, 21 B. 797. But see *Soundararajan* v. *Arunachalam*, 39 M. 136 =39 M. 159=29 M.L.J. 793=29 M.L.J. 816 =2 L.W. 1247=2 L.W. 1266=(1916) 1 M.W.N. 31=33 I.C. 858 and *Naro Gopal* v. *Paragouda*, 41 B. 347=19 Bom. L.R. 69 =39 I.C. 23 ; See also *Ram Chunder* v. *Chunder Coomar*, 13 M.I.A. 181 ; *Chinna* v. *Kali*, 35 M. 47=21 M.L.J. 246=(1911) 1 M.W.N. 238 ; *Mudit Narayan* v. *Ranglal*, 29 C. 797 holding that an order in execution for sale of a coparcener's interest does not effect his severance ; See also *Mahindra* v. *Sitaram*, 16 Pat. L.T. 377 = 1935 P. 349 ; *Balkrishna* v. *Savitribai*, 3 B. 54 ; *Jagannadha Rao* v. *Ramanna*, 1937 M W N. 264=45 L.W. 667=(1937) 2 M.L.J. 586=1937 M. 461 (an alienation by one coparcener in favour of all the other coparceners stands on a different footing).

(e) *Girja Bai* v. *Sadashiv*, 43 C. 1031= 43 I A. 151=14 A.L.J. 822=18 Bom. L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=1916 P.C. 104 ; *Kawal Nain* v. *Budh Singh*, 39 A. 496= 44 I.A. 159=15 A.L.J. 391=19 Bom. L.R. 642=21 C.W.N. 986=33 M.L.J. 42=6 L.W. 330=1917 M.W.N. 514=1917 P.C. 39.

(f) *Venkatapathi* v. *Venkatanarasimha*, 63 I.A. 397=41 C.W.N. 7=71 M.L.J. 858= 44 M.L.W. 408=1936 P.C. 264=38 Bom. L.R. 1236=17 P.L.T. 881=1936 A.L.J. 1039.

Nor can mere instructions given by a deceased coparcener prior to his death to his undivided brother to give his half share to his widow be construed as an unequivocal declaration of intention to separate[g] from him. A declaration of intention to separate has to be communicated to the other coparceners before it can have the effect of bringing about a severance in status, and if a coparcener sends to the other coparceners a notice of his intention to become separated from them, the severance in interest comes into effect the moment the notice is posted and passes out of his control[h] and does not remain suspended till it is received by the addressee.

333. Partition by submission to arbitration.—Submission by the members of a joint family to an arbitration for partitioning their shares operates as a disruption of the joint status involving the conversion of their joint tenancy into a tenancy-in-common [i] because the submission itself is an expression of intention to become divided, and the circumstance that no award has been made is not by itself sufficient to nullify the effect of that expression of intention on the status of the members. [j] Where an award has been made, the question whether it divided all the members from one another or only some of them from the others is to be determined by a construction of the award and the subsequent conduct of the parties is irrelevant. [k] Though a division by the arbitrators of only part of the joint property under their award is open to question on the ground that the award is uncertain in its terms and incomplete, yet it is competent to the parties to agree to the division being made by the arbitrators step by step and that each should be final in itself. [l]

334. Partition by suit by adult coparceners.—The institution of a suit for partition amounts to an intimation by the plaintiff to his coparceners of his unequivocal desire for separation from the

(g) *Shivappa* v. *Rudrava*, 57 B. 1=34 Bom. L.R. 539=1932 B. 410.

(h) *Narayana* v. *Purushothama*, 47 L.W. 104; *Rama Ayyar* v. *Meenakshi*, 33 L.W. 384=1931 M.W.N. 527=1931 M. 278. See also *Venkateswara* v. *Mankayammal*, 69 M.L.J. 410; *Dnyaneshwar* v. *Anant*, 60 B. 736.

(i) *Balmukund* v. *Mt. Sohano*, 8 P. 153 · 10 P.L.T. 259=1929 P. 164; *Bhawrao* v. *Radhabai*, 33 B. 401=11 Bom. L.R. 406=2 I.C. 431; *Syed Kasam* v. *Jorawar Singh*, 50 C. 84=49 I.A. 358=1922 P.C. 353=16 L.W. 223=43 M.L.J. 676=25 Bom. L.R. 1=21 A.L.J. 57=27 C.W.N. 179; *Shantilal* v. *Munshilal*, 56 B. 595=34 Bom. L.R. 862=1932 B. 498.

(j) *Ram Kali* v. *Khamman*, 51 A. 1=1928 A. 422—26 A.L.J. 857; *Balmukund* v. *Mt. Sohano*, 8 Pat. 153=10 P.L.T. 259 1929 P. 164; *Syed Kasam* v. *Jorawar Singh*, 50 C. 84—16 L.W. 223=43 M.L.J. 676—25 Bom. L.R. 1=21 A.L.J. 57=27 C.W.N. 179—49 I.A. 358=1922 P.C. 353; *Harkishan* v. *Partap*, 48 L.W. 66=1938 P.C. 189=42 C.W.N. 1021=40 Bom. L.R. 1068=(1938) 2 M.L.J. 234.

(k) *Babu* v. *Official Assignee*, 1934 M. W.N. 717—1934 A.L.J. 600=67 M.L.J. 167=38 C.W.N. 1018=36 Bom. L.R. 858 —57 Mad. 931=61 I.A. 257=1934 P.C. 138—40 L.W. 80.

(l) *Makund* v. *Saliq*, 21 C. 590=21 I.A. 47 (P.C.).

joint family,[m] and if the suit is decreed, the date of his severance is, if nothing else is proved, the date when the suit was instituted.[n] But if the suit is withdrawn, though just before final decree, [o] no severance of the joint status results, [p] though if the suit is wrongly dismissed (on the erroneous ground that though he had a legal right to partition he had no proper motive to exercise that right) he becomes separated from the date of that suit. [q] But the separation of the plaintiff, however, does not automatically involve the separation of the other members of the family as between themselves, and it is a question of fact in each case whether those members of the family have separated or remained united, depending for its determination on their intention as disclosed by their subsequent conduct. [r] In a suit by an adult coparcener for partition, the Court has no discretion to refuse partition even though the plaintiff may be acting foolishly or under the interested advice of mischief-mongers. [s] Where after the institution of a suit, but before decree, the plaintiff dies, his interest ascertained as on the date of the plaint will be deemed to have become separate and is heritable by his own heirs as his separate property. [t] Even where a suit does not in terms seek partition, if a distinct intention to become divided is indicated therein and the decree gives effect thereto, such decree effects a partition. [u] But a suit for a mere declaration that the plaintiff has a right to a share in the estate in

(m) *Kawal Nain* v. *Budh Singh*, 39 A. 496 41 I.A. 159—15 A.L.J. 581—19 Bom. L.R. 642—21 C.W.N. 986—33 M. L.J. 42—6 L.W. 330—1917 M.W.N. 514—40 I.C. 286—1917 P.C. 39; *Girjabai* v. *Sadashiv*, 43 C. 1031—43 I.A. 151—14 A. L.J. 822—18 Bom. L.R. 621—20 C.W.N. 1085 31 M.L.J. 455—4 L.W. 114—(1916) 2 M.W.N. 65—1916 P.C. 104.

(n) *Palani Ammal* v. *Muthuvenkatachala*, 52 I.A. 83—1925 P.C. 49—48 M.L. J. 83—6 P.L.T. 133—21 L.W. 439—1925 M.W.N. 330—27 Bom. L.R. 735—23 A.L. J 746—29 C.W.N. 846—48 M. 254 P.C.

(o) Ganapathy v. Subramanyam, 52 M. 845—30 L.W. 254—1929 M. 738—57 M.L.J. 374.

(p) *Palani Ammal* v. *Muthuvenkatachala*, 52 I A 83—48 M.L.J. 83—6 P.L.T. 133—21 L.W. 439—1925 M.W.N. 330—27 Bom. L.R. 735 23 A.L.J. 746—29 C.W. N. 846—1925 P.C. 49—48 M. 254; *Kedarnath* v. *Ratan Singh*, 32 A. 415—37 I.A. 161—12 Bom. L.R. 656—20 M.L.J. 900—14 C.W.N. 985—(1910) M.W.N. 311—7 I.C. 648 (P.C.); But the position will be different if the other members of the family have accepted the plaintiff's intimation to sever: See *Rama Rao* v. *Venkata*, 46 L.W. 309—1937 M. 274; *Swaminatha* v. *Gopalaswami*, (1938) 2 M.L.J. 704.

(q) *Kawal Nain* v. *Budh Singh*, 39 A. 496 44 I.A. 159—15 A.L.J 581—19 Bom. L.R. 642—21 C.W.N. 986—33 M.L.J. 42—6 L.W. 330—1917 M.W.N. 514—1917 P.C. 39; *Dhanabati* v. *Protapmull*, 61 C. 1056—38 C.W.N. 1045—1935 C. 131.

(r) *Kanhyalal* v. *Banwari*, 1936 C. 269; *Swaminatha* v. *Gopalaswami*, (1938) 2 M.L.J. 704 (where it was held that an expression of intention to separate from the other members contained in the written statement had the effect of bringing about a severance in status among the defendants).

(s) See *Sellam* v. Chinnammal, 24 M. 441.

(t) *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254—52 I.A. 83—48 M.L.J. 83—6 P.L.T. 133—21 L.W. 439—1925 M. W.N. 330—27 Bom. L.R. 735—29 C.W.N. 846—23 A.L.J. 746—1925 P.C. 49; *Rama Ayyar* v. *Meenakshi*, 1931 M.W.N. 527—33 M.L.W. 384—1931 M. 278 (holding that the severance is effected on the date of the plaint and not on the subsequent date when notice of suit is served on the defendant.)

(u) *Joy Narain* v. *Grish Chunder*, 5 I.A. 228—4 C. 434 P.C.; *Ram Pershad* v. *Lakhpati*, 30 C. 231—30 I.A. 1—5 Bom. L.R. 103—7 C.W.N. 162.

the hands of his father is certainly not inconsistent with his intention to remain joint with his father and hence does not effect a severance in status.(v) Nor is the severance of a coparcener from the joint status brought about by his filing a petition for being adjudicated insolvent.(w)

335. Partition by suit by minor coparcener.—A suit by a minor for partition, if it ends in a decree, has the effect of creating a division of status from the date of the plaint,(x) even though only a preliminary decree has been passed,(y) but the mere filing of the suit by a minor does not effect severance of his interest from the joint family,(z) even though the suit has been filed both by the father and his minor son for partition against the other coparceners.(a) But in a suit by a minor for partition, if the Court finds that partition will not be beneficial to his interest(b) or there is nothing like malversation or hostility on the part of the manager to show that it will be for his benefit, the Court ought not to decree the suit.(c) A minor's suit for partition does not abate if he dies before the Court has found that the partition is for his benefit and it is open to his legal representative to proceed with the trial and obtain a decree on his showing that when the partition suit was instituted it was for the benefit of the minor,(d) the question of benefit to the minor including considerations concerning the minor's mother, widow or daughter in relation to him.(d) The principle underlying this view is that it is open to the next friend of a minor to sever him from the joint family by the next friend's unilateral declaration on behalf of the minor.(e) Hence

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(v) *Debee Pershad* v. *Phool Koeree*, 12 W.R. 510. See also *Suryanarayanamurti* v. *Tammanna*, 25 M. 504 holding that under S. 42 of the Specific Relief Act a suit for a bare declaration of the plaintiff's right to share in the ancestral property without asking for a partition is not maintainable.

(w) *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126=40 M.L.W. 552=1934 M.W.N. 864=67 M.L.J. 486=1934 M. 676.

(x) *Krishnaswami* v. *Pulukamppa*, 48 M. 465=48 M.L.J. 354=21 L.W. 675=1925 M. 717; *Sri Ranga* v. *Srinivasa*, 50 M. 866=26 L.W. 125=53 M.L.J. 189=1927 M. 801; But see contra in *Lalta Prasad* v. *Shiam*, 42 A. 461=1920 A. 116; *Hari Singh* v. *Pritam*, 1936 L. 504; *Narasamma* v. *Akkayamma*, 16 Mys. L.J. 406.

(y) *Sri Ranga* v. *Srinivasa*, 50 M. 866=26 L.W. 125=1927 M. 801=53 M.L.J. 189.

(z) *Ganapathy* v. *Subramanyam*, 52 M. 845=30 L.W. 254=57 M.L.J. 374=1929 M. 738; *Kishan Saroop* v. *Brijraj Singh*, 51 A. 932=1929 A. 726=1929 A.L.J. 941.

(a) *Ganapathy* v. *Subramanyam*, 52 M 845=30 L.W. 254=1929 M. 738=57 M.L.J. 374.

(b) *Bachoo* v. *Mankorebai*, 31 B. 373=24 I A. 107=17 M L.J. 343=9 Bom. L. R. 646=11 C.W.N. 769 (P.C.); *Ganapathy* v. *Subramanyam*, 52 M. 845=30 L. W. 254=1929 M. 738=57 M.L.J. 374.

(c) Ibid—*Thangam* v. *Suppha*, 12 M. 401; *Bholanath* v. *Ghasi Ram*, 29 A. 373; *Damoodur* v. *Senabutty*, 8 C. 537; *Mahadev* v. *Lakshman*, 19 B. 99.

(d) *Rangasayi* v. *Nagarathnamma*, 57 M. 95=1933 M.W.N. 1324=65 M.L.J. 630=1933 M. 890=38 L.W. 676=146 I.C. 269 (F.B.); *Atul Krishna* v. *Lala*, 14 Pat. 732=1935 P. 275. See contra in *Chhotabhai* v. *Dadabhai*, 36 Bom. L.R. 738=1935 B. 54; *Lalta Prasad* v. *Shiam*, 42 A. 461=1920 A. 116 and *Harisingh* v. *Pritam*, 1936 L. 504.

(e) Ibid—*Krishna* v *Nandeshwar*, 4 Pat. L.J. 38=44 I.C. 146; *Akkanna* v. *Sri Ranga*, 1930 M. 486=1930 M.W.N. 32.

even in the case of a suit for partition instituted in *forma pauperis* by minors represented by a next friend, the division in status between the parties must be held to have taken effect as from the date of the presentation of the pauper petition, and the plaintiffs will be entitled to an account of the profits from that date as against the family manager. (f) Even where a minor on whose behalf a suit for partition was instituted by his next friend attains majority during the pendency of the suit and elects to continue the same, the severance in status must be held to have taken place on the date of the plaint itself and the plaintiff's share determined accordingly. (g)

336. Partition by agreement.—A partition may be effected by agreement, although no actual division of the property may have been made by metes and bounds. (h) As was observed by their Lordships of the Privy Council in *Appovier's case* (i) "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 undivided property, that he, that particular member, has a certain definite share. But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain definite shares, then the character of the 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 a right to receive and enjoy in severalty, although the property itself has not been actually severed and divided". (j) *A fortiori* an agreement of a family to divide the corpus or the proceeds of the joint property among its members in definite shares with the intention that each should hold his allotted share in severalty, severs the joint interest and extinguishes the rights springing from united family ownership even though there are minors. (k) The question of intention must arise in all such cases and be determined in each case upon its own circumstances. (l)

(f) *Sarvothama* v. *Govinda*, 44 M.L.W. 692=1937 M. 11=1936 M.W.N. 1225.

(g) *Rama Rao* v. *Venkata*, 46 M.L.W. 309=1937 M. 274.

(h) *Parbati* v. *Naunihal Singh*, 31 A. 412=36 I.A. 71—6 A.L.J. 597=11 Bom. L. R. 878=13 C.W.N. 983=19 M.L.J. 517=3 I.C. 195 (P.C.); *Harkishen* v. *Partap*, 1938 P.C. 189.

(i) 11 M. I.A. 75.

(j) *Venkatapathi* v. *Venkatanarasimha*, 44 M.L.W. 408=63 I.A. 397=71 M.L.J 358 .1936 P C. 264=41 C.W.N. 7=38 Bom. L.R. 1238=17 P.L.T. 881=1936 A. L J 1039.

(k) *Balkishen* v. *Ram Narain*, 30 C. 738 =30 I.A. 139=5 Bom. L.R. 461=7 C. W N. 578.

(l) *Ram Kissen Singh* v. *Sheonundun*, 3 Suth. 151 P.C.; *Appovier* v. *Rama subba Aiyan*, 11 M. I.A. 75; *Doorga* v. *Kundun*, 1 A. 55; *Madho Parshad* v. *Mehrban Sing*, 18 C. 157=17 I.A. 194 P.C. *Runjeet Singh* v. *Kooer Gujraj Singh*, 1 I.A. 9; *Raghubir Singh* v. *Moti Kunwar*, 35 A. 41=11 A.L.J. 146=17 C. W N. 453=15 Bom. L.R. 426=25 M.L.J. 28=(1913) M.W.N. 127 (P.C.).

A deed of partition making a division of part of the joint estate, but leaving the remainder to be divided at a future period, operates to turn the joint tenancy of the property divided into a tenancy-in-common, and to make the members of the previously undivided family a divided family in respect of the property dealt with by the deed. [m] But mere ascertainment of the shares without the intention to separate does not work a severance [n] Thus where a deed under which one of the coparceners separated from the rest, taking his share of the family property separately divided and given to him, provided that the remaining properties should be divided into five equal shares and given to the five groups of the other members of the coparcenary and that these members should continue to live as members of a Hindu family with the rights of survivorship until the death of one M, the senior member among them, it was held by the Privy Council that the cardinal rule of interpretation of a deed being to gather the intention from the language of the entire deed, giving effect, if possible, to all its parts, the proper construction of the deed would be that there was to be no division of status among the remaining members till the death of M. In other words, there was no separation of interest *in praesenti*, but only a contract as to what was to be done in future; such a contract would not be invalid, though it might be rendered ineffective by change of circumstances. [o] Besides, a valid agreement for partition may be made during the minority of one or more of the coparceners. That follows from the admitted right of one coparcener to claim a partition, and if a fair and proper agreement cannot be made binding on minors, a partition can hardly ever take place in most families. No doubt, if the partition be unfair or prejudicial to the minor's interests, he is entitled, on attaining majority, by proper proceedings, to set it aside so far as regards himself. [p]

337. Partition by conversion.—Parcenership under the Hindu Law is put an end to by severance which that law recognises and creates, viz., a member becoming a convert to any other religion like Christianity, [q] or Mahomedanism, [r] and on such severance

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(m) *Appovier* v. *Rama Subba Aiyan*, 11 M.I.A. 75.

(n) *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254=52 I.A. 83=1925 P.C 49=48 M.L.J. 83=6 P.L.T. 133=21 L W. 439=1925 M.W.N. 330=29 C.W.N 846=27 Bom. L.R. 735=23 A.L.J. 746; *Ramabadra* v. *Gopalaswami*, 54 M. 239=1931 M. 404.

(o) *Purnananthachi* v. *Gopalaswami*, 1936 P.C. 281=63 I.A. 436=71 M.L.J. 554=44 L.W. 422=1936 A.L.J. 1094=38 Bom. L.R. 1247=41 C.W.N. 14=17 P.L.T. 910.

(p) *Balkishen Das* v. *Ram Narain*, 30 I.A. 139=30 C. 738=5 Bom. L.R. 461=7 C.W.N. 578.

(q) *Abraham* v *Abraham*, 9 M.I.A. 195.

(r) *Ram Pergash* v. *Mt. Daham Bibi*, 3 P. 152=1924 P. 420=5 P.L.T. 203; *Khunni Lal* v. *Gobind*, 33 A. 356=38 I. A. 87=10 I.C. 477=21 M.L.J. 645=8 A.L.J. 552=13 Bom. L.R. 427=15 C. W.N. 545=(1911) 1 M.W.N. 432; *Gobind Krishna* v. *Abdul*, 25 A. 564.

as a result of his conversion he is entitled to claim his share computed with reference to the date of his conversion. (s) But a conversion of one member does not affect the coparcenary relationship as between the other members and they continue as before with the usual incidents of coparcenary. The same is the legal result of a coparcener's marriage contracted in accordance with the provisions of the Special Marriage (Amendment) Act, 1923.

338. Form of partition agreement.—An agreement to partition joint family property or interest and right does not require to be embodied in a deed or instrument in writing and may simply be a parol agreement. (t) But a deed embodying the terms of a partition effected thereunder requires registration if it affects immovable property of the value of Rs. 100 or upwards and, if unregistered, is inadmissible in evidence to prove those terms, though it is admissible to prove the division in status. (u) But a document called *yadast* which is a memorandum amounting to a declaration that from the date of its execution the parties become entitled to the possession and enjoyment of the properties in separate shares and providing for the execution of another deed effectuating the partition does not require registration for its admissibility because that document by itself does not create, assign, limit, or extinguish any right or interest in immovable property within the meaning of S. 17 (b) of the Registration Act but merely creates a right to obtain another document which will have that effect and is hence saved under the proviso (v) to sub-S. 2 of S. 17. (v)

339. Prohibition against partition.—The fact that in a family in question there has been no division of the estate for six or seven generations previously is no ground for holding that the parties are deprived of their right to demand a partition. (w) An agreement not to partition, even if binding upon the parties thereto, is not binding upon their heirs and successors. (x) Thus a vendee

(s) *Kulada* v. *Haripada*, 17 I.C. 257=40 C. 407=17 C.W.N. 102

(t) *Parbati* v *Naunihal Singh*, 31 A. 412=36 I.A. 71=6 A.L.J. 597=11 Bom. L.R. 978=13 C.W.N. 963=19 M.L.J. 517 3 I.C. 195 P.C.; *Rewun Persad* v. *Mt. Radha Beeby*, 4 M.I.A. 137; *Budha* v. *Bhagwan*, 18 C. 302; *Latchumimmal* v. *Gangammal*, 34 M. 72=1910 M.W.N. 692; *Kishen Lal* v. *Lachmichand*, 1937 A. 456=1937 A.L.J. 297; *Vorada Pillai* v. *Jeevarathnammal*, 43 M 214=46 I.A. 285 18 A.L.J. 274=22 Bom. L.R. 444=24 C.W.N. 346=38 M.L.J. 31.=10 L.W. 679=1919 M.W.N. 724=1919 P.C. 44; *Manickam* v. *Kamalam*, 45 L.W. 114=(1937). M.L.J. 95=1937 M.W.N. 255.

(u) *Rajangam* v. *Rajangam*, 46 M. 373=50 I.A. 134=21 A.L.J. 460=27 C.W.N. 561=44 M.L.J. 745=16 L.W. 615=1922 P.C. 266.

(v) *Durriao* v. *Davi*, 1 I.A. 1.

(x) *Jafri Begum* v. *Syed Ali*, 23 A. 383;) *Chhotalal* v. *Bai Mahakor* 466=40 I.C. 83=19 Bom. L.R. 322; *Mahalakshmamma* v. *Suryanarayana*, 51 M. 977=28 L.W. 919=1928 M. 1113=55 M.L.J. 733; *Saraswatamma* v. *Paddayya*, 46 M. 349=44 M.L.J. 45=18 L.W. 418=1923 M. , M.H.C. 345; See also *Pirojshah* v. *Manibhai*, 36 B. 53=13 Bom. L.R. 963=12 I.C. 543; *Ajit Kumar* v. *Srimati Tarubala*, 63 C. 209=162 I.C. 965.

from a coparcener will not be bound by his vendor's agreement not to partition. (w) On the question whether such an agreement is binding upon the parties to the agreement, the Bombay High Court (z) holds that it is not binding, while the High Courts of Allahabad (a) and Calcutta (b) take the contrary view. But a recent decision of the Madras High Court (c) holds that there is no legal obstacle to prevent two coparceners from agreeing that for a certain time or until a certain event or for their lives they will not exercise their right to divide, so long as the rule of perpetuities is not offended. (d) But the exercise of a right to partition being essential to the full enjoyment of family property, a prohibition or an indefinite postponement of it laid down in a will is invalid. (e)

340. Subject-matter of partition.—The property to be partitioned is *ex vi termini* all the coparcenary property both movable (f) and immovable (g) in whosesoever hands it may be but does not include either the separate properties of the individual members of the coparcenary (h) or property which, though the property of the joint family, is by its nature or custom indivisible. (i) A coparcener's separate property which has been dealt with elsewhere includes his self-acquisitions and property inherited from a collateral. Amongst properties held indivisible by nature and which are to be enjoyed jointly or by turns are rights of way (j) and rights to wells (k) or water, family idol, etc. The right of worship of an idol cannot be made the subject of partition, the joint owners of the right being, however, entitled to a provision for facilities of worship or to perform the worship by turns. (l)

(y) *Rajender* v. *Shamchund*, 6 C. 106.

(z) *Ramlinga* v *Virupakshi*, 7 B. 538.

(a) *Rup Singh* v *Bhabuti*, 58 I.C. 632 = 42 A. 30 -17 A.L.J 916.

(b) *Rajender* v *Sham Chund*, 6 C 106 ; *Krishnendra* v *Debendra*, 12 C.W.N 793 ; *Jyotish Chandra* v. *Radhika*, 60 C. 1078 1933 C. 892 37 C.W.N. 1018 ; See also *Ajit Kumar* v. *Srimati Tarubala*, 63 C. 209 162 I.C 965.

(c) *Arumugha* v. *Ranganatham*, 38 L.W. 736 -146 I C. 1057. 57 M. 405=65 M.L.J. 741=1933 M.W.N. 1177- 1933 M. 847.

(d) *Radhanath* v. *Tarrucknath*, 3 C.W.N. 126.

(e) *Mokoondo* v. *Gonesh*. 1 C. 104 ; *Poorendra* v. *Hemangini*, 36 C. 75 1 I.C. 523=12 C.W.N. 1002 ; *Umrao* v. *Baldeo*, 14 L. 353.

(f) *Jugmohandas* v. *Mangaldas*, 10 B. 528 ; *Lakshman* v. *Ramchandra*, 5 B. 48-7 I.A. 181.

(g) *Dattatraya* v. *Mahadaji*, 16 B. 528 (Leasehold property).

(h) *Yamunabai* v *Manubai*, 23 B. 608.

(i) *Ekradeshwar* v. *Janeshwari*, 42 C. 582 -41 I A. 275 -12 A L J 1217-17 Bom. L R 18 18 C W N 1249-27 M L J 373= 1 L W 803=1914 M.W N 807 -1914 P C. 76.

(j) *Shantaram* v *Waman*, 47 B. 389=21 Bom L R 1029 ; *Nathubai* v. *Hansgoveri*, 36 B 379 .14 Bom. L.R. 418=15 I C. 818.

(k) *Govind* v. *Trimbak*, 36 B. 275=12 Bom L R 363 6 I C. 521.

(l) *Pramatha Nath* v. *Pradyumna*, 52 I A. 245 22 L.W. 492=87 I.C. 305=52 C. 809 -23 A L J 537-49 M.L.J. 30=1925 M W.N. 431-27 Bom. L.R. 1064=30 C.W.N. 25 1925 P.C. 139 ; *Damodardas* v. *Uttamram*, 17 B. 271 ; *Mitta Kunth* v. *Neerunion*. 14 B.L.R. 166 ; *Sethuramnswamiar* v. *Meruswamiar*. 41 M. 296-45 I.A. 1=16 A.L.J. 113 20 Bom. L.R. 514=22 C W.N. 457 34 M.L.J. 130-7 L.W. 22=1917 P.C. 190 ; *Dattatraya* v. *Prabhakar*, 39 Bom. L.R. 94-1937 B. 202 ; *Madan Mohun* v. *Rakhal*, 57 C. 570.

So also places of worship and sacrifice [m] and properties absolutely dedicated for religious or charitable purposes [n] are not partitionable, though in the case of properties which are only subject to a charge or burden in favour of such trust, a partition thereof is not prohibited [o] even though the charge will continue to attach to the properties after the partition. Besides, jewels given to the wives of coparceners for their own use and wearing apparel and dress of coparceners are not subject-matter of partition. [p] So also is the headship of a mutt not a matter for partition, [q] as also an estate which by special law or custom is impartible and descends to a single heir. [r] In cases of cattle and movables of the joint family which may not be conveniently partitionable and in the case of the dwelling house, [s] the proper method is to assign them to the shares of one or more of the sharers and to give compensation to the rest. As was observed in *Ashanullah* v. *Kali* [t] "The principle in these cases of partition is that if a property can 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 a share which would fall to the plaintiff by partition". In a suit for partition, the burden is on the plaintiff to show that a property standing in the name of a female member of the family which he seeks to make available for partition as a joint family asset was purchased in her name *benami* for the joint family. [u]

341. Provisions and deductions on division.—Before a partition is effected, provision should be made for the payment of the debts binding upon the family, [v] like the untainted debts of the father. [w] for the initiation ceremony of the brothers, (but not of

(m) *Anund Mojee* v. *Boykantnath*, 8 W.R C.R. 193; Mere use of the ancestral house for an idol does not, where there is no dedication, make the house impartible · *Dattatraya* v *Prabhakar*, 1937 B 202–39 Bom. L.R. 94.

(n) *Rajendar* v. *Sham Chund*, 6 C. 106.

(o) *Ram Coomar* v. *Jogendar*, 4 C. 56; *Sonatun* v. *Juggutsoondree*, 8 M.I.A 66.

(p) *Varada* v. *Venkata*, 13 L.W. 262–1921 M. 542.

(q) *Sethuramaswamiar* v. *Meruruswamiar*, 45 I.A. 1–41 M. 296–16 A.L.J. 113–20 Bom. L.R. 514–22 C.W.N. 457· 34 M.L.J. 130–7 L.W. 22–1917 P.C. 190.

(r) *Kachi Kaliyana* v. *Kachi Yuva*, 28 M. 508–15 M.L.J. 312–10 C.W.N. 95–2 A.L.J. 845–7 Bom. L.R. 907 –32 I.A. 261; *Ramalakshmi* v *Sivananthe*, 14 M.I.A. 570.

(s) *Dattatraya* v. *Prabhakar*, 39 Bom. L.R. 94–1937 B. 202. See also Partition Act. S. 2.

(t) 10 C. 675.

(u) *Parvatamma* v. *Subbayya*, 55 M. 202 34 L W 704–1932 M. 144.

(v) *Krishnamurthy* v. *Sundaramurthy*, 53 M. 558–1932 M. 381–35 L.W. 592–63 M L.J. 37; *Bankey Lal* v. *Durga Prasad*, 53 A 868–1931 A L.J. 917–1931 A. 512.

(w) *Krishnamurthy* v. *Sundaramurthy*, 1932 M. 381–35 L.W. 592–55 M. 558–63 M.L.J. 37; *Gangaram* v. *Lalumal*, 1930 Sind 138; *Venku Reddi* v. *Venku Reddi*, 50 M. 335–25 L.W. 784–1927 M. 471–52 M.L.J. 387; *Sat Narain* v. *Sri Kishen Das*, 63 I.A. 384–17 Leh. 644–38 Bom. L.R. 1129 -40 C.W.N. 1382–44 L.W. 417–71 M L.J. 812 · 1936 P.C. 277; *Ajit Narayan* v. *Aswatha*, 40 C.W.N. 75 (a case of a provision for a barred debt due from father to one of the sons); *Bankey Lal* v. *Durga Prasad*, 1931 A.L.J. 917–53 A. 868–1931 A. 512.

their sons,(x)), the funeral ceremonies of the mother if widowed(y) though having Stridhana property, (z) the maintenance of disqualified heirs and dependent females of the family, (a) and the marriage expenses of unmarried daughters, (b) but not of unmarried sons. (c) The obligation of maintaining and marrying the daughters of a family consisting of father and sons, being a historical remnant of the daughters' original right to share in the coparcenary property, is created by the birth of the daughter and rests on the whole family and not only on the father and through him the sons. Hence the share of a son who institutes a suit for partition against his father and brothers is liable to a share of the expenses of the marriage of his sister married after the institution of the suit and of other sisters still to be married. (d) But after partition between father and sons, the claims of the sons' daughters for maintenance and marriage expenses are to be met out of the shares of the respective sons and not out of the shares of all those who were coparceners of the old family. (d)

342. Rules as to accounting.—All that a coparcener seeking partition is entitled to is an account of the property which exists at the date of the partition or at the date when owing to demand for partition there had been a severance of status. The manager, being the accounting party, has to file an account as to the properties available for partition. But the other members are not bound to accept his statement and are at liberty to show that the expenditure which the manager says has been incurred has not been incurred in fact or that savings have not been exhibited in the accounts.(e) The nature of the account which a manager is liable to render is unlike that required of a trustee,(f) and, in the absence of fraud, dishonesty, misappropriation or gross reckless waste, he cannot be

(x) Mitak. i-7-3 ; *Jairam* v. *Nathu*, 31 B. 54=8 Bom. L.R. 632.

(y) *Vaidyanatha* v. *Aiyasami*, 32 M. 191=1 I.C. 408=19 M.L.J. 94.

(z) *Vrijbhukandas* v. *Bai Parvati*, 32 B. 26=9 Bom. L.R. 1187.

(a) *Mt. Bholi Bai* v. *Dwarka Das*, 5 Lah. 375=1925 L. 32 ; *Ramakrishna* v. *Parameswara*, 1931 M.W.N. 215 ; *Narasamma* v. *Akkayamma*, 16 Mys. L.J. 406 ; *Chidambaram* v. *Nachiappa*, 48 L.W. 485.

(b) *Subbayya* v. *Ramayya*, 30 L.W. 923=57 M.L.J. 826=53 M. 84=1929 M. 586 (F.B.) ; *Mt. Bholi Bai* v. *Dwarka Das*, 5 Lah. 375=1925 L. 32.

(c) *Ramalinga* v. *Narayana*, 49 I.A. 168=1922 P.C. 201=45 M. 489=20 A.L.J. 839=24 Bom. L.R. 1209=16 L.W. 639=1922 M.W.N. 399=26 C.W.N. 929=43 M.L.J. 428 ; *Mt. Bholi Bai* v. *Dwarka Das*, 5 Lah. 375=1925 Lah. 32 ; *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126=40 M.L.W. 552=1934 M.W.N. 864=67 M.L.J. 486=1934 M. 676 ; *Pranjivan* v. *Motiram*, 1927 B. 651.

(d) *Subbayya* v. *Ramayya*, 30 L.W. 923=53 M. 84=1929 M. 586=57 M.L.J. 826.

(e) *Tammi Reddi* v. *Gangi Reddi*, 45 M. 281=16 L.W. 55=42 M.L.J. 570=1922 M. 236 (2) ; *Sri Ranga* v. *Srinivasa*, 50 M. 866=26 L.W. 125=1927 M. 801=53 M.L.J. 189 ; *Vaikuntam* v. *Ayudiappa*, 1936 M. W.N. 809=1937 M. 127 ; *Narendra* v. *Abani*, 42 C.W.N. 77=1938 C. 78 ; *Ramakrishna* v. *Parameswara*, 1931 M.W.N. 215.

(f) *Perrazu* v. *Subbarayudu*, 44 M. 656=48 I.A. 280=1922 P.C. 71=19 A.L.J. 621=22 Bom. L.R. 920=26 C.W.N. 1=41 M.L.J. 33=3 P.L.T. 1=48 I.A. 280=1921 M.W.N. 540 ; *Jyotibati* v. *Lachhmeshwar*, 1930 P. 1=8 Pat. 818.

called upon to defend the propriety of his past transactions[g] or the manner in which he has disposed of the income in the past.[h] As was observed by the Privy Council in *Perrazu* v. *Subbarayadu*,[i] "In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with." Thus in the absence of fraud or dishonesty, no relief can be granted against the manager in respect of debts allowed by him to become barred.[j] But in respect of assets proved to have come into the hands of the manager, he has to account for their non-availability for partition,[k] but there is no foundation, either legal or equitable, for making the manager pay interest on the outstandings collected but not invested by him.[l] The manager, however, is not bound to keep general accounts and the other members cannot complain, if he, in his discretion, favours in his expenditure one of them at the expense of the others.[k] The account is to be confined to the existing assets available for division and the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters.[m] Thus no coparcener is entitled to credit being given to him on the ground that the amount spent upon him and his branch was smaller than what was spent upon another branch or claim that a charge should be made against the latter branch on the ground of such excess expenditure.[n] But in estimating the share to which a coparcener would be entitled, it is legitimate to debit him with the value of the interest in the joint property alienated by him for his own personal purposes and with any advances made to him either to discharge his own private debts or for purposes of his own personal benefit for which he will have no claim upon the family purse.[o] So also where a coparcener spends his own personal savings for the benefit of the joint family not intending to do so

(g) *Tamm Reddi* v. *Gangi Reddi*, 45 M. 281 .16 L.W 55- 1922 M 236 (2) -.42 M.L.J 570 · *Sukh Deo* v *Basdeo*, 57 A. 949 1935 A.L.J. 582 :1935 A. 594

(h) *Krishnayya* v. *Guruvayya*, 14 L.W. 668 70 I.C. 146-41 M.L.J. 503 -1921 M W N 742 1921 M. 443.

(i) 44 M. 856-48 I.A. 280- 1922 P.C. 71 ·19 A L J 621 -22 Bom. L.R. 920-26 C.W N. 1 41 M.L J. 33-3 P.L.T. 1-48 I.A. 280- 1921 M.W.N 540.

(j) *Jyotibati* v. *Lachhmeshwar*, 1930 Pat 1-8 Pat. 818.

(k) *Official Assignee of Madras* v. *Rajabadhur*, 19 L.W. 597-78 I.C. 536.-46 M.L.J. 145-1924 M.W.N. 192=1924 M. 458.

(l) *Yasobadra* v. *Samantha*, 59 M. 154 · 1935 M.W.N. 1169-70 M.L.J. 311-42 M.L W. 674 1936 M. 12.

(m) *Sri Ranga* v. *Srinivasa*, 50 M. 866 · 26 L.W. 125-53 M.L.J. 189-1927 M. 801 ; *Nibaran Chandra* v. *Nirupama Debi*, 69 I C. 476-26 C.W.N. 517=1921 C. 131 ; *Jyotibati* v *Lakshmeshwar*, 8 Pat. 818= 1930 Pat. 1 ; *Swaminatha* v. *Gopalaswami*, (1938) 2 M.L.J. 704 ; *Ramnath* v. *Gotu-ram*, 44 B. 179-1920 B. 236 ; *Parmeshwar* v. *Govind*, 43 C. 459-1916 C. 500.

(n) *Abhaychandra* v. *Pyari Mohan*, 5 Beng. L. R. 347.

(o) *Damodardas* v. *Uttamram*, 17 B. 271 ; *Lakshman* v. *Ramchandra*, 1 B. 561 ; *Narayana Sah* v. *Sankar Sah*, 53 M. 1= 30 L.W. 751=57 M.L.J. 685=1929 M. 865.

gratuitously, for instance, for the marriage expenses of the daughter of another coparcener, the former is entitled to be reimbursed for the amount thus spent, at the time of the partition.[p] Generally a coparcener is not entitled to claim mesne profits as against the others on the ground that he has been living away from the family residence and has not been maintained out of the family income.[q] Nor is a coparcener entitled to claim interest upon outstandings collected by the manager but not invested by him,[r] though in the case of a trading family, where the presumption is that the moneys of the family are always invested, the plaintiff in the partition action is entitled to claim interest from the date of the plaint up to the date of the decree.[s] But if he has been excluded from joint possession and enjoyment of the property,[t] or from separate possession and enjoyment to which he was entitled under an arrangement to enjoy the joint property in distinct shares,[u] or when partition was demanded by him but was improperly refused by the other members,[v] he is entitled to claim from the other members mesne profits in respect of his share from the date of such exclusion or refusal,[w] and he can be awarded even interest on the mesne profits in cases of persistent obstruction by the other members in the way of his enjoying his share of the income.[x] So also in the converse case i.e., where a coparcener holds a joint family property claiming it to be his own exclusive property and the joint family as such has been excluded from the possession and enjoyment thereof, mesne profits should be allowed in respect of that property in favour of the other members who have been excluded from enjoyment.[y] But dispossession or exclusion is not the same thing as discontinuance of possession: the one is where a person comes in and drives out the others from possession; the other case is where a person in possession goes out and is followed into possession by the other persons.[z] Unless there has been a

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If in a suit for partition it appears that all the defendants have already received all that is equitably due to them the whole of the remainder may be awarded to the plaintiff : *Rajendra* v. *Brojendra*, 77 I C 790 ; *Hobson* v. *Sherwood*, 49 E.R 309

(p) *Mt. Bholi Bai* v. *Duarka Dss.* 5 Lah. 375—1925 L. 32.

(q) *Shankar* v. *Hardeo*, 16 C. 397—16 I A. 71.

(r) *Yesobadra* v. *Samantha*, 59 M. 154 —70 M.L.J. 311—1936 M. 12.

(s) *Annamalai* v. *Palaniappa*, 40 L.W. 619—1935 M. 266.

(t) *Appa Rao* v. *The Court of Wards*, 5 M. 236—9 I.A. 125 (P.C.); *Bhivrav* v. *Sitaram*, 19 B. 532 ; *Krishna* v. *Subbanna*, 7 M. 564 ; *Raja Venkata Rao* v. *Court of Wards*, 2 M. 128 at 137—7 I.A. 38.

(u) *Shankar* v. *Hardeo*, 16 I.A 71—16 C 397 (P.C.), *Raja Setrucherla* v. *Raja Setrucherla*, 22 M. 470—26 I A. 167—1 Bom. L R 388- 3 C.W.N. 533.

(v) *Gangaram* v *Sitaram*, 6 C.W.N. 698 (P.C.); *Ramasamy* v *Subramania*, 46 M. 47—16 L.W 297—1923 M. 147—43 M.L.J. 406.

(w) *Vanjapuri* v *Pachamuthu*, 7 L.W. 225 45 I.C 62 -35 M.L.J. 609 ; *Honniah* v *Eraiya*, 10 Mys. L.J. 129—37 Mys. H.C.R. 395

(x) *Ramakrishna* v *Parameswara*, (1938) 1 M.L.J 439. 1938 M 424.

(y) *Bhivrav* v *Sitaram*, 19 B. 532; *Appa Rao* v *Court of Wards*, 5 M. 236—9 I.A. 125.

(z) *Rains* v. *Buxton*, (1880) 14 Ch. D. 537.

distinct ouster of one member by other members or *vice versa* from the joint enjoyment of the family property no question of mesne profits will arise.[a] Such an ouster or exclusion of a member so as to entitle him to claim mesne profits from the other members is not made out where it is found that the manager had all along been offering him a particular allowance which he had refused to accept as inadequate.[b] But the moment a severance in interest takes place, either by mutual agreement or even by a unilateral declaration of intention, the right to an account and to claim mesne profits from that moment logically arises.[w] The same principle applies even in the case of severance by the institution of a suit for partition, as, subsequent to the suit, the parties become only tenants-in-common with a stricter liability on the karta to account, taking credit only for expenses incurred for the benefit or necessity of the estate.[c]

343. Persons entitled to shares.—Barring the exceptions mentioned below, any coparcener[d] can require partition of the joint family property, and his demand to that effect, if it be not complied with, can be enforced by legal process.[e] But persons who are entitled to shares on partition and those who can claim partition as of right are not the same. Thus persons like the wife, mother and grandmother, though entitled to share on partition, are not entitled to claim a partition of the joint family assets[f] just as an adult coparcener is entitled to claim. So also an illegitimate son cannot claim partition during the lifetime of his father. Even a legitimate son in Bombay is not entitled to claim partition without his father's assent so long as the father is joint with his own ancestors or collateral relations.[g]

Persons who are entitled to share on partition are thus either males or females. All the coparceners, barring those who are disqualified, or whose claim is barred by ouster and adverse possession,[h] constitute the group of male sharers. The wife, the mother and the grandmother, including the step-mother and the step-

(a) *Radhakanta* v. *Manomohinee* 60 C. 292 : 1933 C. 397.

(b) *Suraj Narain* v. *Iqbal Narain*, 40 I A. 40 : 35 A. 80—18 I C. 30=15 Bom. L R. 456=17 C.W.N. 333 :11 A.L.J. 172—1913 M W.N. 183=24 M.L.J. 345.

(w) See p. 353, footnote (w).

(c) *Sri Ranga* v. *Srinivasa*, 50 M. 866:= 26 L.W. 125=1927 M. 801=53 M.L.J. 189.

(d) As to who is a coparcener, see S 234 and the discussion from *Moro Vishvanath* v. *Ganesh Vithal*, 10 Bom. H.C R. 444 extracted in the next section, S. 344.

(e) *Suraj Bunsi* v *Sheo Persad*, 6 I.A. 88 -5 C 148 (P.C.): *Madho Parshad* v. *Madho Parshad* v. *Mehrban Singh*, 17 I.A. 194 18 C. 157 ; *Suraj Kuari* v. *Deoraj Kuari*, 10 A. 272 .15 I A. 51.

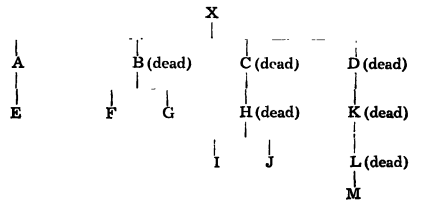
(f) See the change in this respect introduced by the Hindu Women's Rights to Property Act of 1937 printed at the end of this book.

(g) *Apaji* v. *Ramchandra*, 16 B. 29 ; *Nvabai* v. *Vadilal*, 7 Bom. L.R. 232.

(h) *Manjaya* v. *Shanmuga*, 38 M. 684 —1914 M.W.N. 356—26 M.L.J. 576 ; *Babaji* v. *Dattu*, 37 B. 64=14 Bom. L.R. 923=17 I.C. 642 ; Limitation Act, Art. 127.

grandmother constitute the female group. Added to these are persons outside the family such as the assignee of coparcenary interest such as a purchaser or a receiver in insolvency.

344. Sons, grandsons and great-grandsons.—The son, the grandson or the great-grandson is entitled to claim partition of the moveable and the immovable property(i) of the joint family against the father, the grandfather or the great-grandfather even without the latter's consent and against his wish,(j) subject to the exception recognised in the Bombay Presidency and in the Punjab that a son is not entitled to claim partition without the consent of the father when the latter is joint with his own father or collaterals.(k) On a partition between the father and sons, they are entitled to share equally.(l) If one of the sons is dead and has left his own sons or grandsons, they will represent the share of the deceased son and are entitled to his share. In other words the male issue of a deceased coparcener, if they themselves are within the limits of the coparcenary, are entitled to represent and receive the share of the deceased coparcener.



In a partition between X and the other members of his family, A represents his line and receives his share as representing his branch consisting of himself and his son E. B being dead, X's grandsons F & G represent B's share and are entitled to receive that share. In the line of C, the third son of X, both C and C's son H are dead and that line is represented by X's great-grandsons I

(i) *Jugmohandas* v. *Mangaldas*, 10 B. 528.

(j) *Subba* v. *Ganesa*, 18 M. 179; *Rameshwar Prosad* v. *Lachmi Prosad*, 31 C. 111=7 C.W.N. 688; *Jogul Kishore* v. *Shib Sahai*, 5 A. 430; *Suraj Bunsi* v *Sheo Persad*, 6 I.A. 88 5 C. 148 (P.C.); *Digambar* v. *Dhanraj*, 1 Pat. 361—1922 Pat. 96.

(k) *Apaji* v. *Ramchandra*, 16 B. 29; *Gahru Ram* v. *Mt. Hardevi*, 89 I C. 176=1926 L. 85; *Punjab National Bank* v. *Jagdish*, 1936 L. 390; *Bhupal* v. *Tavanappa*, 46 B. 435.

(l) *Nagindas* v. *Bachoo*, 43 I.A. 56=40 B. 270=1915 P.C. 41—3 L.W. 259=14 A.L.J. 185 :18 Bom. L.R. 172—20 C.W.N. 702=30 M.L.J. 193=(1916) 1 M.W.N. 193; Mitak. 1-3-6.

and J who, as representatives of C's line, are entitled to the share to which C would have been entitled, if he were alive. Coming to the line of the fourth son D, his line has become extinct for purposes of partition and M who is more than three degrees removed from X is not a coparcener and is not entitled to share as D's representative. D's share by his death leaving no descendant within the coparcenary limits of three degrees from the living common ancestor X, has survived to the lines of the other members of the coparcenary and ¼ share is assignable to X and each of the lines of A, B and C. But if the partition is to be a partition even as between the grandsons F and G and the great-grandsons I and J, each of them will receive ½ of ¼, that is, ⅛. In other words, each branch takes *per stirpes* as regards the other branches,[m] but the members of each branch take *per capita* as regards one another.[n] It must be noted in this connection that if D died divided from his father X, then the share taken by D would be taken by M, because M would then be within three degrees from the last taker of the property, namely, D, though X is more than three degrees removed from M. In the case of *Moro Vishvanath* v. *Ganesh Vital*,[o] Justice Nanabhai Haridas discusses as follows the question whether a descendant who is more than four degrees removed from the common ancestor can ask for a partition of the property left by that ancestor :—

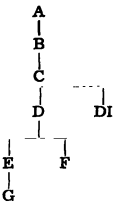
> Upon a consideration of the authorities cited, it seems to me that it would be difficult to uphold the appellants' contention that a partition could not, in any case, (other than that of absence in a foreign country) be demanded by descendants of a common ancestor, more than four degrees removed, of property originally descended from him. Take, for instance, the case put in the margin: A the original owner of the property in dispute, dies, leaving a son B and a grandson C, both members of an undivided family. B dies, leaving C and D, son and grandson, respectively; and C dies, leaving a son D and two grandsons by him, E and F. No partition of the family has taken place, and D, E and F, are living in a state of union. Can E and F compel D to make over to them their share of the ancestral property? According to the law prevailing on this side of India they can, sons being equally interested with their father in ancestral property; 1 Str. H L. 177; 2 *Ibid*., 316; *Mit*. Ch. 1, Sec. 1, 27 and Sec. V, 3, 5, 8 and 11; Vyav. May., Ch. IV, Sec. VI, 13.
>
> A
> |
> B
> |
> C
> |
> D
> |
> E F

In the same way, suppose B and C die leaving A and D members of an undivided family, after which A dies whereupon the whole of his property

(m) *Hurpurshad* v. *Sheo Dyal*, 3 I.A. 259 (P.C.); *Bhimul* v. *Choonee*, 2 C. 379; *Rajnarain* v. *Heeralal*, 5 C. 142; Mitak. 1-5-2.

(n) Mitak. 1-3-1 to 7; *Manjanatha* v. *Narayana*, 5 M. 362.

(o) *Moro Vishvanath* v. *Ganesh Vithal*, 10 Bom. H.C.R. 444.



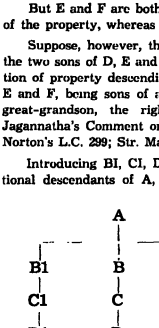
devolves upon D who thereafter has two sons E and F. They, or either of them, can likewise sue their father D for partition of the said property, it being ancestral.

Now, suppose B and C die leaving A, D and DI, members of an undivided family, after which A dies, whereupon the whole of his property devolves upon D and DI jointly, and that D thereafter has two sons E and F, leaving whom D dies. A suit against DI for partition of the joint ancestral property of the family would be perfectly open to E and F; or even to G and F, if E died before the suit. It would be a suit against DI by a deceased brother's sons or son and grandson: Vyavahara Mayukha, Chap. IV, Sec. IV, 21.

But E and F are both fifth and G sixth in descent from the original owner of the property, whereas D and DI are only fourth.

Suppose, however, that A dies after D, leaving a great-grandson DI and the two sons of D, E and F. In this case E and F could not sue DI for partition of property descending from A, because it is inherited by DI alone since E and F, being sons of a great-grandson, are excluded by DI, A's surviving great-grandson, the right of representation extending no further. See Jagannatha's Comment on Text CCCLXX at 2; Colebrooke's Dig. 512, 517: 1 Norton's L.C. 299; Str. Man. Sec. 323; 2 Str. H.L. 327.

Introducing BI, CI, DI, EI and FI, and B2, C2. D2, E2 and F2, as additional descendants of A, all forming an undivided family, might render the case a little more complicated and affect the value of their shares, but could not destroy the right, if any, of E and F to share the joint family property with the other members.



The rule then which I deduce from authorities on this subject is not that a partition cannot be demanded by one more than four 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. (In addition to the above authorities, consult I Norton's L.C. 292, 2 Colebrooke's Digest, Text CCCLXLX, page 479, also pages 512, 515; Str. Man. Sec. 347).

345. Putra Bhaga and Patni Bhaga.—Two modes of division between sons are known in Hindu Law. When the division is by the number of sons, it is called *Putra Bhaga*, when the division is according to the wives, it is known as *Patni Bhaga*. Though Putra Bhaga is now the recognised rule of Hindu Law, there are still traces of the other view and a customary law of Patni Bhaga, due probably to the matriarchal theories of the earlier inhabitants, is

fairly prevalent in Southern India, especially among the lower castes.[p] Such a custom was held proved in a case where the parties belonged to the Nattukottai Chetty community.[p]

346. Jyeshta Bhaga and the doctrine of double share.—The practice which once prevailed and was advocated by the sages,[q] of giving the elder brother and manager of the joint family an extra share in excess of the others as Jyeshta Bhagam on partition has become obsolete and is unenforceable,[r] except when there is a custom to that effect.[s] But an allowance under a partition award of a sum of money to the elder brother in excess of his share in consideration of his services to the family cannot be called Jyeshta Bhagam and the award does not become on that ground illegal within the meaning of Para 14 (c) of Sch. II of the Civil Procedure Code.[t] In a recent Calcutta case, however, the doctrine of double share was held applicable so as to enable a coparcener to claim an extra share in respect of property acquired by him out of joint funds if the means of acquisition drawn from such joint funds was of little consideration while his own personal exertions in the acquisition were considerable.[u]

347. Shares of son, father and grandfather.—When a partition takes place between a son, his father and his grandfather, the grandfather is entitled to ½, the father ¼ and the son ¼ of the joint assets.[v]

348. Adopted son.—In a partition between a father and his adopted son, the latter is in the same position as an aurasa son and is entitled to share equally with the father, that is, the father will take half, the adopted son the other half. But the position gets changed in a twice-born family if the partition involves also the share of an aurasa son born to the father subsequent to the adoption. The existence of an aurasa son contracts the share to which an adopted son would be otherwise entitled and the adopted son's share is to be determined in accordance with the rules laid down in Ss. 153 and 155. To illustrate this proposition, the position of an adopted son amongst the twice-born classes in the Madras Presidency may be considered. There he gets 1|5th of the interest in competition with an aurasa son who gets 4|5. These will be their

(p) *Palaniappa Chettiar* v. *Alagan Chetti*, 48 I.A. 539=1922 P.C. 228=44 M. 740=26 C.W.N. 417=15 L.W. 521=1921 M.W.N. 687.

(q) *Narada*, xiii-13; *Manu*, ix-112; *Yagnyavalkya*, ii-114.

(r) *Rajangam* v. *Rajangam*, 12 L.W. 435 =39 M.L.J. 382=57 I.C. 18; *Yerukola* v. *Yerukola*, 45 M. 648=15 L.W. 595=1922 M. 150=1922 M.W.N. 215=42 M.L.J. 507 (F.B.); *Venkata* v. *Kuppa*, 8 L.W. 400= (1918) M.W.N. 680=47 I.C. 716.

(s) *Sheo* v. *Futteh*, 2 S.D. 265.

(t) *Vaithinatha* v. *Subramania*, 78 I.C. 238=1925 M. 301.

(u) *Ashutosh* v. *Tarapada*, 58 C.L.J. 372 - 1934 C. 308.

(v) *Venkatapathi* v. *Pappia*, 28 L.W. 228 -51 M. 824=1928 M. 788=1928 M.W.N. 410=55 M.L.J. 489.

respective shares if the partition is only between an aurasa son and an adopted son. But if the father is also alive and the partition is to be among all the three, the father is entitled to share as an aurasa son, that is, like an aurasa son he will be entitled to get four times the share of the adopted son.[w] Thus computed, the respective shares will be 4|9 for the father, 4|9 for the aurasa son and 1|9 for the adopted son. But where the partition is between the adopted son of one deceased brother and either the surviving brother or his son, the adopted son represents his father and shares equally with the other.[x]

349. Illegitimate son.—An illegitimate son of a Sudra, born of an exclusively and continuously kept concubine, though he does not get an interest by birth in the father's property, is still entitled to claim partition after the father's death against the father's legitimate sons if the father had died divided from his collaterals. The share to which he is entitled on a partition with the legitimate sons of his putative father is to be determined in accordance with the rule that he is entitled to take ½ of what he would be entitled to if he were legitimate,[y] and this share is not confined to the self-acquired property of the father but embraces also property which was ancestral in the hands of the father.[z] But the illegitimate son is not entitled to claim partition against his father,[a] or even after his death if he had died joint with his collaterals and leaving no separate property.[b] But the father may allot him a share during his lifetime, a share even equal to that of an aurasa son.[c] (See also Ss. 72 and 77).

Thus an illegitimate son is entitled to claim partition as against his legitimate brothers only if he is (1) born of an exclusively and continuously kept mistress (2) to a Sudra father (3) who has died separated from his collaterals. If the father belongs to any of the regenerate castes,[d] or if the father died joint with his collaterals,[e] or if he had transferred the property to his

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(w) *Balakrishnayya* v. *Venkata*, 43 M. 398 -11 L.W 379—55 I.C. 371—38 M.L.J 86

(x) *Nagindas* v. *Bachoo*, 40 B. 270 - 43 I.A. 56—14 A.L.J. 185 .18 Bom. L.R. 172 —20 C.W.N. 702 30 M.L.J. 193 3 L.W. 259 —(1916) 1 M.W.N. 258—1915 P.C 41 : *Rala* v *Subbaru*, 7 M 253.

(y) *Kamulammal* v. *Vincanathaswami*, 46 M. 167—50 I.A. 32- 1923 P.C. 8=44 M.L.J. 465=25 Bom. L.R. 577 -27 C.W.N. 1021—17 L.W. 298.

(z) *Ratu* v. *Arunagiri*, 1933 M.W.N. 632 —37, L.W. 462 - 64 M.L.J. 500—1933 M. 397.

(a) *Jogendra* v. *Nityanund*, 18 C. 151= 17 I.A. 129 (P.C.); *Thangam* v. *Suppa*, 12 M. 401 ; *Sadu* v. *Baiza*, 4 B. 44.

(b) *Vellaiyappa Chetty* v. *Natarajan*, 34 L.W 589- 55 M. 1=58 I.A. 402—1931 P.C 294 -1931 M.W.N 848—35 C.W.N 1278 - 61 M.L.J 522—1931 A.L.J 1123—33 Bom. L.R. 1526.

(c) *Karuppannan* v *Bulokam*, 23 M 16; *Packirisawmy* v *Doraswamy*, 9 R 266.—1931 R. 216.

(d) *Roshan Singh* v. *Balwant Singh*, 22 A 191 27 I.A 51—4 C.W.N 353—2 Bom. L.R. 529 P.C

(e) *Vellaiyappa Chetty* v *Natarajan*, 58 I.A. 402—1931 P.C 294—34 L.W. 589= 55 M. 1—1931 M.W.N. 848.-35 C.W.N. 1278 —61 M.L.J. 522—1931 A.L.J. 1123—33 Bom. L.R. 1526 (P.C.).

legitimate issue during his lifetime,[f] the illegitimate son is not entitled to claim a partition of the joint family property. But if the putative father was a Sudra and died leaving separate property, the fact that he was undivided with his collaterals at the time of his death would not prevent his illegitimate son from claiming a partiton in respect of that property as against the legitimate sons of the putative father.

350. After-born son.—A son born after partition might have been conceived either before or after partition. In the case of a son born after partition but conceived before it, no partition can be made so as to prejudice his rights, because under Hindu Law a child is presumed to come into existence from the moment it is conceived, and if no proper provision is made for his share at the partition, he is entitled to get his share by re-opening it.[g] But if he was begotten only after partition, he is entitled to re-open it so as to obtain a share for himself only if the father has not reserved to himself a share thereunder.[h] If, on the other hand, a share was allotted to the father under the partition, the son conceived thereafter is not entitled to re-open it so as to claim a share in the interests of the separated coparceners but is only entitled to succeed to the property allotted to the father along with his self-acquisitions to the exclusion of the divided sons ;[i] the fact that the father has run through the share alloted to him is no ground for such a son claiming to re-open the partition.[j] These propositions are given with reference only to a partition between a father and his sons. Will the same principles apply even in the case of a partition between collaterals ? If a partition is made in a joint family consisting of three brothers and one of them does not take any share at all, then his son in *gremio matrix* at the time of the partition, on the reasoning that a son begotten is as good as born, can claim to rip open the partition so as to get himself allotted his legitimate share.[k] But the same reason cannot hold good if the son of the brother who had not taken any share was begotten only subsequent to the partition and hence such a son cannot claim to re-open the partition on the ground that his father has not taken

(f) *Ram Saran* v. *Tek Chand*, 28 C. 194.

(g) *Hanmant* v *Bhimacharya*, 12 B. 105 ; *Kalidas* v *Krishan*, 2 Beng. L.R. 103 F.B. See *Narasimha* v. *Veerabadhra*, 17 M. 287 ; *Shivajirao* v. *Vasantrao*, 33 B. 267—2 I.C. 249=10 Bom. L.R. 778 ; *Minakshi* v. *Virappa*, 8 M. 99.

(h) *Chengama* v. *Munusami*, 20 M. 75 ; *Ganpat* v. *Gopalrao*, 23 B. 636 ; *Vishnu*, 2 Colebrook 11-268 ; But see *Shivajirao* v. *Vasantrao*, 33 B. 267=2 I.C. 249=10 Bom. L.R. 778 ; *Rai Bishen* v. *Mt Asmaida*, 11 I A. 164—6 A. 360.

(i) *Kalidas* v. *Krishan*, 2 Beng. L.R. 103 (F.B.); *Shivajirao* v. *Vasantrao*, 33 B. 267 —2 I.C. 249=10 Bom. L.R. 778 ; *Nawal* v. *Bhagwan*, 4 A. 427 ; *Ganpatrao* v. *Gopalrao*, 23 B. 636=1 Bom. L.R. 123 ; *Yekeyamin* v. *Agnisvaarian*, 4 M.H.C.R. 307.

(j) *Shivajirao* v. *Vasantrao*, 33 B. 267 —2 I.C. 249=10 Bom. L.R. 778.

(k) *Krishna* v. *Sami*, 9 M. 64 (F.B.). See also *Shivajirao* v. *Vasantrao*, 33 B. 267.

any share in the partition between him and his brothers. But a partition between brothers cannot prejudice the rights of another brother who was in their widowed mother's womb at the time of the partition, provided of course that the child's paternity could be traced to their father either in fact or under legal presumption.

351. Minor Coparceners.—Ordinarily the family estate is better managed and yields a greater ratio of profit in union than when split up, [l] and hence a partition can be claimed on behalf of minors only if the continuance of the joint status is prejudicial to their interest, [m] as, when the manager is guilty of malversation or waste [n] or denies the minor's title. [o] In a suit for partition on behalf of a minor, no decree for partition should therefore be passed unless the Court finds that it will be for the minor's benefit. [p] The minority of one or more of the coparceners does not however prevent a valid agreement for partition being made so as to be binding upon them, [q] though, no doubt, if such partition is unfair or prejudicial to the interests of a minor coparcener, he is entitled, on attaining his majority, by proper proceedings to set it aside so far as regards himself. [r] A partition cannot be said to be unfair or prejudicial to the interest of a minor merely on the ground that the acreage of the lands allotted to him is less than the extent of the lands allotted to other coparceners, because mere acreage is not a satisfactory test of value, as much depends in fact upon the productivity of the lands allotted. [s] See also S. 335.

352. Absent Coparceners.—Though partition cannot be delayed by the absence of a coparcener, his absence does not place him in a worse position than that of a minor and his share cannot be ignored because at the time of the partition, he by his absence is unable to claim it for himself. If at the partition no share is allotted to him or a share is allotted to him which is unequal, he is entitled

(l) *Kamakshi* v. *Chidambara*, 3 M.H C R. 94.

(m) *Shantilal* v. *Munshilal*, 1932 B 498 56 Bom 595 34 Bom L.R 862 ; *Bhola Nath* v. *Ghasi*, 29 A. 373.

(n) *Shantilal* v. *Munshilal*, 56 B 595 – 34 Bom. L.R. 862 –1932 B. 498 ; *Bhola Nath* v *Ghasi*, 29 A. 373.

(o) *Soamiyar* v *Chokkalingam*, 1 M H.C.R. 105 ; *Thangam* v. *Suppa*, 12 M. 401.

(p) *Bachoo* v. *Mankorebai*, 31 B. 373—24 I.A. 107—17 M L.J. 343 :9 Bom. L.R 646—11 C.W.N. 769 P C. ; *Kamakshi* v *Chidambara*, 3 M.H.C.R. 94 ; *Damoodur* v. *Senabutty*, 8 C. 537 ; *Bhola Nath* v. *Ghasi*, 29 A. 373 ; *Mahadev* v. *Lakshman*, 19 B. 99 ; *Rangasoyi* v. *Nagarathnamma*, 38 L.W. 676=57 M. 95=65 M.L.J. 630= 1933 M.W N 1324=1933 M 890.

(q) *Parbati* v *Naunihal Singh*, 31 A. 412=36 I.A. 71 6 A.L.J 597 =11 Bom. L.R. 878= 13 C W.N. 983=19 M L.J. 517=3 I C. 195 P C. ; *Balkishen Das* v. *Ram Narain*, 30 C. 738 :30 I A. 139=5 Bom. L.R. 461= 7 C W.N 578.

(r) *Balkishen Das* v. *Ram Narain*, 30 C 738= 5 Bom L.R. 461=7 C.W.N. 578 ; *Ganesh* v. *Jewach*, 31 C. 262=14 M.L.J. 8 =8 C.W.N. 146. 6 Bom L.R. 1=31 I.A. 10 (P.C.) ; *Krishnabai* v. *Khangowda*, 18 B. 197; *Lal Bahadur* v. *Sispal*, 14 A 498; *Chanvirapa* v. *Danava*, 19 B. 593.

(s) *Sennimalai* v. *Sellappa*, 1929 P.C. 81=29 L.W. 439=33 C.W.N. 407=56 M.L.J. 511 ; See also *Bishambar Nath* v. *Lala Amar Nath*, 46 M.L.W. 94.

on his return to re-open the whole partition [t] subject of course to the law of limitation.[u]

353. Disqualified Coparceners.—"*An impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blindman and a person afflicted with an incurable disease, and the like, are excluded from participation, but are to be maintained. But their sons, whether real, legitimate or born of the appointed wife, are entitled to allotments, if free from defects; and their daughters must be maintained until they are provided with their husbands; and their sonless wives conducting themselves aright must be supported; but such as are unchaste should be expelled; and so indeed are those who are perverse.*"[v]

Under the Hindu Law, a person suffering from a disability which disentitles him to inherit cannot claim a share on partition but is entitled only to maintenance. [w] But if the defect be removed by medicaments or other means as penance and atonement at a period subsequent to a partition, the right of participation takes effect by analogy to the case of a son born after separation. [x] But the disability is purely personal and does not attach to his male descendants, so that, on a partition, his male descendants, if they are within the limits of the coparcenary, are entitled to get the shares which would fall to their branch if the disqualified coparcener were dead instead of being alive. [y] This rule will enure even to the benefit of a disqualified coparcener's son who was present in *gremio matrix* at the time of the partition and he would be entitled to reopen the partition if no share was allotted to his branch. But if he was not conceived at the time of the partition, the Bombay and the Calcutta High Courts would say that the fact that he was born subsequent thereto does not enable him to claim a share in the property. [z] But the Madras High Court, however, takes the contrary view, [a] and the analogy of a son both begotten and born after partition between the father and the sons supports this view inasmuch as the disqualified coparcener is in the same position as a father who has not reserved to himself a share on partition. This question is discussed as follows in the case of *Krishna* v. *Sami* [a]:—

"The right of the disqualified person to inherit, if he is cured of his disqualification, is likened to the rights of a son born after partition.

(t) *Krishna* v. *Sami*, 9 M 64 (F.B.).

(u) Limitation Act. Arts. 127. 142 and 144.

(v) *Yagnavalkya* ii. 141-143.

(w) *Ram Sahye* v. *Lalla*, 8 C. 149; *Murarji* v. *Parvati*, 1 B. 177.

(x) Mitak.. ii. 10-7; *Krishna* v. *Sami*, 9 M. 64 (F B); But see *Deo Kishen* v. *Budh*, 5 A. 509 (F.B.).

(y) Mitak.. ii. 10-9 to 11; *Krishna* v. *Sami*, 9 M. 64 (F.B.).

(z) *Bapuji* v. *Pandurang*, 6 B. 616; *Kalidas* v. *Krishan*, 2 Beng. L.R. Full Bench rulings, 103.

(a) *Krishna* v. *Sami*, 9 M. 64 (F.B.)

The son born after partition may be a son begotten and born after partition in his father's lifetime. He may be a son begotten before partition and born after it in his father's lifetime. He may be a son begotten before partition and born after it when the partition has been made after the father's death.

The common feature in all three cases is that he takes a share in the wealth. In the first case he takes the shares of his parents and acquisitions made after partition, or, if the father has reserved no share, he may call upon his brothers to make up a share to him. In the second and third cases he takes a share made up out of the shares of his brothers. In no case is he excluded altogether although the estate may have vested.

Analogy is intended to illustrate and not to limit. The analogy between the case of the disqualified person and the case of the after-born son is incomplete if the opinion of the Calcutta High Court be adopted, and the true meaning of the analogy appears to be explained by the author of the Sarasvati Vilasa. There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood: there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent, or may come into existence at a future time as it does in the case of the after-born son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies he is at once entitled to be recognized as a member of the coparcenary: the only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested.

That the rule prohibiting the divesting of an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the law of the Mitakshara, appears to be established by admitted rules and by judicial decision.

A, who after his father's death becomes the sole and absolute owner of the wealth in which on his birth he had become a co-owner with his father, marries and has a son B born to him. His absolute estate is immediately converted into a coparcenary estate, and as other sons C and D are born, the interests of A and B are practically curtailed by the admission of new coparceners. It is true that while the estate remains coparcenary it is vested as a unit in all the male members, and that the diminution in the interest which each member would take on a partition is not strictly a divesting, though it must be remembered that the right vests in birth and not on partition. But let a partition be made in A's lifetime and let him reserve no share for himself and then let a son E be born to him who was not in the womb at the time of partition. We have authority for saying he would be entitled to require his brothers to contribute out of their allotments so that all might receive an equal portion of the family wealth. Again, let the eldest son B have gone to a foreign country and let his brothers in his absence make a partition of the family wealth. A share is not necessarily set apart for him; the time may have elapsed when it may reasonably be believed he was dead. According to Hindu law, which does not in other cases ignore limitation, he may, after seven generations, return and claim to have a share or a half share made up to him out of his brother's allotments.

Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father—*Sri Raghunadha* v. *Sri Brozo Kishore*.(b) To the argument of Mr. Justice Norman that a widow by adopting a son caused a divesting of the estate, it was objected that she divested only her own estate. This no doubt is true where the estate has descended to her as the sole heir; but where the estate has descended to more than one widow jointly, an adoption by any one of them divests the estate of the others—*Rakmabai* v. *Radhabai*.(c) It may, however, be objected that in this case the estate had not vested in a full male owner, and that the learned Judges of the Bombay Court supported the adopted son's claim on the ground that the widow who had not made the adoption was bound to consent to it. A case, however, arose in this presidency and went before the Judicial Committee, in which an estate was divested from a full male owner by reason of an adoption made by a widow. An impartible zemindari, the property of two undivided brothers was in the possession of the elder. On his death, leaving a widow and no male issue, the brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her husband and it was held the adopted son was entitled to possession of the zamindari—*Sri Raghunadha* v. *Sri Brozo Kishore*.(d) The existence of a valid power creates a potentiality of inheritance, which may be likened to that of a son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified share-taker, who may afterwards become qualified to demand possession or who may beget a qualified son.

In our judgment, it must be held that the estate vests subject to its being divested on the recovery of the disqualified, or the birth of a qualified, heir. We, therefore, affirm the decree of the Court of the Subordinate Judge and dismiss the appeal with costs". *Krishna* v. *Sami*, 9 M. 64 at pp. 77-79 (F.B.).

But such a reopening of the partition at the instance of a subsequently born son of a disqualified coparcener ought not to be made to affect the rights of third parties *bona fide* acquired and for consideration unless he had already been conceived at the time of the partition. Now S. 2 of the Hindu Inheritance (Removal of Disabilities) Act (XII of 1928) provides: "Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot shall be excluded from inheritance or from any right of share in joint family property by reason only of any disease, deformity or physical or mental defect". Under this Act, which, however, is not retrospective (See S. 3 of the Act) and does not apply to persons governed by the Dayabhaga School (See S. 1 of the Act), it is only a person who has been an idiot or lunatic congenitally, that is disqualified from inheriting or claiming a share on partition. This is in consonance with the view taken

(b) 3 I.A. 154=1 Mad. 69.
(c) 5 Bom. H.C.R. 181.
(d) 3 I.A. 154=1 Mad. 69.

by the Allahabad High Court on the question of lunacy [e] differing from the view taken by the Calcutta High Court.[f] Coparceners disqualified from sharing are, however, entitled along with their wives and children to a provision for maintenance out of the joint family assets.[g]

354. Female Sharers.—The wife, the widow-mother, the grandmother and possibly the great-grandmother are also entitled to share on partition, but they cannot themselves call for a partition.[h] The terms mother, grandmother and great-grandmother include step-mother, step-grandmother and step-great-grandmother. Their right to share arises only on partition being actually effected.[i] Thus if a suit for partition brought by some of the coparceners is withdrawn, a female sharer like the mother cannot claim a share or insist that the suit should be carried on to a decree. If the suit, for some reason, is dismissed, the mother cannot get any share in the property.[j] In other words, though the mother or grandmother is entitled to a share when sons or grandsons divide the family estate between themselves, she cannot be recognised as the owner of such share until the division is actually made, she having no pre-existing right in the estate except a right to maintenance. There is no difference in this respect between the rights of a wife and those of a mother or grandmother. The mere institution of a suit for partition by a member of the joint family or even the passing of a preliminary decree therein does not make any of these females the owner of a share in the family property so long as no actual division of the joint property is made. Hence a decree obtained in a mortgage suit against the male members of the joint family during the pendency of a partition suit and prior to the actual division of the property under a decree for partition cannot be resisted by any such female sharer as not binding on her on the ground of her not having been made a party to the mortgage action.[k] The share allotted to a Hindu woman on partition among her sons is an interest in lieu of her right to maintenance which is carved out of the shares of the coparceners, and at the death of the woman, her share goes back to and becomes

(e) *Tribeni* v. *Muhammad*, 28 A. 247; *Deo Kishen* v. *Budh*, 5 A. 509.

(f) *Ram Soonder* v. *Ram Sahye*, 8 C. 919

(g) Mit. II-10.

(h) *Punna* v. *Radha*, 31 C. 476; *Venkatammal* v. *Andyappa*, 6 M. 130; See the change in this respect introduced by the Hindu Women's Rights to Property Act of 1937 printed at the end of this book.

(i) *Pratapmull* v. *Dhanabati*, 63 C. 691 =63 I.A. 33=40 C.W.N. 193=38 Bom. L.R. 323=43 L.W 177=1936 P.C. 20; *Raoji* v. *Anant*, 42 B. 535=20 Bom. L.R. 671; *Beti Kunwar* v. *Janki*, 33 A. 118=7 A.L.J. 980 7 I.C. 908.

(j) *Baldeo* v. *Sarojini*, 34 C.W.N. 160=1929 C. 697; *Jadunath* v. *Haran Chandra*, 49 C. 1043—1923 C. 221

(k) *Pratapmull* v. *Dhanabati*, 43 M.L.W. 177=1936 P.C. 20=63 C. 691=63 I.A. 33=40 C.W.N. 193=38 Bom. L.R. 323.

part of the shares out of which it came. [l] Hence during her lifetime the male sharers have a vested interest in her share and not merely a *spes successionis*. [m] But the practice of allotting shares to females has, however, become obsolete in Southern India [n] where their rights are regarded as being confined to maintenance. [o]

355. Wife.—When a partition takes place during the father's lifetime, a share equal to that of a son must be allotted to his wife,[p] whether she be the mother of the sons[q] or their step-mother,[r] and she is entitled to hold and enjoy that share separately even from her husband. [s] If she has already received some property from her husband or father-in-law, that will also be taken into consideration in ascertaining whether her share is equal to that of a son,[t] and, if the property so received by her exceeds in value such share, she is not entitled to claim any share on partition. [u] But property acquired by her otherwise than as above, should not be deducted from the share to which she would otherwise be entitled. [v] Again, property obtained by her, though from her husband or father-in-law, can be deducted only if it is capable of producing income. A share given to a woman on partition is in lieu of maintenance [w] and it is difficult to understand how a woman can possibly maintain herself out of non-productive property like ornaments, clothes etc. etc. [x]

356. Mother (widowed).—A widowed mother, though not entitled to require a partition so long as her sons remain united

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(l) *Debi Mangai* v *Mahadeo*, 34 A. 234 -39 I A 121 . See also *Saheb Rai* v. *Shafiq*, 1927 P C 101 . *Hriday* v *Behari* 11 C W N 239

(m) *Shoshi Bhusan* v *Hari Naram*, 48 C 1059 1921 C. 202 .25 C W N. 990 , *Hemangini* v *Kedarnath*, 16 C 758 .16 I A 115

(n) *Subramanian* v *Arunachelam*, 28 M. 1 . See the change introduced by the Hindu Women's Rights to Property Act of 1937 printed at the end of this book

(o) *Mari* v *Chinnammal*, 8 M 107 (F B.), *Venkatammal* v. *Andyappa*, 6 M. 130

(p) *Dhanbati* v. *Protapmull*, 61 C. 1056 -38 C.W.N 1045- 1935 C 131 ; *Damoodur* v *Senabutty*, 8 C. 537 ; *Beeby* v. *Kshitish Chandra*, 18 C W.N. 631=41 C. 771=26 I.C. 284 ; *Mancharam* v *Dattu*, 44 B. 166=54 I.C 110=21 Bom. L.R. 1172 ; Mitak . 1-7-1 and 2.

(q) *Partap Singh* v. *Dalip Singh*, 52 A 596 1930 A.L.J. 793=1930 A 537 ; *Dular Koeri* v *Dwarkanath*, 32 C. 234=9 C.W.N.

(r) *Hoshanna* v *Devanna*, 48 B 468=1924 B. 444=26 Bom L R 424.

(s) *Dhanbati* v. *Protapmull*, 61 C. 1056 38 C W N 1015 1935 C 131

(t) *Hushensab* v *Basappa*, 34 Bom L.R 1325 .140 I C 736 , *Jairam* v. *Nathu*, 31 B 54 8 Bom L R 632. Mitak., 11-2-5.

(u) *Beti Kunwar* v. *Janki Kunwar*, 33 A 119 .3 A L J 989=7 I C. 908 ; *Poorendra* v. *Hemangini*, 36 C 75 . 12 C.W.N. 1002 1 I C 523 ; *Jairam* v *Nathu*, 31 B. 54 8 Bom L.R. 632 Mitak . 11-11-5.

(v) *Kishori Mohun* v *Moni Mohun*, 12 C. 165 ; *Poorendra* v. *Hemangini*, 36 C. 75 12 C.W.N. 1002 1 I.C. 523 ; *Jogobundhu* v *Rajendra*, 66 I.C 121=1921 C. 351

(w) *Hemangini* v. *Kedarnath*, 16 C. 758 .16 I A. 115 ; *Basist* v. *Bindeshwari*, 97 I.C 289—1926 P. 537 7 P.L.T. 599 ; *Shashi Bhusan* v. *Hari Narain*, 48 C. 1059=1921 C 202=25 C.W.N. 990 ; *Jairam* v. *Nathu*, 31 B. 54 =8 Bom. L.R. 632.

(x) *Basist* v. *Bindeshwari*, 97 I.C. 289 1926 P. 537=7 P.L.T. 599.

is, [y] however, entitled, when a partition takes place between them or between them and their illegitimate brothers, [z] to receive the share of a son in property which is ancestral, or acquired by the employment of ancestral wealth, and is not bound by a partition effected in disregard of her right. [a] As in the case of a partition effected during the husband's lifetime, the value of any property given to the widowed mother by her husband and her father-in-law must be taken into consideration in computing her share. [b] But partition to entitle a mother to the share, must be made of ancestral property, or of property acquired by ancestral wealth. [c] Thus if the property is the acquisition of only the sons without the aid of ancestral assets, the mother is not entitled to a share on a partition between them. [d] The step-mother has the same right as the mother as the term "mata" in the text, [e] must be taken to include also a step-mother. [f] On this reasoning the proposition that in a partition between brothers who are the sons of different mothers, the property is first divided into equal shares among all the brothers, and then the shares of all the sons of each mother are put together and again equally divided between them and her, [g] is not correct. [h] A mother is, however, not entitled to claim her share when there is only a severance in status and not a division by metes and bounds between her sons. Her right, as also the right of a grandmother considered in the next section, to be allotted a share, arises only when the actual division of the joint family property is made [i] and that too only when there is a general partition and not merely a partition of one of the items of the joint family property at the instance of a stranger. [j] It is

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[y] See the change introduced in this respect by the Hindu Women's Rights to Property Act of 1937 printed at the end of this book.

[z] *Manchharam* v *Dattu*, 41 B. 166 = 54 I.C 110 21 Bom L.R 1172; *Bhagwantrao* v *Punjaram*, 1938 N 1

[a] *Ganesh* v. *Jewach*, 31 C 262 31 I A 10 =14 M L J 8 8 C W N 146 =6 Bom L.R. 1; *Hemangini* v *Kedarnath*, 16 C 758=16 I A. 115; *Damodardas* v. *Uttamram*, 17 B. 271; *Bilaso* v. *Dinanath*, 3 A 88.

[b] *Hushensab* v. *Basappa*, 140 I C. 736 =34 Bom. L.R 1325; *Kishori Mohun* v. *Moni Mohun*, 12 C. 165; Mitak. 1-2-9; Vyavahara Mayukha. iv-4-18.

[c] *Ganesh Dutt* v. *Jewach*, 31 C 262=31 I.A. 10 =14 M.L.J. 8 =8 C.W.N. 146=6 Bom. L.R. 1.

[d] *Isree Pershad* v. *Nasib Kooer*, 10 C. 1017.

[e] Mitak., 1-7-1 and 2.

[f] *Hosbanna* v. *Devanna*, 48 B. 468=26 Bom. L.R. 424=1924 B. 444; *Basist* v. *Rindeshwari*, 97 I.C. 389 1926 P 537 =7 P L T 599; *Saheb Rai* v *Shafiq Ahmad*, 101 I C 426= 26 L W 82 1927 P C 101= 1927 M.W N 480= 31 C W N 972=53 M L J. 507 (P.C.). *Teqh Indar* v *Harnam*, 6 L 157 1925 L 568; *Har Narain* v *Bishambhar* 38 A 83 31 I C 907 13 A L J 1129; *Ram Peari* v *Hari Dutt*, 1933 A 562; but this proposition is inapplicable in the Bengal School See *Damoodur* v *Senabuttu*, 8 C 537

[g] *Krista* v. *Ashutosh*, 13 C. 39

[h] *Padman Singh* v *Subramnai*, 94 I C 791 1926 N. 291; *Damodardas* v. *Uttamram*, 17 B 271; *Damoodur* v *Senabuttu*, 8 C 537 at 539

[i] *Pratapmull* v *Dhanabati*, 63 I A. 33 63 C 691 =43 M L W 177=38 Bom L.R. 323 1936 M.W.N 5 =40 C.W.N 193=1936 A L J 89=70 M L J. 296=1936 P.C 20; See the change effected in this respect by the Hindu Women's Rights to Property Act of 1937 printed at the end of this book.

[j] *Barahi* v. *Debkamini*, 20 C. 682.

also possible to argue that since the right of a mother to share on a partition is in the nature of a right to an allotment for her maintenance, the forfeiture of her right to be maintained out of the estate by reason of her unchastity also entails the extinction of her right to claim a share on a partition between her sons, certainly between her step-sons. (k)

357. Grandmother and great-grandmother.—The grandmother's share equal to that of a son has been conceded when the partition is between her sons and the sons of a deceasad son. (l) So also, if the partition is between her grandsons after the death of her son, the grandmother is entitled to a share equal to that of a grandson even though their own mother is alive. (m) But if the partition is between her son and that son's sons, the grandmother is, according to the Allahabad and Bombay High Courts, not entitled to a share. (n) It is however submitted that there is nothing in the texts on which this decision is arrived at to negative the grandmother's right in such cases and the text of Vyasa "The father's sonless wives shall be made equal sharers as also the paternal grandmother, for they are declared to be equal to mother" clearly supports the contrary view taken by the Calcutta rulings. (o) This question is well considered in the following extract from the decision in *Krishna Lal* v. *Nandeshwar*. 44 I.C. 146 :—

"The next question is whether Girija Ojhain, the grandmother of the plaintiff and mother of the defendant Krishna Lal Jha, was entitled to a share on partition. Upon this point divergent views have been expressed by the High Courts of Calcutta and Allahabad. The decisions of the Calcutta High Court which until recently exercised jurisdiction in this Province, although they do not prevent this Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reason. In *Badri Roy* v. *Bhugwat Narain Dobey* (p) it was decided by Mitter and Maclean, JJ., that in a partition between a father and son at the instance of the son both the mother of the latter and his paternal grandmother were entitled to share equally with him and his father. That was a case of a Mitakshara family and the Mitakshara together with the Vivada Ratnakara and the Vivada Chintamani is the leading authority recognised by the Mithila School. In the case of *Sheo Narain* v. *Janki Parshad* (q) a Full Bench of the Allahabad High Court on the other hand held that in a partition between a father and his sons the father's mother

(k) *Sellam* v. *Chinnammal*, 24 M. 441.

(l) *Brij Mohan* v *Bitana*, 102 I.C 354 = 1927 O. 233 ; *Mani* v. *Chinnammal*, 8 M. 107 (123) (F.B.); *Babuna* v. *Jagat*, 50 A. 532=1928 A. 330. 26 A.L.J. 293 ; *Ram Peari* v. *Hari Dutt*, 1933 A. 562.

(m) *Kanhaiya Lal* v. *Mt. Gaura*, 47 A 127=1925 A. 19=22 A.L.J. 890 ; *Vithal* v. *Prahlad*, 39 B. 373=17 Bom. L.R. 361=28 I.C. 967 ; *Sorolah* v. *Bhoobun*, 15 C. 292.

(n) *Jamnabai* v. *Vesudeo*, 54 B. 417= 32 Bom. L.R. 48=1930 B. 302 ; *Sheo Narain* v. *Janki Prasad*, 34 A. 505=9 A.L.J. 749= 16 I.C. 88 ; See contra in *Krishna Lal* v. *Nandeshwar*, 4 P.L.T. 38=44 I.C. 146 ; *Badri Roy* v. *Bhugwat*, 8 C. 649. See also *Shantaya* v. *Mallappa*, 40 Bom. L.R. 1029.

(o) *Badri Roy* v. *Bhugwat*, 8 C. 649 ; *Purna Chandra* v. *Sarojini*, 31 C. 1065= 8 C.W.N. 763.

(p) 8 C. 649=11 C.L.R. 186=6 Ind. Jur. 636=4 Ind. Dec. (N.S.) 417.

(q) 16 I.C. 88=9 A.L.J. 749=34 A. 505.

is not entitled to a share according to the Benares School of the Mitakshara Law. The latter case appears to be based mainly upon the consideration that whilst the author of the Mitakshara expressly recognises the right of the wife of the father to share equally with the sons when distribution is made during the lifetime of the father no mention is made of the father's mother, although after the father's death, if the sons separate, the mother is mentioned as entitled to an equal share with the sons. The passage relied on is found in section VIII of the Mitakshara and reads as follows in Colebrooke's translation.—"When a distribution is made during the life of the father the participation of his wives, equally with his sons, has been directed" (If he make the allotments equal his wives must be rendered partakers of like portions). The author now proceeds to declare their equal participation when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father let the mother also take an equal share". It seems fairly clear that Vijnaneswara, in the passage just referred to, is considering the claim of the same person, *first*, as a wife of the head of a joint family when a partition takes place and, *secondly*, as the widow of the late head of the family when the sons themselves are seeking separation, and in either case she is awarded a share equal to that of a son. In the case now under appeal if the defendant Krishna Lal Jha had had a brother alive and unseparated from him, it would appear that on a partition taking place between them their mother would be entitled to share with them the ancestral property, they being "the heirs dividing after the death of the father", in which case the Mitakshara provides "let the mother also take an equal share". The fact that either or each of the brothers had issue living would not, we apprehend, affect the rights of the mother although in such a case she might with equal accuracy be described as a grandmother concerning whom the Mitakshara is silent. How then ought her claim to be considered when the partition takes place, not between her sons as heirs of her deceased husband, but between her only son who is undoubtedly an heir and her grandson? On referring to the text of Yajnawalkya it also appears that where the father in his lifetime makes an equal distribution among his sons, his wives to whom no *stridhan* has been allotted take like portions and where after his death the sons separate, their mother takes a share equal to that of a son. Separation between a father and an only son does not appear to be contemplated by Yajnawalkya, nor is it in terms referred to in the text of the Mitakshara It is not improbable that at the time when the Mitakshara was written a partition between a father and an only son at the instance of the latter was seldom if ever resorted to. However this may be, the propriety of such a proceeding could hardly be challenged at the present day. It is not easy to see on what principle of justice or equity the mother of an only son on a partition between him and his heirs should be excluded, when if two or more of her sons as coparceners were dividing the family property she would be entitled to share equally with them. It was argued as a reason for leaving her unprovided that her maintenance should properly fall after partition as a charge upon her son's share. This argument appears to us to have little to recommend it. Before partition he would have control of the whole of the family property from which to provide for his mother's maintenance. After partition that control would cease and his resources would be limited in proportion to the number of sharers with whom he divided. It could be urged with equal force that on partition between sons after the death of a father the mother should have no portion as her maintenance should fall on the eldest son or any other, but in such a case she is in fact allotted a full share equal to that of her sons.

But as the Mitakshara makes no express provision for the case now under consideration, we should have some difficulty in coming to a decision not expressly authorised by the great commentator if the Mitakshara were the only authority recognised by the Mithila School. The Vivada Ratnakara and the Vivada Chintamani, which are authorities of at least equal weight amongst the followers of the Mithila School, both quote a text of Vyasa which says: "But the sonless wives of the father are pronounced equal sharers and all grandmothers also are pronounced equal to mother." The above quotation occurs in Chapter IV, 31 of Golapchandra Sarkar's translation of the Vivada Ratnakara. In Tagore's translation of the Vivada Chintamani the passage is rendered: "Even childless wives of the father are pronounced equal sharers and so are all the paternal grandmothers who are declared equal to mothers." It has been argued before us that the quotation from Vyasa should be treated as applying only to cases of partition amongst brothers, as in the Vivada Ratnakara it occurs in a Chapter dealing with partition among brothers and in Vivada Chintamani it forms one of the paragraphs under the heading "grandsons of different fathers." We can see no reason for so restricting its application and we are supported in this view by the decision of the Calcutta High Court in the case of *Badri Roy* v. *Bhugwat Narain Dobey*(r) already referred to. If we are right in supposing that in Vijnaneswara's day a separation between a father and an only son was not an established practice, this may account for the fact that no mention is made in the Mitakshara of the father's mother in such a case. It would not, however, account for the case of a separated brother as the head of a new line of descent partitioning with his sons in the lifetime of his mother. But such a case *ex hypothesi* supposes an earlier separation between the present head of the family and his brothers, in which case his mother would have already been provided for by her share in the earlier partition. There is no evidence that the grandmother had been so provided for in the present case. This does not exhaust all possible cases where the question could arise, but other cases would necessarily be of rare occurrence. In any case the claim of the grandmother is distinctly recognised in two out of three of the leading authorities governing the Mithila School and although we have great hesitation in view of the Full Bench decision of the Allahabad High Court in arriving at a conclusion in favour of the grandmother's claim, we think that such a claim should be recognised amongst those governed by the Mithila Law."—*Krishnalal* v. *Nandeshwar*, 44 I.C. 146 at 148-150.

In the same way as the term "mother" has been held to include a "step-mother", the term "grandmother" must be taken to include a step-grandmother. (s)

What exactly will be the share of the grandmother if the grandsons are sons of different fathers is an interesting question. Supposing A dies leaving three sons B, C and D and his widow W. If subsequently B dies leaving one son E, C dies leaving two sons F and G and D dies leaving three sons H, I and J, what is the share to be allotted to the grandmother W, if the partition takes place between her grandsons E, F, G, H, I and J? It will be seen

(r) 8 C. 649=11 C.L.R. 186=6 Ind. Jur. 636=4 Ind. Dec. (N.S.) 417.

(s) *Sriram* v. *Haricharan*, 9 P. 338=11 P.L.T. 651=1930 P. 315; *Vithel* v. *Prahlad*, 39 B. 373=17 Bom. L.R. 361=28 I.C. 967; *Ram Peari* v. *Hari Dutt*, 146 I.C. 810=1933 A. 562.

here that E will take 1/3, F and G each will take 1/6 and H, I and J will each take 1/9. Which of these shares is the one to which W is to be entitled? It is said that the proper mode of division is to treat W as one of the grandsons and treat all the grandsons as having been born to the same father, ascertain the share to which W will then be entitled, and after giving that share to her, divide the rest among her grandsons giving 1/3 to E, 1/6 to each of F and G, and 1/9 to each of H, I and J of the remainder. W will then get 1/7 of the whole, but the shares of her grandsons are to be computed with reference only to the remainder. (t)

As was observed in the case of a mother, even in the case of a grandmother, she will be entitled to a share only if the property was one in which her husband during his lifetime had an interest. Hence if the property has been acquired by her sons and grandsons without the aid of ancestral assets, she is not entitled to a share on a partition between them. The above rules are applicable also in the case of a great-grandmother. (u)

358. Purchaser and other assigns of coparcenary interest.— Where the undivided interest of a coparcener has validly passed to a stranger either by operation of law as on the insolvency of a coparcener or by purchase either in execution of a decree(v) or by private contract, he is entitled to claim a partition as against the other coparceners and to enforce it by a suit both during and after the lifetime of that coparcener. (w) This right is available even to a mortgagee of a coparcener's interest who has got a right to possession under the deed of mortgage. (x) Such an alienee of an unascertained share in a joint family property cannot claim mesne profits (y) nor can he insist upon the possession of any definite piece of property. His remedy is to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included and all the necessary parties joined. In a suit of this nature, the Court in making the partition would endeavour to give effect to the alienation by so marshalling the family property amongst the coparceners as to allot that portion of the family estate alienated,

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(t) *Mayne's Hindu Law*, 10th Edn. 548.

(u) F. Mac. N. 52. *Purna Chandra* v. *Sarojini*, 31 C. 1065=8 C.W.N. 763; Sircar's "Vyavasta Darpana", 497 and 498.

(v) *Deendyal* v. *Jugdeep*, 4 I.A. 247=3 Cal. 198; *Medni Prasad* v. *Nand Keshwar*, 2 Pat 386=1923 P. 451; *Maruti* v. *Lila Chand*, 6 B 564.

(w) *Aiyyagari* v. *Aiyyagari*, 25 M. 690; *Dhulabai* v. *Lala*, 46 B. 28=23 Bom. L.R. 777=1922 B. 137; See also S. 316.

(x) *Mori Meghaji* v. *Amarchand*, 35 Bom. L.R. 132=1933 B. 121.

(y) *Trimbak* v. *Pandurang*, 44 B. 621=57 I.C. 582=22 Bom. L.R. 812; *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265=1915 M. 453=27 M.L.J. 409.

or so much of it as may be just, to the alience. [z] *In other words, the alienee will be decreed the possession of the specific property transferred to him, if that can be done without substantial injustice to the other members.* [a] Where the allotment of the property alienated, or a share therein, to the alience, is not possible or equitable, then out of the properties allotted to the alienor's share, property equal in value to the alienated property should be allotted to the alience. [b] In the same way, where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, but the mortgagee can proceed against the properties allotted to the mortgagor in substitution of his undivided share. [c] But if the other co-sharers or some of them happen to be the mortgagor's sons, then the mortgagee is entitled to enforce his security even as against the properties assigned to such sons' shares and the fact that due provision had been made in the partition for the discharge of the mortgage debt out of the property allotted to the mortgagor's share cannot take away the mortgagee's right to proceed against the sons' allotted shares. [d] When, however, it has been proved that the whole of the family interest in the property has been disposed of by the joint act of all the coparceners or by their separate acts against which no dispute has been raised, then an action for partition between

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(z) *Ishrappa* v. *Krishna*, 46 B. 925=24 Bom. L.R. 428=1922 B. 413; *Aiyyagari* v. *Aiyyagari*, 25 M. 690; *Monjaya* v. *Shanmuga*, 38 M. 684 1914 M.W.N. 356=26 M.L.J. 576 22 I C. 555, *Gurlingappa* v. *Sabu*, 33 Bom. L.R. 141 -1931 B. 218, *Daud Beevi Ammal* v. *Ramakrishna*, 72 I.C 81=17 L.W. 332 1923 M.W.N 202=1923 M. 467=44 M.L.J 309.

(a) *Daud Beevi Ammal* v. *Ramakrishna*, 72 I.C. 81=17 L.W. 332=44 M.L.J. 309=1923 M.W.N. 202=1923 M. 467; *Aiyyagari* v *Aiyyagari*, 25 M. 690 (F.B.); *Pandu* v. *Goma*, 43 B. 472=21 Bom. L.R. 213=50 I.C. 765; *Chinnu Pillai* v. *Kalimuthu*, 35 M. 47=21 M.L.J. 246=(1911) 1 M.W.N. 238=9 I.C. 596 (F.B.); *Gurlingappa* v. *Sabu*, 131 I.C. 886=33 Bom. L.R. 141 -1931 B. 218.

(b) *Manjaya* v. *Shanmuga*, 38 M. 684=1914 M.W.N. 356=26 M.L.J. 576=22 I.C. 555; But see *Dhadha* v. *Muhammad*, 44 M. 167 -39 M.L.J. 706=12 L.W. 603=59 I.C. 311=1920 M W.N. 710; *Sabapathi* v. *Thandavroya*, 43 M. 309=11 L W. 108=54 I.C. 515 37 M.L.J. 620.

(c) *Mahomed Afzal* v. *Abdul*, 36 L.W. 456 1932 P.C. 235=13 Lah. 702=36 C.W.N. 1129 -1932 M.W.N 1063 1932 A.L.J. 909=63 M L.J 664=35 Bom L.R. 1 59 I.A. 405; *Bujhath* v. *Ramoodeen*, 1 I.A. 106; *Nagendra* v. *Pyari Mohan*, 43 C. 103=20 C W.N 319 30 I.C. 420; *Muthia* v. *Appala*, 34 M. 175 6 I.C. 991=1910 M.W.N. 418=20 M.L.J. 398; *Lakshman* v. *Gopal*, 23 B. 385; *Amolak* v. *Chandan*, 24 A. 483; *Kharag Narayan* v. *Janki Rai*, 16 Pat. 230.

This right of the mortgagee to proceed against the property allotted to his mortgagor is subject to the liability which under the partition has to be met out of that property, as, for instance, a liability to pay owelty to the other sharers; *Rathnavelu* v. *Subramaniam*, 48 L.W. 215 - 1938 M. 767.

(d) *Rama Aiyar* v. *Raghavathi*, 43 M.L.W. 478=1936 M. 473=70 M.L.J. 506=1936 M.W.N. 374.

strangers in respect of a particular item may be allowed in the plainest of cases. [e] Besides such an action for partition in respect of only the property alienated is maintainable if the same is brought by all, [f] and not by some only, [g] of the non-alienating coparceners, or when the coparceners do not object to it if brought by the alienee. [h] When all the members of a joint family have parted with their rights in a specific property of the family, questions between the alienees from the several members are not questions between coparceners, and the cases which hold that alienees from coparceners can sue only for general partition have no application to one of the alienees being entitled to sue the others for partition of the specific property. [i] Besides, in a suit for partition to which a purchaser is a party, he is entitled to his rights upheld only subject to the equities affecting the alienor's share. e.g., its liability for the payment of debts, etc. [j] See also S. 316.

359. Alienee's share on partition.—The alienee's share on partition has to be determined with reference to the alienating coparcener's share on the date of the alienation and not with reference to his share on the date of partition. [k] But that share has to be worked out only by taking the properties existing at the date of the partition and not with reference to the properties or their value as they existed at the date of the alienation. [l]

SUIT FOR PARTITION

360. Frame of the suit and parties thereto.—The general rule is that a suit for partition must embrace all the joint family properties, [m] and that all the parties interested in such properties,

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(e) *Ishrappa* v. *Krishna*, 46 B. 925. 24 Bom. L.R. 428—1922 B. 413; *Iburamsa* v. *Thirumalai*, 34 M. 269—1910 M.W.N. 380 -7 I.C. 559—20 M.L.J. 743.

(f) *Ramcharan* v. *Ajudhia*, 28 A. 50; *Hanmandas* v. *Valabhdas*, 43 B. 17—20 Bom. L.R. 472 -46 I.C. 133; *Subramanya* v. *Padmanabha*, 19 M. 267; *Kandasamy* v *Velayutha*, 50 M. 320—24 L.W. 367—1926 M.W.N. 399—1926 M. 774 -51 M.L.J. 99. But see *Koer Husmat* v. *Sundar*, 11 C. 396.

(g) *Shyam Sunder* v *Jagarnath*, 2 P. 925—5 P.L.T. 193—1923 P. 590; *Hanmandas* v. *Valabhdas*, 43 B. 17—20 Bom. L.R. 472—46 I.C. 133; *Ramcharan* v. *Ajudhia*, 28 A. 50.

(h) *Venkayya* v. *Lakshmayya*, 16 M. 98; *Manjaya* v. *Shanmuga*, 22 I.C. 555—1914 M.W.N. 356—26 M.L.J. 576 -38 M. 684; *Ishrappa* v. *Krishna*, 46 B. 925—1922 B. 413—24 Bom. L.R. 428; *Chidambaram* v. *Nachiappa*, 48 L.W. 485.

(i) *Iburamsa* v. *Thirumalai*, 34 M. 269—1910 M.W.N. 380—20 M.L.J. 743—7 I.C. 559; *Suranna* v. *Subbarayadu*, 38 L.W. 952—1933 M. 871 65 M.L.J. 769—1933 M.W.N. 823.

(j) *Venkureddi* v *Venkureddi*, 50 M. 535 -52 M.L.J. 387—1927 M.W.N. 267—25 L.W. 781—1927 M. 471; *Narayan* v. *Nathaji*, 28 B 201; *Chidambaram* v. *Nachiappa*, 48 L.W. 485

(k) *Muthukumara* v. *Sivanarayana*, 56 M. 534—64 M.L.J. 66—1933 M. 158—1933 M.W.N. 199 37 L.W. 19; *Chinnu Pillai* v. *Kelimuthu*, 35 M. 47 -21 M.L.J. 246—(1911) 1 M.W.N. 238—9 I.C. 596 (F.B.); *Naro* v. *Paragauda*, 41 B. 347—39 I.C. 23—19 Bom. L.R. 69; *Aiyyagari* v. *Aiyyagari*, 25 M. 690 (F.B.); See also S. 316.

(l) *Muthukumara* v. *Sivanarayana*, 37 L.W. 19 -56 M. 534—1933 M. 158—64 M.L.J. 66—1933 M.W.N. 199 See contra in *Jinwarsa* v. *Gunvantrao*, 1936 N. 34; *Chinnu* v *Kalimuthu*, 35 M. 47 -21 M.L.J. 246—(1911) 1 M.W.N. 238; *Naro* v. *Paragauda*, 41 B. 347—1916 B. 130—19 Bom. L.R. 69.

(m) *Shiv Dyal* v. *Ram Jiwaya*, 12 L. 574—32 P.L.R. 376—1931 L. 603—131 I.C. 209.

such as the sharers, the aliences and dependent members having claims for maintenance and marriage expenses, must be made parties to the suit. But if the suit is not for partition of the properties between all the individual coparceners, but only between the various branches of the family, the really necessary parties are the heads of the various branches, and it is therefore not obligatory on the plaintiff to implead all the coparceners of each of the branches. [n] The rule that a partition suit should embrace all the joint family property is neither arbitrary nor technical and is founded on sound and weighty reasons. But for its being recognised and and firmly applied, multiplicity of litigation would be the inevitable result, with suits for partition instituted in fragments and the jurisdiction of the trial Court and the forum of appeal materially altered; it would be of paramount importance to a party litigant whether he should have a first appeal or a second appeal to the High Court and whether he should at all be permitted to seek the judgment of the Judicial Committee with regard to the matters in controversy. The rule further ensures a just partition, as otherwise parties might be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements and adjustment of accounts. [o] Though this is the general rule it is within the power of co-tenants by mutual agreement to make a partition of a part only of the joint property, retaining the rest in joint tenancy. [p] Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised in addition to those adverted to in S. 358. Thus a suit for partition in respect of only a portion of the property has been held maintainable when different portions of the family property are situate in different jurisdictions, [q] or when the portion excluded is situate outside India, [r] or required for its inclusion in the suit the consent of the Government by reason of its being inam land [s] or when, not being in the possession of coparceners, it should be deemed not to be really available for partition, [t] or when it is impartible property [u] or held jointly with strangers who have no

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(n) *Bishambar* v. *Kanshi*, 13 L. 483=1932 L 641; *Jamna Prasad* v. *Mt. Durga*, 1933 A. 138; *Digambar* v. *Dhanraj*, 1 P. 361; *Subba Rao* v. *Subba Rao*, 1936 M. 689=44 L.W. 515=71 M.L.J. 419.

(o) *Rajendra* v. *Brojendra*, 77 I.C. 790=1923 C. 501; *Haridas* v. *Prannath*, 12 C. 566; *Ganpat* v. *Annaji*, 23 B. 144.

(p) Ibid—*Ramalinga* v. *Narayana*, 49 I.A. 168=45 M. 489=1922 M.W.N. 399=26 C.W.N. 929=43 M.L.J. 428=20 A.L.J. 539=24 Bom. L.R. 1209=16 L.W. 639=1922 P.C. 201; *Kandasami* v. *Doraisami*, 2 M. 317.

(q) *Balaram* v. *Ramchandra*, 22 B. 922; *Abdul Karim* v. *Badrudeen*, 28 M. 216; *Punchanun* v. *Shib Chunder*, 14 C. 835.

(r) *Ramacharya* v. *Anantacharya*, 18 B. 389; *Purushottam* v. *Atmaram*, 23 B. 597=1 Bom. L.R. 76.

(s) *Purushottam* v. *Atmaram*, 23 B. 597=1 Bom. L.R. 76.

(t) *Narayan* v. *Pandurang*, 12 Bom. H.C.R. 148; *Pattaravy* v. *Audimula*, 5 M.H.C.R. 419.

(u) *Parvathi* v. *Thirumalai*, 10 M. 334.

interest in the family partition,[v] or where the subject matter of the suit was left out in a prior suit for partition owing to ignorance of its existence.[w] So also if some property could not be divided by reason of its being in possession of a usufructuary mortgagee[x] or a lessee on a long lease or set apart for the maintenance of a widow[x] or owing to its being in the hands of third party claiming adversely to the family,[y] no Court will be inclined to hold that such property should be brought into the suit. Besides, the mere non-inclusion in the suit of all the coparcenary properties available for partition does not justify the immediate dismissal of the suit; the proper course for the Court to adopt in such a case is to give an opportunity to the plaintiff to amend his plaint by the inclusion of the omitted properties.[z] Though as between members of a joint family, no suit for partial partition lies, a member or members of a joint family may sue an alienee from a member or members of the joint family for his or their share of the property alienated without suing for a general partition. In so doing they affirm the sale by the other members, but the real basis of the rule is that as the rule against partial partition is a rule for the protection of the joint family against being harassed by multiplicity of suits at the instance of alienees from recalcitrant members, they can waive the benefit of it and bring a suit to separate themselves from the undesirable stranger. This rule in favour of the maintainability of a suit for partial partition as between members of a joint family and an alienee from a member or members applies even where the contending parties, namely, the plaintiff and defendant, are alienees from the members of the joint family; in other words, as between two strangers, who are alienees from members of a joint family, there is no reason why there could not be a suit for partition of only those items in respect of which the contending parties to the suit are tenants-in-common.[a] The whole law on partial partition has been considered in the following decision, reported in *Rajendra* v. *Brojendra*,[b] of Mukerjee and Cuming JJ.

(v) *Purushottam* v. *Atmaram*, 23 B. 597=1 Bom. L.R. 76. See the exceptions summarised in *Rajendra* v. *Brojendra*, 77 I.C. 790=1923 C. 501.

(w) *Subramanian* v. *Lakshminarasamma*, 98 I.C. 538=1927 M. 213.

(x) *Kristayya* v. *Narasimham*, 23 M. 608; *Narayan* v. *Pandurang*, 12 Bom. H.C.R. 148; *Shivmurteppa* v. *Virappa*, 24 B. 128=1 Bom. L.R. 620; *Purushottam* v. *Atmaram*, 23 B. 597=1 Bom. L.R. 76.

(y) *Subramanian* v. *Ramachandra*, 85 I.C. 503=47 M.L.J. 908=1925 M. 333; *Shamsuddin* v. *Chatomal*, 1931 S. 143.

(z) *Mukunda* v *Jogesh*, 20 C.W.N. 1276 =35 I.C. 370.

(a) *Kandaswami* v. *Venkatarama*, 146 I.C. 64=38 L.W. 498=65 M.L.J. 696=1933 M. 774· 1933 M.W.N. 1110; *Iburamsee* v. *Thirumalai*, 34 M. 269=1910 M.W.N. 380=20 M.L.J. 743=7 I.C. 559; *Subbarazu* v. *Venkataratnam*, 15 M. 234.

(b) 77 I.C. 790=1923 C. 501.

"This is an appeal by the defendant in a suit for partition. The plaintiff and the defendant are two brothers, governed by the Dayabhaga School of Hindu Law. Under a testamentary disposition of their father, now deceased, they are entitled in equal shares to the properties in suit and many other properties. In this suit, the plaintiff seeks partition of an ancestral house at Srinagar, two houses at Dacca and a large number of movables. The defendant contends that all the joint properties should be included in the suit and divided by the decree therein. The Subordinate Judge has overruled this objection, and has made a preliminary decree. On the present appeal, the defendant has urged that the plaintiff should not be allowed to sue for partial partition.

The principles applicable to cases of this character are well settled. The general rule is that all property held in co-tenancy and nothing but property held in co-tenancy should be included in a partition suit. A co-tenant, whose title to an undivided share of joint property is admitted or is clear, is entitled to partition as a matter of right; and a difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition; and it has sometimes been maintained that partition may be claimed, even though it be impossible to divide the property without materially impairing its value, or even totally destroying it: *Norris* v. *Le Neve*(c); *Parker* v. *Gerard*(d); *Baring* v. *Nash*(e) *Calmady* v. *Calmady*;(f) *Turner* v. *Morgan*;(g) *Agar* v. *Fairfax*;(h) *Clarendon* v. *Hornby*.(i) Since partition can be claimed as a matter of right, a co-tenant is not required to make a demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenants must be included in a partition suit, it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common: *Darvill* v. *Roper*.(j) The principle that a partition suit should include all the property of the co-tenancy is widely recognised, and it has been pointed out that if the rule were not enforced, a co-tenant might institute as many suits to partition the property as his caprice dictated. Consequently a partial partition cannot, as a general rule, be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding their moieties together and undivided, the Court may permit them to do so, and instead of making a separate allotment to each, set apart, to all who so desire, an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff; this is not partial but complete partition: *Hobson* v. *Sherwood*;(k) *Clarendon* v. *Hornby*.(i) The rule is enunciated in these or similar terms by text-writers of recognised authority. Thus, Freeman (Co-tenancy and Partition, section 508) states that a tract held in common cannot be partitioned by fragments, and a suit for partition should always embrace the whole tract held by the co-tenancy. But while it is indispensable that the whole tract should be embraced in the suit for partition, it does not follow that those who are mutually desirous of continuing the rela-

(c) (1744) 3 Atk. 83=26 E.R. 850.
(d) (1754) Ambl. 236=27 E.R. 157.
(e) (1813) 1 V. & B. 551 at p 554=35 E.R. 214.
(f) (1795) 2 Ves. Jur. 568=80 E.R. 780.
(g) (1803) 8 Ves. 143=32 E.R. 307=149 R.R. 667.
(h) (1808) 17 Ves. 533 at p. 543=1 Wh. & T.L.C. (7th Ed.) 181=34 E.R. 533.
(i) (1718) 1 P. Wms. 446=24 E.R. 485.
(j) (1855) 3 *Drewry* 294=3 Eq. R. 104 =24 L.J. Ch. 779=3 W.R. 467=61 E.R. 915 =106 R.R. 355.
(k) (1841) 4 Beav. 184=49 E.R. 309= 55 R.R. 40.

tion of co-tenancy among one another, are obliged to have their several portions allotted to them to hold in severalty. It is true that there are cases where a partial partition has been treated as improper and unauthorised under all circumstances: *Robertson* v. *Robertson*.(l) But the weight of the authorities is in favour of the view that the plaintiff in a partition suit is entitled to have his share set off, if the premises are capable of being divided, for that is his object in instituting the proceedings; if the situation of the defendants is such as to render it for their interest to retain their portion together and undivided, there can be no possible objection in principle in permitting it to be done. To the same effect is the statement by Knapp (Partition, p. 192) that common property cannot be partitioned in fragments; it is not the practice of the Court to cause or decree a partial partition. The established rule may accordingly be taken to be that a suit for partition should include all the lands of the co-tenancy, and if it does not, any party interested may insist that the omitted land or lands be included in the suit.

There is little doubt that the general principle enunciated above was recognised by Hindu jurists; see Mitakshara, Chap. II, section 10; Vishnu XV, 33; Narada XIII, 32; *Radha Churn Dass* v *Kripa Sindhu Dass*;(m) *Manjanath Shanabhaga* v. *Narayana Shanabhaga*;(n) *Sudarsanam Maistri* v. *Narasimhulu Maistry*.(o) Jolly, Tagore Lectures on Partition, p. 135.

The principle that a suit for a division of a portion of the family property cannot lie and must comprise the entire family property has been affirmed in numerous cases: *Nanabhai Vallabdas* v. *Nathabai Haribhai*;(p) *Trimbak Dixit* v. *Narayan Dixit*;(q) *Venkatesh* v. *Ganpaya*;(r) *Gopal* v. *Narnapa*;(s) *Parbati Churn Deb* v. *Ain-ud-deen*;(t) *Upendra Narain Myti* v. *Gopee Nath Bera*;(u) *Haridas Sanyal* v. *Pran Nath Sanyal*;(v) *Ramjoy Ghose* v. *Ram Ranjan Chukerbutty*;(w) *Kalka Pershad* v. *Budree Sah*;(x) *Hoolas Khan* v. *Munsub Ali*;(y) *Venkayya* v. *Lakshmayya*;(z) *Juggo Lal Oopidhya* v. *Manohar Lal Oopidhya*,(a) *Shirmurteppa* v. *Virappa*;(b) *Kristayya* v. *Narasimham*;(c) *Cheyt Narain Singh* v. *Bunwarree Singh*;(d) *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji*;(e) *Ram Lochan Pattuck* v. *Rughoobur Dayal*;(f) *Venkata Narasimha* v. *Bhashyakarla*;(g) *Srimohan Thakur* v. *Macgregor*.(h)

Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts: *Hari Narayaan Brahme* v. *Ganpatrav Daji*;(i) *Ramacharya* v. *Anantacharya*;(j) *Moti Ram* v. *Kanhiyalal*;(k) *Punchanun Mullick* v. *Shib Chunder Mullick*;(l-a)

(l) (1852) 2 Swan (Tenn) 199.
(m) 5 C. 474—4 C.L.R. 428.
(n) 5 M. 362.
(o) 25 M. 149—11 M.L.J. 353.
(p) 7 B.H.C.R. A.C.J. 46.
(q) 11 B.H.C.R. 69.
(r) (1876) Bom. P.J. 110.
(s) (1883) Bom. P.J. 3.
(t) 7 C. 577.
(u) 9 C. 817.
(v) 12 C. 566.
(w) 8 C.L.R. 367.
(x) 3 N.W.P.H.C.R. 267.
(y) 3 N.W.P.H.C.R. 37.
(z) 16 M. 98.
(a) 19 W.R. 43.
(b) 24 B. 128 : 1 Bom. L.R. 620
(c) 23 M 608—10 M.L.J. 141
(d) 23 W.R. 395
(e) 14 C 122.
(f) 15 W.R. 111.
(g) 25 M. 367 : 4 Bom. L.R. 543=6 C. W.N. 611 29 I.A. 76
(h) 28 C. 769
(i) 7 B. 272.
(j) 18 B. 389.
(k) 77 Ind. Cas. 780.
(l-a) 14 C 835.

Balaram Bhaskarji v. *Ramchandra Bhaskarji*;(m) *Abdul Karim Sahib* v. *Badrudeen Sahib*;(n) *Srimati Pudamani Dasi* v. *Srimati Jagadamba Dasi*;(o) *Ram Mohan Lal* v. *Mul Chand*;(p) *Lachmana* v. *Terimul*;(q) *Subba Rau* v. *Rama Rau*;(r) *Jairam Narayan Raje* v. *Atmaram Narayan Raje*.(s) Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition; *Balkrishna Vithal* v. *Hari Shankar*;(t) *Narayan Babaji* v. *Pandurang Ramchandra*;(u) *Shivmurteppa* v. *Virappa*;(v) *Kristayya* v. *Narasimham*;(w) *Pattaravy Mudali* v. *Asidimula Mudali*;(x) *Gora Chand Haldar* v. *Basanta Kumar Haldar*.(y) A suit for partial partition has also been allowed when the portion excepted is impartible property *Malikarjuna Prasad* v. *Durga Prasad*;(z) *Parvathi* v. *Thirumalai*.(a) In another class of cases the rule has been relaxed, namely, where the portion excluded is held jointly with strangers who have no interest in the family partition; *Purshottam* v. *Atmaram Janardan*;(b) *Venkatachella Pillay* v. *Chinnaiya Mudaliar*;(c) *Sripati Chinna Sanyasi Razu* v. *Sripati Surya Razu*;(d) *Manjanatha Shanabhaga* v. *Narayana Shanabhaga*;(e) *Venkayya* v. *Lakshmayya*;(f) *Subramanya Chettyar* v. *Padmanabha Chettyar*;(g) *Lachmi Narain* v. *Janki Das*;(h) *Ram Mohan Lal* v. *Mul Chand*;(ii) *Ram Charan* v. *Ajudhia Prasad*;(jj) *Banwari Lal* v. *Sheo Sankar Misser*;(kk) *Gadadhar* v. *Balvant*;(ll) *Subbarazu* v. *Venkataratnam*;(mm) *Ibramsa Rowthan* v. *Thirumalai*;(nn) *Hari Kristna* v. *Venkatalakshmi*;(oo) *Kadegan* v. *Periya Munisami*;(pp) *Ajodhya Pershad* v. *Mahadeo Pershad*;(qq) *Kailash Chandra Das* v. *Nityananda Das*.(rr) We are not concerned here with the question whether an alienee from a co-sharer is entitled to institute a suit for partition of the property he is interested in; upon that point there has been some divergence of judicial opinion as is clear from the decisions reviewed in *Subba Row* v. *Ananthanarayana Iyer*.(ss) In such a contingency, two conflicting opinions have been maintained; on the one hand, it is urged that the purchaser is in precisely the same position as his transferor; on the other hand, it is said that the transfer really effects a severance, and the only joint property held in common by the transferee and the co-sharers of his transferor is what forms the subject matter of the conveyance. The first alternative is supported by the decisions in *Ibramsa Rowthan* v. *Thirumalai*;(tt) *Parbati Churn*

(m) 22 B. 922.
(n) 28 M. 216.
(o) 6 B.L.R. 134.
(p) 28 A. 39=2 A.L.J. 700.
(q) 4 Mad. Jur. 241.
(r) 3 M.H.C.R. 376.
(s) 4 B. 482.
(t) 8 Bom. H.C.R. A.C.J. 64.
(u) 12 Bom. H.C.R. 148.
(v) 1 Bom. L.R. 620.
(w) 23 Mad. 608=10 M.L.J. 141.
(x) 5 M.H.C.R. 419.
(y) 12 Ind. Cas. 684=15 C.L.J. 258.
(z) 27 I.A. 151=24 M. 147=2 Bom. L.R. 945=5 C.W.N. 74=10 M.L.J. 294.
(a) 10 M. 334.
(b) 23 B. 597=1 Bom. L.R. 75.
(c) 5 M.H.C.R. 166.
(d) 5 M. 196.
(e) 5 M. 362.
(f) 16 M. 98.
(g) 19 M. 267.
(h) 23 A. 216; A.W.N. (1901) 50.
(ii) 28 A. 39=2 A.L.J. 700.
(jj) 28 A 59.
(kk) 1 Ind. Cas. 670=13 C.W.N. 815.
(ll) (1883) Bom. P.J. 250.
(mm) 15 M. 234.
(nn) 7 Ind. Cas. 559=34 M. 269=(1910) M.W.N. 380=8 M.L.T. 269=20 M.L.J. 743.
(oo) 5 Ind. Cas. 491=34 M. 402=7 M.L.T. 155=20 M.L.J. 323=(1910) M.W.N. 555.
(pp) 13 M.L.J. 477.
(qq) 3 Ind. Cas. 9=14 C.W.N. 221.
(rr) 3 Ind. Cas. 21=11 C.L.J. 384.
(ss) 14 Ind. Cas. 524=23 M.L.J. 64.
(tt) 7 Ind. Cas. 559=34 Mad. 269=1910 M.W.N. 380=8 M.L.T. 269=20 M.L.J. 743.

Deb v. *Ain-ud-deen*;(uu) *Shivmurteppa* v. *Virappa*;(vv) *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*;(ww) *Padala Chekkaya* v. *Vethagirisvarudu Garu*.(xx) The second alternative is favoured in *Chundernath Nandi* v. *Hur Narain Deb*;(yy) *Mukunda Lal Pal Chowdhury* v. *Lehuraux*;(zz) *Barahi Debi* v. *Debkamini Deb*;(a) *Hamadri Nath Khan* v. *Ramani Kanta Roy*;(b) *Uma Sundari* v. *Benode Lal*;(c) *Subba Row* v. *Ananthanarayana Iyer*;(d) *Hanmandas Ramdayal* v. *Valabhdas Shankardas*;(e) *Kailash Chandra Das* v. *Nityananda Das*;(f) *Hari Kristna* v. *Venkatalakshmi*;(g) *Chinnu Pillai* v. *Kalimuthu Chetti*;(h) *Hem Chandra* v. *Hemanta Kumari Debi*;(i) *Ram Taran* v. *Hari Charan*;(j) *Sris Chandra Datta* v. *Mahima Chandra*;(k) *Dhulabhai Dabhai* v. *Lala Dhulu*.(l) But although partial partition by suit is allowed where different portions of the property lie in different jurisdictions or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. That rule is recognised in a long series of decisions *Baboo Lalljeet Singh* v. *Baboo Raj Coomar Singh*;(m) *Ram Lochun Pattuck* v. *Rughoobur Dayal*;(n) *Hari Narayan Brahme* v. *Ganpatrav Daji*;(o) *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji*;(p) *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee*;(q) *Radha Kanta* v. *Bipro Das*;(r) *Syed Barudden Saheb* v. *Syed Esaff Sahib*;(s) *Kailash Chandra Das* v. *Nityananda Das*;(t) *Koer Hasmat Rai* v. *Sunder Das*;(u) *Haridas Sanyal* v. *Pran Nath Sanyal*;(v) *Jogendra Nath Rai* v. *Baldeo Das*;(w) *Syed Habibur Rasul* v. *Ashita Mohan Ghose*;(x) *Mahomed Fazlur Rohman Chowdhury* v. *Mahomed Fayzur Rahman Chowdhury*;(y) *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee*;(z) *Mansaram Chakravarti* v. *Ganesh Chakravarti*;(za) *Mukunda Lal Chakrabarty* v. *Jogesh Chandra*;(zb) *Bem Madhab* v. *Gobinda Chandra*;(zc) *Shivmurteppa* v. *Virappa*;(zd) *Doman Lal* v. *Prokash Lal*;(ze) *Ranku* v. *Hukmi*;(zf) *Buragapalli Sriramulu* v. *Nandigam Subbarayadu*.(zg) The decisions mentioned on behalf of the respondent cannot be deemed to have abrogated this rule: *Hem Chandra* v. *Hemanta*

(uu) 7 Cal. 577.
(vv) 24 Bom. 128=1 Bom. L.R. 620.
(ww) 25 Ind. Cas. 585=39 M. 265=27 M.L.J. 409=16 M.L.T. 181.
(xx) 12 Ind. Cas. 408=(1911) 2 M.W.N. 382.
(yy) 7 C. 153.
(zz) 20 C. 379.
(a) 20 C. 682.
(b) 24 C. 575=1 C.W.N. 406.
(c) 34 C. 1026.
(d) 14 Ind. Cas. 524=23 M.L.J. 64=11 M.L.T. 393.
(e) 46 Ind. Cas. 133=43 B. 17=20 Bom. L.R. 472.
(f) 3 Ind. Cas. 21=11 C.L.J. 384.
(g) 5 Ind. Cas. 491=34 Mad. 402=7 M.L.T. 155=20 M.L.J. 323=(1910) M.W.N. 555.
(h) 9 Ind. Cas. 596=35 M. 47=21 M.L.J. 246=(1911) 1 M.W.N. 238=9 M.L.T. 380 (F.B.).
(i) 23 Ind. Cas. 442=19 C.W.N. 356.
(j) 22 Ind. Cas. 30=18 C.L.J. 556.
(k) 33 Ind. Cas. 17=23 C.L.J. 231.
(l) 64 Ind. Cas. 115=23 Bom. L.R. 777 =46 B. 28=(1922) A.I.R. (B) 137.
(m) 25 W.R. 353.
(n) 15 W.R. 111.
(o) 7 B. 272.
(p) 14 Cal. 122.
(q) 3 Ind. Cas. 247=10 C.L.J. 503.
(r) 1 C.L.J. 40.
(s) 3 Ind. Cas. 20.
(t) 3 Ind. Cas. 21=11 C.L.J. 384.
(u) 11 C. 396.
(v) 12 Cal. 566.
(w) 35 C. 961=12 C.W.N. 127=6 C.L.J. 735.
(x) 12 C.W.N. 640.
(y) 10 Ind. Cas. 354=15 C.W.N. 677.
(z) 8 Ind. Cas. 346=15 C.W.N. 375=12 C.L.J. 25.
(za) 16 Ind. Cas. 383=17 C.W.N. 521.
(zb) 35 Ind. Cas. 370=20 C.W.N. 1276 =1 P.L.J. 393.
(zc) 46 Ind. Cas. 165=22 C.W.N. 669.
(zd) 24 Bom. 128=1 Bom. L.R. 620=12 Ind. Dec. (*N.S.*) 623.
(ze) 18 Ind. Cas. 866.
(zf) 35 Ind. Cas. 545.
(zg) 10 Ind. Cas. 57=10 M.L.T. 313.

Kumari Debi ;(zh) *Kali Charan Singh* v. *Kiranbala Debi* ;(zi) *Ram Mohan Lal* v. *Mul Chand* ;(zj) *Durga Charan Acharjee* v. *Enamul Huq.*(zk)

The rule that a partition suit should embrace all the joint property is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied, multiplicity of litigation would be the inevitable result. If suits for partition were allowed to be instituted in fragments the jurisdiction of the Trial Court and the forum of appeal might be altered; it might be of paramount importance to a party litigant whether he should have a first appeal or a second appeal to the High Court, and whether he should at all be permitted to seek the judgment of the Judicial Committee with regard to the matters in controversy. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. It need not be disputed that there may be very special cases where the application of the rule may be justly relaxed. The case before us, however, is not of an exceptional description. The plaintiff asserts that if all joint properties were included in the suit, it would take a long time to complete the partition. There is no substance in this contention. The two brothers have fallen out and the Subordinate Judge has found that there is great bitterness of feeling between them. There can be no room for doubt that the sooner they cease to be joint owners, the better for them. The partition may be expedited if suitable arrangements are made; for instance, there is no reason why different surveyors and valuers should not be employed to deal with the various properties; and whoever may be appointed commissioner, may have such assistance placed at his disposal that the work of partition may be speedily completed.

The result is that this appeal is allowed and the preliminary decree made by the Subordinate Judge set aside. The case will be remanded to him for re-trial. The joint properties owned by the two brothers will all be included in the suit and will be dealt with in such manner as the Court may consider consistent with justice, equity and good conscience. If the plaintiff declines to have a partition of the entire joint estate, the suit will stand dismissed with costs in both Courts. The appellant is entitled to his costs of this appeal. The hearing fee will be assessed at 15 gold *mohurs*. The costs in the Trial Court, before and after remand, will be in the discretion of that Court." 77 I.C. 790-795.

361. Equities to be adjusted on partition.—Where a division takes place by metes and bounds, due regard must be had as a matter of equity to the predilection of a coparcener in respect of a particular property,(a) the improvements effected by a coparcener in respect of the property of which he has been in separate possession, the rights of *bona fide* transferees for value(b) and any particular mode of distribution which will ensure the mutual convenience of the respective sharers. Under the provisions of the Partition Act, wherever in any suit for partition it appears to the Court that by reason of the nature of the property to which the suit re-

(zh) 23 Ind. Cas. 442=19 C.W.N. 356.
(zi) 51 Ind. Cas. 948=29 C.L.J. 494.
(zj) 28 A. 39=2 A.L.J. 700=A.W.N. (1905) 169.
(zk) 60 Ind. Cas. 762.

(a) *Narayan* v. *Chulhan*, 15 C.L.J. 376 .14 I.C. 677.
(b) *Udaram* v. *Ranu*, 11 Bom. H.C.R. 76.

lates, 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 (See S. 2 of Act IV of 1893). Undoubtedly, when a coparcener disposes of his share or part of it, he will, on partition, be debited with what he has so taken away.[c]

362. Partial partition.—Partition may be general or partial. A general partition is that which is brought about in respect of the entire joint family property by all the members getting themselves separated from one another. A partial partition is that which takes place either in respect of only a portion of the joint family property[d] or in respect of only some of the joint owners. But the Hindu Law writers do not contemplate cases of partial partition, partial either as regards the property to be divided, or partial as regards the coparceners who seek to become divided. But such partial partitions have been taking place for a long time and the law relating to the same is practically judge-made law.[e] Still the presumption is that once there is an intention to sever, the coparceners hold the property as tenants-in-common,[f] though as was observed in *Ramalinga* v. *Narayana*,[g] "it is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining the rest as the properties of the joint and undivided family."[g] But except in cases enumerated in Ss. 358 and 360 there cannot be a suit for partition in respect of only some of the properties of a joint family. As regards partial partition in respect of persons, a member of a joint family can separate himself from the other members, and the remaining coparceners, without any special agreement among themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family

(c) *Narayana Sah* v. *Sankar Sah*, 53 M. 1 -30 L.W. 751 -57 M.L.J. 685=1929 M. 865 ; *Aiyyapari* v. *Aiyyagari*, 25 M. 690 (F.B.). See also Ss. 358 and 316 ; *Deorao* v. *Asaram*, 1936 N. 203.

(d) *Ramalinga* v. *Narayana*, 49 I.A. 168 - 45 M. 489.-1922 M.W.N. 399=26 C.W.N. 929 .43 M.L.J. 428--20 A.L.J. 839=24 Bom. L.R. 1209=16 L.W. 639=1922 P.C. 201.

(e) *Narayana Sah* v. *Sankar Sah*, 53 M. 1=30 L.W. 751=57 M.L.J. 685=1929 M. 865 (F.B.)

(f) *Martand* v. *Radhabai*, 54 B. 616= 1931 B. 97--32 Bom. L.R. 924 ; *Manickam* v. *Kamalam*, 45 M.L.W. 114=1937 M. 335 ; *Beni Pershad* v. *Mst. Gurdevi*, 4 Lah. 252 1923 L. 493.

(g) See also *Appovier* v. *Rama Subba Aiyan*, 11 M.I.A 75 , *Mohan Singh* v *Mt. Gur Devi*, 12 L. 767=1931 L. 728 , *Manickam* v. *Kamalam*, 45 L.W. 114-= (1937) 1 M.L.J. 95=1937 M.W.N. 285.

property.[h] Where one coparcener separates from others, there is no presumption that the latter remain united,[i] or have become divided, and either allegation must be proved like any other fact.[j] That the remaining members continued to be joint may, if disputed, be inferred from their subsequent conduct or from the way in which their family business was carried on after a coparcener had separated from them.[k] Where a coparcener who has sons living separates from his brothers, there is no presumption of law that he separates also from his sons and that he and his descendants cease to constitute among themselves a joint family.[l] In a suit for partition which proceeds to a decree, the decree for partition is the evidence to show whether the separation was only a separation of the plaintiff from the other coparceners or was a separation of all the members of the joint family from one another.[m] In *Balkrishna* v. *Ram Krishna*,[n] their Lordships of the Privy Council, after a review of the case-law, observed as follows: "The general principle undoubtedly is that every Hindu family is presumed to be joint until the contrary is proved. If it is established that one member has separated, does the presumption continue with reference to the others? The decisions of the Board show that it does not. But it is equally clear on these decisions that the other members of the family may remain joint: it is again, their Lordships think, a question of their intention, which must no doubt be proved."

363. Successive partitions.—When only some members of the joint family become separate, leaving the rest joint, questions arise

(h) *Palani Ammal* v. *Muthuvenkatachala*, 48 M 254=52 I.A. 83=48 M.L.J. 83 =6 P.L.T. 133=21 L.W. 439=1925 M.W.N. 330=27 Bom. L.R. 735=23 A.L.J. 746=29 C.W.N 846 1925 P.C. 49 ; *Ram Pershad* v. *Lakhpati*, 30 C. 231=30 I.A. 1=5 Bom. L.R. 103=7 C.W.N. 162.

(i) *Mt. Jatti* v. *Banwarilal*, 50 I.A. 192 =21 A.L.J. 582 18 L.W. 273 45 M.L.J. 355=25 Bom. L.R. 1256 1923 M.W.N. 687 =28 C.W.N. 785—1923 P.C. 136=4 L. 350 ; *Balabux* v. *Rukhmabai*, 30 I A. 130=30 C. 725=5 Bom. L.R 469=7 C.W.N. 642 (P.C.).

(j) *Sengoda* v. *Muthu*, 47 M. 567=19 L.W. 533=1924 M. 625=46 M.L.J. 404= 1924 M.W.N. 376 ; *Bai Krishna* v. *Ram Krishna*, 58 I.A. 220=53 A. 300=33 Bom. L.R. 1280 35 C.W.N. 815=61 M.L.J. 362= 1931 A.L.J. 499=1931 M.W.N. 793=34 M.L.W. 13—1931 P.C. 154.

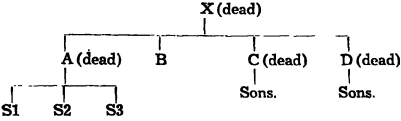
(k) *Ram Pershad* v. *Lakhpati*, 30 C. 231 30 I.A. 1=5 Bom. L.R. 103=7 C.W.N. 162 (P.C.); *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254=52 I.A. 83=48 M.L.J. 83=6 P.L.T. 133=21 L.W. 439=1925 M.W.N. 330=27 Bom. L.R. 735=23 A.L.J. 746=29 C.W.N. 846=1925 P.C. 49

(l) *Hari Baksh* v. *Babu Lal*, 51 I.A. 163 =22 A.L.J. 254=28 C.W.N. 953=1924 M.W.N. 659=20 L.W. 498=26 Bom. L.R. 1108—47 M.L.J 938=1924 P.C. 126=5 L. 92 (P.C.); *Lala Jai Narain* v. *Prag Narain*, 21 L.W. 162 85 I.C. 2=1925 M.W.N. 13= 48 M L.J. 536 27 Bom. L.R. 713=29 C. W.N. 775 (P.C.); *Jag Prasad Rai* v. *Mt. Singari*, 86 I.C. 122—23 A.L.J. 97—27 Bom. L.R. 760=29 C.W.N. 941=49 M.L.J. 162 =1925 P.C. 93 (2); *Digamber* v. *Dhanraj*, 1 Pat. 361=1922 P. 96 ; *Umed* v. *Khalasbai*, 11 Bom. L.R. 396=2 I.C. 426 (2).

(m) *Palani Ammal* v. *Muthuvenkatachela*, 48 M. 254=52 I.A. 83=48 M.L.J. 83 =6 P.L.T. 133—21 L.W. 439=1925 M.W.N. 330=27 Bom. L.R. 735=23 A.L.J. 746=29 C.W.N. 846=1925 P.C. 49.

(n) 53 All. 300=58 I.A. 220=1931 A.L.J. 499=35 C.W.N. 815=34 L.W. 13=1931 M.W.N. 793=61 M.L.J. 362=33 Bom. L.R. 1280—1931 P.C. 154 ; See also the discussion in *Rudragouda* v. *Basangouda*, 40 Bom. L.R. 202.

in a subsequent partition amongst those who have remained joint as to the fraction of the property to which each of them will be entitled. The ordinary rule that partition should be made *rebus sic stantibus*, *i.e.*, as at the date of the partition, in its application to this question, may mean either that regard should be had to the state of the family at the time of the prior partition or to its state at the time of the subsequent partition. The former is the view taken by the Madras High Court,[o] and the latter view is taken by the Bombay High Court.[p] Thus when there are two or more branches of a joint family and one member of one branch separates leaving the rest still joint, the question arises whether the share already taken by him is to be deducted from the share due to his branch at a subsequent partition or whether it is to be entirely ignored and the subsequent partition effected as if it is in itself an entirely new and complete partition. In the Madras case of *Narayana Sah* v. *Sankar Sah*,[q] the facts are as given in the following illustration:



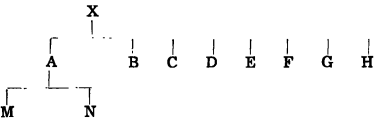
In a prior partition S3 got his 1/12 share and went out of the family leaving the rest joint. In a subsequent partition S1 and S2 each claimed 1/8th of the family property on the ground that at the time of this partition their branch was one of the four branches of the joint family and that that branch should therefore be entitled to ¼ of the whole property. It was held that as one of the members of their branch, namely, S3, already got 1/12th, that should be deducted from the ¼ to which their branch would otherwise be entitled and that S1 and S2 would each be entitled to ½ of (¼—1/12) or 1/12 and not 1/8. According to the decision in 39 B. 734, the share available to S1 or S2 would be 1/8 instead of 1/12. Both the Madras and the Bombay High Courts proceed upon the ground that equality amongst the sons of a father is of the essential spirit of the Hindu Law, with this difference that the Madras view endeavours to secure that result by preventing any branch from eating part of its cake and keeping the

(o) *Narayana Sah* v. *Sankar Sah*, 53 M. 1=30 L.W. 751=1929 M. 865=57 M.L.J. 685 (F.B.) following *Manjanatha* v. *Narayana*, 5 M. 362; This view is followed in Mysore. *Sadashiva* v. *Subbarao*, 37 Mys. H.C.R. 77=10 Mys. L.J. 49 (F.B.).

(p) *Pranjivandas* v. *Ichharam*, 39 B. 734=30 I.C. 918=17 Bom. L.R. 712.

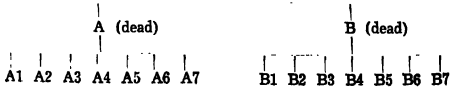
(q) *Narayana Sah* v. *Sankar Sah*, 53 M. 1=30 L.W. 751=1929 M. 865=57 M.L.J. 685.

whole, while the Bombay view endeavours to secure that equality by ignoring the fact that any of the cake has already been eaten and by dividing the remainder equally. The question is not an easy one and injustice cannot be avoided in whatever way it is answered. Thus while the Madras view may be quite alright and very equitable if the branches do not increase in number between the two partitions, it will work very unjustly if the branches multiply in numbers. Let us take an illustration:



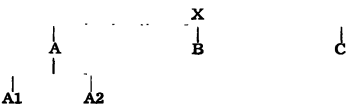
Supposing at the time of a prior partition the joint family consisted of only X the father, his two sons A and B, and his two grandsons M and N. Let us then suppose that N alone separated with his 1/9th leaving M, A, X and B joint. If subsequently X should have six more sons and the question as to the share of A's branch should arise in a subsequent partition, what is the answer? According to the Bombay view A's branch consisting of A and his son M will get 1/9 of the properties existing at the time of the second partition. The same will be the share allottable to X and to each of his other seven sons. How is the Madras view to be applied here? If the original 1/3rd share to which A's branch was entitled at the time of the prior partition must be deemed to belong to it, after deducting the 1/9th share allotted to N, A and M together would be entitled to claim at the subsequent partition 1/3—1/9=2/9. But then the father and his other sons, in all 8, have to share in the remaining 7/9, that is, each of them is not able to get even ½ of what A's branch gets. If on the other hand A's branch should be allowed to share as one of the 9 sharers in the subsequent partition with X and his 7 other sons, and then you deduct from that branch the 1/9th share that was already given to N in the prior partition, then A's branch does not get anything at all.

Let us take a case to illustrate the inequity involved in the Bombay view.



A family consists of two branches of sons of brothers as here. It has properties worth Rs. 1,400. Let us suppose that the first 6 sons of A separate out of the family leaving A7 joint with B's sons B1 to B7. That is A1 to A6 will take Rs. 600 and go out of the family. What remains out of the joint family assets is only Rs. 800. Now if a partition is to take place, say a month after the prior partition, among A7 and B1 to B7, then A7 will get according to the Bombay view Rs. 400 while B1 to B7 will have to share in the other half of Rs. 800, that is, Rs. 400. Here it will be found that A's branch has obtained in all Rs. 400 plus Rs. 600—Rs. 1,000 while B's branch gets only Rs. 400. But according to the Madras view, A7 will get only Rs. 100 as each of his brothers got in the prior partition and similarly B1 to B7 will each get Rs. 100.

It will thus be seen neither view will always work equitably. But a combination of the two views may be adopted to modify the extremes of injustice possible under either of them. The proposition may be laid down as follows: Where there are two or more branches of a joint family and one or more members of one branch separate leaving the rest still joint, then in a subsequent partition among those who have continued joint, the fraction which the share allotted to the already separated members bore to the share allottable to their branch in the prior partition should be calculated with reference to the share allottable to that branch if there were no prior partition, and the same fraction deducted from that share, the rest being divided equally among the other branches. The following illustration will explain this:



Here is a joint family consisting of X, his two sons A and B, and two grandsons A1 and A2. If A2 alone separates, then he will take 1/9th or 1/3rd of the share allottable to his branch. If subsequently X should have another son C and the question arises as to the respective shares on a partition between X, A, B, C and A1, the method to be adopted according to the above rule is this. Ignoring the prior partition A's branch will be entitled to ¼th of the properties. 1/3rd of this ¼th or 1/12th should be deducted out of ¼th and the balance (¼—1/12=1/6) of 1/6 should be allotted to A's branch consisting of A and A1, the remaining 5/6th being allotted to X, B and C. It will here be found that the shares

of the respective branches do not materially vary. In all A's branch would have obtained 1/6th plus 1/9th (allotted at the prior partition to A2) = 5/18th. Each of X, B and C also obtains 5/18th. Thus the shares are practically equal though the 1/9th allotted to A2 was a fraction of larger assets. If the family had originally Rs. 1,800, A2 would have obtained Rs. 200. In the balance of Rs. 1,600 the share to A's branch, if calculated on the basis of no prior partition would be Rs. 400. 1/3rd of this is Rs. 133-5-4, and deducting this, the amount allottable to A and A1 will be Rs. 266-10-8. Thus A's branch would get in all Rs. 466-10-8 and each of B and C about Rs. 444, the difference between the two amounts not being very material.

364. Reopening partition.—Partition once made cannot ordinarily be reopened, for the Sastras say "once is the partition of inheritance made, once is a damsel given in marriage, and once does a man say 'I give'; these three are by good men done once for all and irrevocably".(r) But this rule has certain recognised exceptions. On a partition there is an implied contract between the parties thereto that neither error nor fraud has vitiated the allotment of shares, and that there is a subsisting interest in the share allotted to each sharer. If there is a breach of this implied covenant, the party prejudiced is entitled to reopen the partition. Thus if it is found that a property allotted to a sharer is charged for the benefit of a stranger, or if it is discovered that it does not really belong to the joint family and the sharer is subsequently dispossessed thereof,(s) or that a fraud has been practiced by one of the coparceners at the time of the partition to gain an unfair advantage for himself,(t) the partition is liable to be reopened at the instance of the party prejudiced by such mistake or fraud(t) or he may be given compensation out of the shares of the others.(u) Whether a sharer prejudiced by the fraud or mistake vitiating the partition agreement is in any particular case entitled to reopen the partition or is only entitled to compensation from his co-sharers depends upon the facts of that case, the degree of prejudice, his conduct and the nature of the property with reference to which his loss was occasioned. But where an item of joint family property has been excluded from partition due to mistake, fraud, or accident, it is not necessary to reopen the partition (Dayabhaga xiii, S. 6); only,

(r) *Manu*, ix-47.

(s) *Lakshman* v. *Gopal*, 23 B. 385; *Ganeshi* v. *Babu*, 40 A. 374 at 381=45 I.C. 4—16 A.L.J. 339; *Maruti* v. *Rama*, 21 B. 333; *Ramakotayya* v. *Sundararamayya*, 54 M 883 34 L W 262=61 M.L.J. 430 · 1931 M 707

(t) *Moro Vishwanath* v. *Ganesh*, 10 Bom. H.C.R. 444; *Lakshman* v. *Gopal*, 23 B. 385; Mitak., i-9-1; Vyavahara Mayukha, iv-6-3; *Lachman* v. *Sanwal*, 1 A. 543.

(u) *Lakshman* v. *Gopal*, 23 B. 385; *Maruti* v. *Rama*, 21 B. 333.

the right of the coparceners in the excluded property is not lost by the partition and can be enforced by a fresh partition so far as that property alone is concerned.(v) But if the error occurs in a partition decree, the remedy of the party aggrieved by it lies by way of proceedings in the suit itself for which adequate provision is made in the Code of Civil Procedure.(w) Again a partition effected during the minority(x) or absence(y) of a coparcener which is unfair or prejudicial to his interests can also be reopened by such coparcener. In addition to these, there are the rights of afterborn and disqualified coparceners to reopen the partition under circumstances stated in Ss. 350 and 353. But when a party entitled to reopen the partition has with full knowledge acquiesced in the violation of his right, or where unravelling a partition on the ground of error or fraud would prejudice the rights of innocent third parties, the party otherwise entitled to reopen the partition will either altogether lose his right or he may have his remedy in a mere compensation in money.(z)

365. Effect of partition.—When once anything has occurred which effects a separation of the members of a joint family, from that moment they hold the property as tenants-in-common(a) and not as joint tenants. From that moment the right of survivorship as between the separating coparceners ceases to operate except within each of their branches, and on the death of any one of them, his own heirs succeed to the property. Subsequent births or deaths except in his own branch do not effect any fluctuation in the share of a separating coparcener which becomes determined and fixed up on his separation.(b) The separation may be by an unambiguous unilateral declaration, or by agreement or by filing a suit for separation or by any of the other means already adverted to. All the above rules which apply to a separation effected by any means, do not apply when a separation is only attempted as in the case of a withdrawal of a suit for partition (See S. 334), in the case of a withdrawal of notice for separation (See S. 329) and

(v) *Ganeshi* v. *Babu*, 40 A 374=16 A.L.J 339=45 I.C. 4; *Jogendra* v. *Baladeb*, 12 C.W.N. 127=35 C. 961; *Lachman* v. *Sawai*, 1 A. 543.

(w) *Nalini Kanta* v. *Sarnamoyi*, 41 I.A 247=1 L.W. 607=17 Bom. L.R. 1=19 C.W.N 531=27 M.L.J 76=1914 M.W.N. 948=1914 P.C. 31.

(x) *Balkishen Das* v. *Ram Narain*, 30 C. 738=30 I.A. 139=5 Bom. L.R. 461=7 C.W.N. 578 P.C.; *Lal Bahadur* v. *Sispal*, 14 A. 498; See S. 351.

(y) *Krishna* v. *Sami*, 9 M. 64 (F.B.); See S. 352.

(z) *Moro Vishwanath* v. *Ganesh*, 10 Bom H C R 444; *Ganesh Dutt* v. *Jewach*, 31 C 262=14 M.L.J. 8 8 C.W.N. 146=6 Bom. L.R. 1=31 I.A. 10

(a) *Maharajah Ram Kissen* v *Rajah Sheonundan*, 23 W.R. 412 P.C; *Ramchandra* v. *Tukaram*, 45 B. 914=1921 B 276 23 Bom L.R. 311; *Yerukola* v. *Yerukola*, 45 M. 648=1922 M.W.N. 215=42 M.L.J 507=15 L.W. 595=1922 M. 150 (F.B); *Sheodan* v. *Balkaran*, 43 A. 192=18 A.L.J. 1033=1921 A. 337.

(b) *Girja Bai* v. *Sadashiv*, 43 C. 1031=43 I.A. 151=14 A.L.J. 822=18 Bom. L.R. 621=20 C.W.N. 1085=31 M.L.J. 455=4 L.W. 114=(1916) 2 M.W.N. 65=1916 P.C. 104.

in the case of a suit for partition by a minor which is dismissed as not for the minor's benefit (See S. 335), because in all these cases separation is said not to have taken place. On separation, the family business ceases to be such and may become subject to the provisions of the Partnership Act.[c] A father cannot bind his *separated sons by his post-partition contracts and a promissory note taken from him by a creditor knowing of the partition, for amounts* due to him prior to partition is not binding on the sons, as, on partition, the father's power to represent and bind his separated sons comes to an end.[d] Besides, the right of the female sharers to claim their shares arises only when there is a partition between the coparceners except in cases governed by the Hindu Women's Rights to Property Act of 1937. Nor does the right to interdict an unauthorised alienation by another coparcener continue in favour of a coparcener who has separated from him (See also S. 298 as regards the effect of partition on the son's pious obligation to pay his father's debts).

REUNION

366. Proof of reunion.—If a joint family separates, the family or any member of it may agree to re-unite as a joint Hindu family but such a re-uniting is of very rare occurrence, and when it happens, it must be strictly proved as any other disputed fact requires to be proved.[e] Just as there is a presumption of jointness until a partition is proved, so also, after a partition is established, there is a presumption against a reunion, and the burden is upon those alleging a reunion to establish, not only that the parties, already divided, lived or traded together, but that they did so with the intention of thereby altering their divided status into a joint status with all the usual incidents of jointness in estate and interest.[f]

(c) *Mt. Jatti* v. *Banwari Lal*, 4 Lah. 350 = 50 I.A. 192=21 A.L.J. 582 18 L.W 273 = 45 M.L.J. 355=25 Bom. L.R. 1256=1923 M.W.N. 687=28 C.W.N. 785. See also *Gundayya* v. *Siddappa*, 45 L.W. 749; *Ramaswami* v. *Srinivasa*, 43 L.W 437=70 M.L.J. 214=1936 M. 94.

(d) *Subramania* v. *Subbiah*, 1930 M.W.N. 658; See also S. 298.

(e) *Jay Prasad* v. *Mt. Singari*, 86 I.C. 122=23 A.L.J. 97=27 Bom. L.R. 760=29 C.W.N. 941=49 M.L.J. 162=1925 P.C. 93 (2) (P.C.); *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254=52 I.A. 83=48 M.L.J. 83=6 P.L.T. 133=21 L.W. 439=1925 M.W.N. 330=27 Bom. L.R. 735=23 A.L.J. 746=29 C.W.N. 846=1925 P.C. 49; *Raghubir* v. *Moti*, 35 A. 41=11 A.L.J. 146 =17 C.W.N. 453=15 Bom. L.R. 426=25 M.L.J. 28=1913 M.W.N. 127=17 I.C. 756 P.C.; *Balabux* v. *Rukhmabai*, 30 C. 725= 30 I.A. 130=5 Bom. L.R 469=7 C.W.N. 842 (P.C.); *Manickam* v. *Kamalem*, 45 L.W. 114=(1937) 1 M.L.J. 95=(1937) M. W.N. 255.

(f) *Rajagopal* v. *Veeraperumal*, 102 I C 680=53 M.L.J. 232=1927 M. 792; *Babu* v. *Official Assignee*, 61 I.A. 257=57 M. 531=36 Bom. L.R. 858=38 C.W.N. 1018 =67 M.L.J. 167=1934 A.L.J. 600=1934 M.W.N. 717=40 L.W. 80=1934 P.C. 138; *Pan Kuer* v. *Ram Narain*, 117 I.C. 33=10 P.L.T 217=1929 P. 353; *Mt. Jatti* v. *Banwari Lal*, 4 Lah. 350=50 I.A. 192=21 A.L.J. 582=18 L.W. 273=45 M.L.J. 355=25 Bom. L.R. 1256=1923 M.W.N. 687=28 C.W.N. 785=74 I.C. 482 (P.C.); *Rusi Mandli* v. *Sundar*, 37 C. 703=6 I.C. 441; *Balkishen Das* v. *Ramnarain*, 30 I.A. 139=30 C. 738=5 Bom. L.R. 461=7 C.W.N. 578.

Mere jointness in residence, food and worship does not necessarily connote reunion, in the same way as a separation in these respects is not conclusive proof of partition.(g)

367. Who may reunite.—The text of Brihaspati on this question is as follows: "He who being once separated dwells again through affection with his father, brother or paternal uncle, is termed reunited". Vachespati and the Mayukha take the view that even persons other than those mentioned by Brihaspati may reunite, but Mayukha adds a qualification that a re-union can only be between persons who were parties to the prior partition (h) On this question there is this observation by the Privy Council in *Balabux* v. *Rukhmabai*: (i)"A reunion in estate properly so called can only take place between persons who were parties to the original partition". There is no qualification here that there can be a re-union only with persons mentioned in the text of Brihaspati. This text, however, has been treated as exhaustive and restrictive and not merely illustrative in Bengal, (j) and Southern India, (k) but the Bombay High Court adopts the view of the Mayukha.(l) The Lahore High Court, (m) and the Patna High Court, (n) however, take the view that under the Mitakshara a reunion cannot take place with any person except with a father, a brother, or a paternal uncle and that it can take place only between persons who were parties to the original division so that a person who had not divided the inheritance with a father, brother or uncle cannot become reunited with any of them. (o) This view has now been approved by their Lordships of the Privy Council in *Ram Narain* v. *Pan Kuer* (p) where it is observed as follows:—

"The passage in the Mitakshara, Chap. II, S. 9. Paras 2 and 3, is thus translated by Colebrooke:—

"2. Effects which have been divided and which are again mixed together are termed re-united. He to whom such appertain is a re-united parcener.

(g) *Babu* v. *Gokul Doss*, 28 L.W. 824 =55 M L.J. 132=1928 M. 1064=112 I.C. 184; *Setrucherla* v. *Setrucherla*, 22 M. 470=26 I.A. 167=3 C.W.N. 533=1 Bom. L.R. 388.

(h) *Vishvanath* v. *Krishnaji*, 3 Bom. H.C. (A.C.J.) 69.

(i) 30 C. 725 at 734=30 I.A. 130=5 Bom. L.R. 469=7 C.W.N. 642.

(j) *Basanta Kumar* v. *Jogendra*, 33 C. 371=10 C.W.N. 236; *Akshay Chandra* v. *Haridas*, 35 C. 721.

(k) Mit. ii.-9-3 *Smrithi Chandrika*, xii-1.

(l) *Vishvanath* v. *Krishnaji*, 3 Bom. H.C.R. (A.C.J.) 69.

(m) *Hira Singh* v. *Mt. Mangian*, 9 Lah. 324 .1928 L. 122.

(n) *Nena Ojha* v. *Prabhu Dutt*, 75 I.C. 508=1924 P. 647=5 P.L.T. 284; *Pan Kuer* v. *Ram Narain*, 117 I.C. 33=10 P. L T. 217=1929 P. 353; affirmed in *Ram Narain* v. *Pan Kuer*, 62 I.A. 16=14 P. 268 37 Bom. L.R. 144=1935 M.W.N. 92=39 C.W.N. 265=16 P.L.T. 57=41 L W 151 1935 A.L J. 270=68 M.L.J. 139=1935 P C. 9.

(o) *Pichayya* v. *Sarvayya*, 26 L.W. 746=106 I C 649=1927 M. 1118.

(p) 62 I A. 16=14 P. 268=1935 A.L.J. 270 .37 Bom. L.R. 144=39 C.W.N. 265= 68 M.L.J. 139=41 L.W. 151=16 Pat. L.T. 57=60 C.L.J. 544=1935 M.W.N. 92 =1935 P.C. 9.

3. That cannot take place with any person indifferently, but only with a father, a brother or a paternal uncle, as Brihaspati declares, 'He who being once separated dwells again through affection with his father, brother or paternal uncle is termed re-united.'"

In *Basanta Kumar Singha* v. *Jogendra Nath Singha*, 33 Cal. 371 at p. 374, the learned Judges note two slight inaccuracies in the translation of Para 3, viz., that there is no word in the original Sanskrit corresponding to the word "only," and that the concluding words "is termed re-united" should be literally rendered as "is termed re-united with him." The question in that case, as in the present case, was whether the express mention of the father, brother and paternal uncle was restrictive or merely illustrative. It was held that it was restrictive. In the present case the learned Judges of the High Court followed that decision, and their Lordships agree with their decision and the reasoning on which it is based. In their Lordships' opinion the text of the Mitakshara is clear and unambiguous and excludes recourse to other authorities, and they would only add that, in their opinion, paragraph 2 makes clear that the parties to the reunion must have been parties to the original partition, and that, when paragraph 3 states "that cannot take place with any person indifferently," it is intended to place a further restriction within a still narrower limit than that prescribed by paragraph 2. In this view it is difficult to see how the persons expressly named can be merely illustrative, or, indeed, what class they can illustrate."

Since a reunion involves an intention to become once again joint in estate and interest and an agreement to revert to that status, no agreement to reunite can be made by or on behalf of a minor, who, under the law, is incapable of entering into any agreement either expressly or by implication.(q) But fathers by their reunion can carry their undivided sons, though minors, within the reunited family by their own act of reunion. (r)

368. Effect of reunion.—A reunion remits the reunited parties to their original status of jointness. (s) As the Hindu Law recognises the father's power to alter the son's joint family status into one of separation, (t) there is nothing inherently illogical in the father also possessing the power of converting his son's status of a separated member into that of a reunited member. Thus a father can reunite carrying by his act into the reunited family, his own sons. (r) When a partition is effected between the reunited members, their shares are the same as they would be at the original

(q) *Balabux* v. *Rukhmabai*, 30 C. 725 = 30 I.A. 130–5 Bom. L.R. 469–7 C.W.N. 642

(r) *Babu* v. *Gokul Doss*, 28, L.W. 824–112 I.C. 184–55 M.L.J. 132–1928 M. 1064.

(s) *Mt Jatti* v. *Banwari Lal*, 4 Lah. 350–50 I.A. 192–21 A.L.J. 582 –18 L.W. 273–45 M L J. 355–25 Bom. L.R. 1256 –1923 M.W.N. 687–28 C.W.N. 785–74 I C. 462 P.C. ; *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254 - 52 I.A. 83–48 M L.J. 83–6 P.L.T. 133–21 L.W. 439–1925 M W.N. 330 -27 Bom. L.R. 735–23 A.L.J. 746–29 C.W.N. 846–1925 P.C. 49 ; *Prankishen* v. *Mothooramohun*, 10 M.I.A. 403 ; *Babu* v. *Gokuldoss*, 28 L. W. 824–112 I.C. 184–55 M.L.J. 132–1928 M. 1064 ; *Nana Ogha* v. *Parbhu*, 1924 P. 647 ; *Krisiraya* v. *Venkataramiah*, 19 M.L.J. 723. But see *Ramaswami* v. *Venkatesam*, 16 M. 440.

(t) See S. 331.

partition irrespective of the amount of capital contributed by each coparcener on re-union. (u) On a reunion even the sons, grandsons and great-grandsons of those reuniting, though born subsequent to the reunion, will remain joint and are entitled to succeed to one another on the basis of survivorship as in ordinary joint family until a fresh partition takes place. (v) But this general rule of succession by survivorship (w) is subject to certain special rules when the reunited family consists of half brothers. A reunited half brother is excluded in matters of succession by the divided son or a reunited full brother of the propositus, and he shares equally with a divided full brother (x) or the uterine sister of the deceased. Where only some of the brothers of the half blood reunite, those not reunited do not inherit. Barring these special rules regarding brothers of the half blood, the rule of succession among those living in reunion, in a competition between two members of the same degree of relationship to the deceased, one reunited and the other divided, is that the reunited member excludes the divided member. (y) The reason for this is stated in *Ramasami* v. *Venkatesam* (z) as follows:

"The reason is explained in the Sarasvati Vilasa, Foulkes' Edition, p. 148 Sloka 769. The rule is founded on a mixed conception. The primary idea is that reunion is a ground of preference. It furnished the rule of decision when the surviving brothers are either of the whole or of the half blood. When there is a competition between uterine and non-uterine brothers, another idea influences the decision, viz., the superior efficacy of the funeral oblations offered by the uterine brother. That furnishes the ground of preference in his favour. If the reunited brother is the brother of the whole blood, both causes of succession occur. They conflict when there is a competition between a reunited brother of the half blood and a separate brother of the whole blood; the rule of equal division is the outcome of the desire to give effect to both principles."

See S. 454 entitled *Succession among reunited members.*

369. Partition and Reunion.—Evidence and presumptions.—A Mitakshara family is presumed in law to be a joint family until it is proved that its members have become separated. (a) A family once joint is presumed to retain that status unless it is shown to

(u) *Kristnayya* v. *Guravayya*, 70 I.C 146=14 L.W 668=41 M.L.J. 503=1921 M.W.N. 742=1921 M. 443.

(v) *Narasimha* v. *Venkata*, 33 M. 165 3 I.C. 741=19 M.L.J. 719; *Kristraya* v. *Venkataramiah*, 19 M.L.J. 723; *Abhai Churn* v. *Mangal*, 19 C. 634; See contra in *Ramaswami* v. *Venkatesam*, 16 M. 440 where the right of a son of a reunited half-brother to succeed by survivorship to the share of his reunited uncle was negatived as against the claim of the divided full brothers of the uncle.

(w) *Jasoda* v. *Sheo*, 17 C. 33.

(x) *Ramasami* v. *Venkatesam*, 16 M. 440—3 M.L.J. 107.

(y) *Akshay* v. *Hari*, 35 C. 721—12 C. W.N. 511.

(z) 16 M. 440.

(a) *Palani Ammal* v. *Muthuvenkatachala*, 52 I.A. 83=48 M.L.J. 83=6 P.L. T. 133 21 L.W. 439 =1925 M.W.N. 330—27 Bom. L.R. 735—23 A.L.J. 746—29 C. W.N. 846—1925 P.C. 49—48 M. 254 P C.; *Raj Kishore* v. *Madan Gopal*, 13 Lah. 491=1932 Lah. 636.

have become divided at some material time.[b] But when it is admitted or proved that a partition has already taken place, the presumption is that it has been a complete partition in respect of all the family properties, [c] and it lies upon the person alleging that a family property in the exclusive possession of a particular member subsequent to partition is liable to be partitioned, to make good his allegation. [d] In a suit for partition the burden of proving that any particular item of property is joint primarily rests upon the plaintiff, though the circumstances of any particular case may easily cause this onus to be discharged. [e] But if an estate is admitted to be ancestral, and the family undivided, the burden of proving the plea that the estate is impartible is upon the person setting it up. [f] A separation from commensality, though an element properly to be considered on the question whether there has been a separation,[g] does not, as a necessary consequence, effect a division of the joint status, since such separation in mess and worship may be due to various causes unconnected with severance in interest, [h] as, for instance, for the convenience of the parties. [i] Even a mere division of the income for the convenience of the different members does not amount to a partition. [j] A definition of shares in revenue and village papers, unless it was proved that such definition was effected with a view to a then partition, affords by itself, but a very slight indication of an actual separation. [k] But where parties have been in possession of, and exercising rights of ownership over, separate blocks of land for a

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(b) *Mt. Bhagwani* v *Mohan Singh*, 22 L.W. 211=23 A.L.J. 589=49 M.L.J. 55 =1925 M.W.N. 421=29 C.W.N. 1037=1925 P.C. 132; *Nageshar Baksh* v. *Ganeshu*, 47 I.A. 57=56 I.C. 306=42 A. 368=18 A.L.J. 532=22 Bom. L.R. 596=38 M L.J. 521=13 L.W. 622=1920 P.C. 46; *Deo Narain* v. *Agyan Ram*, 1927 P. C. 52=1927 M.W.N. 96=31 C.W.N. 533 =53 M L J. 658=101 I.C. 249. P.C.

(c) *Purnima* v. *Nand Lal*, 11 P. 50=12 Pat. L.T. 582=1932 P. 105; *Manickam* v. *Kamalam*, 45 L.W. 114=(1937) 1 M.L.J. 95=1937 M.W.N. 255=1937 M. 335

(d) *Kumarappa* v. *Adaikalam*, 55 M. 483=35 L W. 35=1931 M.W.N. 1323=1932 M. 207=62 M.L.J 141; *Rudragouda* v. *Basangouda*, 1938 B. 250.

(e) *Annamalai* v. *Subramaniam*, 29 L. W. 91=1929 P.C. 1=1928 M.W.N. 39=1929 A.L.J. 9=31 Bom. L.R. 280=33 C. W.N. 435=56 M.L.J. 435=10 P.L.T. 283.

(f) *Durria* v. *Davi*, 1 I.A. 1 (P.C.).

(g) *Ganesh Dutt* v. *Jevaeh*, 31 I.A. 10 =31 C. 262=14 M.L.J. 8=8 C.W.N. 146 =6 Bom. L.R. 1; *Purnima* v. *Nand Lal*, 11 P. 50=12 Pat. L.T. 582=1932 P. 105; *Lingangouda* v. *Sangangouda*, 35 Bom. L.R. 779=1933 B. 396.

(h) *Suraj Narain* v. *Iqbal Narain*, 40 I A. 40=18 I.C. 30=35 A. 80=15 Bom. L.R. 456=17 C.W.N. 333=11 A.L.J. 172=1913 M.W.N. 183=24 M.L.J. 345; *Saddha Singh* v. *Mangal*, 10 Oudh. W.N. 58=1933 O. 166.

(i) *Venkatapathi* v. *Venkatanarasimha*, 63 I.A. 397=1936 A.L.J. 1039=38 Bom. L. R 1238=41 C.W.N. 7=71 M.L.J. 558=44 L.W. 408=1936 P.C. 264.

(j) *Sonatun* v. *Juggutsoondree*, 8 M.I. A. 66; *Babaji* v. *Kashibai*, 4 B. 151.

(k) *Nageshar Bakah* v. *Ganesha*, 42 A. 368=47 I.A. 57=18 A.L.J. 532=23 Bom. L.R. 596=38 M.L.J. 521=13 L.W. 622 =1920 P.C 46; *Mt. Bhagwani* v. *Mohan Singh*, 88 I.C. 385=22 L.W. 211=23 A.L. J. 589=49 M.L.J. 55=1925 M.W.N. 421 =29 C.W.N. 1037=1925 P.C. 132; *Net Ram Singh*, v. *Mt. Tursa*, 25 M.L.J. 489 =1913 M.W.N. 658=15 Bom. L.R. 863=11 A.L.J. 861=17 C.W.N. 1085=20 I.C. 967 (P.C.); *Jag Prasad* v. *Mt. Singari*, 49 M.L.J. 162=23 A.L.J. 97=27 Bom. L.R. 760=29 C.W.N. 941=1925 P.C. 93 (2); *Mt. Anurago* v. *Darshan*, 47 L.W. 225.

considerable time, the Court may well presume that these lands have already been divided and rights of parties defined in regard to them in such a manner as to preclude their being re-partitioned. (l) What may amount to a separation or what conduct on the part of some of the members may lead to a disruption of the joint undivided family depends on the facts and circumstances of each case. A definite and unambiguous declaration, indication or manifestation by one member of his fixed intention to separate himself and to enjoy his share in severalty amounts to separation,(m) and this intention to separate may be evinced by different ways, either by explicit declarations or by conduct. (n) The legal construction and effect of a deed effecting separation cannot be controlled or altered by the subsequent conduct of the parties (o) In cases in which the intention is to be inferred from conduct, the conclusion whether it was unequivocal and explicit must be based only on the inference of intention derivable from the acts and declarations of the member who is said to have separated.(p) Where the issue of separation has to be decided upon documents tendered in evidence, it is not enough to consider whether each of those documents is sufficient to rebut the *prima facie* presumption of jointness, but what is necessary is to take into account the cumulative or the converging effect of all the documents so tendered. (q) The mere fact that the different members of a family have small transactions of their own does not necessarily establish a division in

(l) *Mukhram* v *Chandradeep*, 1936 P 68 ; *Yellappa*, v. *Tipanna*, 1929 P.C. 8 53 B 213 56 I A 13 33 C W.N 238 56 M L.J 287 29 L.W 231 1929 A L J. 4 31 Bom. L R. 249

(m) *Suraj Narain* v *Iqbal Narain*, 35 A. 80 40 I A 40 -15 Bom L R. 456-17 C W.N. 333-11 A L J. 172-1913 M. W.N 183 - 24 M L J. 345 18 I.C 30 (P.C.) ; *Girja Bai* v. *Sadashiv*, 43 C 1031 43 I A. 151 14 A.L.J. 822-18 Bom L.R. 621 20 C.W N. 1085 -31 M L J 155 4 L.W. 114 - (1916) 2 M.W.N. 65-1916 P.C. 104; *Syed Kasam* v. *Joravar*, 50 C. 84-49 I A. 358-16 L.W 223. 43 M.L.J 676 25 Bom. L.R. 1. 21 A L.J. 57-27 C.W N. 179-1922 P.C. 353 ; *Gundayya* v. *Shrinivas*, 38 Bom. L.R 1095 1937 B 51.

(n) *Dattatraya* v. *Prabhakar*, 39 Bom L.R. 94-1937 B. 202; *Ganesh* v. *Jewack*, 31 C. 262-31 I.A. 10-6 Bom. L.R. 1 14 M.L.J. 8-8 C.W.N. 146 ; *Doorga Persad* v. *Kundan*, 13 Beng. L.R. 235-1 I.A. 55 ; *Adi Deo* v. *Dukharam*, 5 A. 532 ; *Ram Pershad* v. *Lakhpati*, 30 C. 231-5 Bom. L.R. 103-7 C.W.N. 162-30 I.A. 1 ; *Murari* v *Mukund*, 15 B 201 ; *Ram Lal* v *Debi Dat*, 10 A 490

(o) *Babu* v *Official Assignee*, 61 I.A. 257 57 M. 931-67 M L J 167 1934 A L J 600 36 Bom L R 858 38 C.W N 1018 1934 M W N 717 40 L W. 80-1934 P C 138. *Balkishen* v *Ram Narain*, 30 C 738 30 I A 139 5 Bom. L.R. 461 7 C W N. 578 ; *Venkatapathi* v *Venkatanarasimha*, 63 I A 397-1936 A.L J 1039 -38 Bom L R 1238 41 C.W.N. 7 -71 M L.J 558 44 L W. 408-1936 P. C 261 ; *Manickam* v. *Kamalam*, 45 M. I W 114-1937 M.W N. 255 (1937) 1 M L J. 95 1937 M. 335 ; *Hira Singh* v. *Mst Manglan*, 9 Lah. 324-1928 L 122.

(p) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (P.C)-43 I A. 151-14 A.L.J. 822-18 Bom. L R 621-20 C.W.N. 1085-31 M. L.J. 455 4 L W 114-(1916) 2 M.W.N. 65-1916 P.C 101.

(q) *Parbati* v *Naunihal Singh*, 36 I.A. 71 3 I.C 195-6 A.L.J. 597-11 Bom. L.R. 878-13 C.W N 983-19 M.L J. 517 31 A. 412 (P.C.).

status as between them. (r) But where there are deeds of partition duly executed and registered, the onus of proving that such deeds do not evidence a real and *bona fide* transaction between the parties thereto but a mere pretence or that they were intended to be operative only in a particular event or contingency lies on the party who asserts to that effect. (s)

Though an unilateral declaration of intention to become divided, if definite or unambiguous, is sufficient to effect severance, yet to have that effect, the intention must be communicated to the other coparceners. (t) Once the intention to become divided is communicated to the other coparceners, as for instance, by posting a letter embodying the intention, the severance in interest is effected from the time the letter is posted and does not remain in a state of suspended animation till the communication reaches the addressee; to hold that in such a case the severance takes effect only from the time when the addressee receives the communication would lead to uncertainty and confusion regarding the date of severance where there are several coparceners residing in different localities, as in such a case there can obviously be no simultaneity in the receipt of the communication by all the other coparceners. (u) Withdrawal of notice to become separated, or withdrawal of a suit for partition, nullifies the effect of such notice or institution of a suit to become divided. (v) Actual division of the property is not necessary for a severance in status, nor is such division merely for convenient enjoyment by the various members without the necessary intention to become divided sufficient to effect a severance in interest. Writing is not necessary to effect a severance in status. (w) When a partition is under a deed, which owing to its want of registration, is inadmissible in evidence under the Registration Act to prove the division of the property, the deed can yet be used to prove a division in status, since the same is dissociated from and does not necessarily imply a division of property. But where a registered partition deed has divided the property into specific plots, an unregistered document following it cannot be used to prove either a reunion of the property, or a reunion of status, because in such a case the reunion of status necessarily involves the reunion of the property. But even then

(r) *Deo Narain* v. *Agyan Ram*, 1927 P.C. 52=53 M.L.J 658=1927 M.W.N. 96=31 C.W.N. 533; *Raj Kishore* v. *Madan Gopal*, 13 L. 491=1932 L. 636=33 P.L.R. 829 (case of separate businesses).

(s) *Sham Chand* v. *Protap Chandra*, 25 C 78=24 I.A. 186=1 C.W.N. 594; *Sreemutty Sookheemonee* v. *Mohendro*, 13 W.R 14=4 B.L.R. 16 (P.C.).

(t) *Kamepalli Ayillamma* v. *Venkataswamy*, 8 L.W. 24=1918 M.W.N. 136=33 M.L.J. 746=43 I.C. 130; *Saraswatamma* v. *Paddayya*, 46 M. 349=18 L.W. 418=44 M.L.J 45=1923 M. 297=71 I.C. 274; *Indoji* v. *Rama Chariu*, 10 L.W. 498=54 I.C. 146; See contra in *Rachhpali* v. *Chandessardi*, 79 I.C. 256=1924 O. 252.

(u) *Narayana* v. *Purushothama*, (1938) 1 M.L.J. 45=47 L.W. 104.

(v) See Ss. 332 and 334.

(w) *Rewun Persad* v. *Radha*, 4 M.I.A. 137; *Ganesh Dutt* v. *Jewach*, 31 C. 282=31 I.A. 10=6 Bom. L.R. 1=14 M.L.J. 8=8 C.W.N. 146.

it could be shown by the conduct of the parties that subsequent to the date of the registered partition deed, the parties continued to be joint or reunited and no document is necessary to prove the reunion. (x)

370. Partition under the Dayabhaga.—As has already been seen (See S. 325), the incidents of a Dayabhaga joint family are fundamentally different from those that attach to a joint family under the Mitakshara. The father in the Dayabhaga joint family is the absolute owner of the ancestral estate, and so long as he is alive, his son cannot claim any partition as against him. The coparcenary under the Dayabhaga arises only on the father's death, when his sons take the estate as separate owners of defined shares, though the property is not actually divided by metes and bounds. Hence a partition in a Dayabhaga joint family can only mean an allotment among the members of specific portions of the joint property in distinct lots. Besides, a Dayabhaga coparcenary may consist of both males and females, the latter being the heirs, like the daughters or wives, of deceased male coparceners, and, as such heirs, they can insist on a partition as against the other coparceners. (y) There can be no such thing as a share allottable to the father's wife, as there can be no partition during the father's lifetime. But she is entitled, after her husband's death, to a share in a partition between her sons, and if she has already succeeded as heir to one of her deceased sons, she is entitled to receive her share also in addition. (z) Neither a mother who has an only son nor a sonless step-mother, (a) is entitled to claim a share on partition. Besides, neither of them, unless she happens to be a coparcener by virtue of her having succeeded to the share of a deceased male coparcener, is entitled to call for a partition. The share which is allottable to a mother or grandmother on partition in her own right and not as heir of a deceased coparcener is only in lieu of maintenance, (b) and any Stridhana which she has already received from her husband or father-in-law is deductible in computing it. (c) The share of a grandmother is equal to that of a grandson except that she gets a share equal to that of a son when her son is also a party to the partition. (d) Separation of one member under the Dayabhaga School does not constitute a separation of all the members. (e)

(x) *Mahalakshmamma* v. *Suryanarayana*, 51 M. 977=55 M.L.J. 733=28 L.W. 919=1928 M. 1113.

(y) *Durga* v. *Chintamani*, 31 C. 214=8 C.W.N. 11; *Janoki* v. *Mothura*, 9 C. 580.

(z) *Poorendra Nath* v. *Hemangini*, 36 C. 75=1 I.C. 523-12 C.W.N. 1002.

(a) *Hemangini* v. *Kedarnath*, 16 I.A. 115 =16 C. 758 (P.C.).

(b) *Shashi Bhusan* v. *Hari Narain*, 48 C. 1059-1921 C. 202=25 C.W.N. 990.

(c) *Jogendra* v. *Fulkumari*, 27 C. 77=4 C.W.N. 254; *Kishore* v. *Moni Mohun*, 12 C. 165.

(d) *Purna Chandra* v. *Sarojini*, 31 C. 1065 8 C.W.N. 763.

(e) *Gourhari* v. *Shyama Sundari*, 38 C.W.N. 977=1934 C 824.

CHAPTER XI

GIFTS AND WILLS

371. Gifts and Wills defined.—Gift is the transfer of certain existing property made voluntarily and without consideration, by one person called the donor, to another called the donee and accepted by or on behalf of the donee. (See S. 122 of the Transfer of Property Act). Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death (See S. 2 (h) of the Succession Act). A gift takes effect immediately, while a will only after the testator's death; the former confers a present interest in respect of existing properties while the interest conferred by the latter is deferred and may relate to future property; the one, when completed, is irrevocable, the other is ambulatory in its nature and revocable at any time before the testator's death. Owing to the absence in India of any uniform and accurate system of conveyancing and to the fact that written instruments are as a rule most inartistically drawn up, frequently by persons not possessed of legal knowledge, it is often difficult to ascertain with certainty whether a document was intended to operate as a gift or a will. [a] The description of a document as a gift or will in such cases does not afford a certain test to find out whether it is testamentary or non-testamentary. [b]

History of wills.—The ancient Hindú treatises make no mention of wills and it can be safely said that the idea of testamentary disposition was unknown among the primitive Hindus, since there is not a single word in any of the native languages which is its synonym. [c] But the idea inculcated by the Brahmins of the tribulations to be undergone in the other world for the sins committed in this operated as one of the chief motives for making gifts to secure the necessary salvation especially when a Hindu was fast approaching the door of death. It is not improbable that the Brahmins who stood to gain by such notions, left no stone unturned to encourage gifts, though to be effective only after the donor's lifetime. As Sir Thomas Strange remarks, originally the chief object which first prevailed in making wills was to expiate, for the sins committed, by making pious disposition through wills, and "the proportion is commonly in the ratio of the inequity with

(a) *Muhammad Abdul Ghani* v. *Fakhr Jahan*, 44 A. 301 49 I.A. 195=43 M.L.J. 453 24 Bom. L.R. 1268=27 C.W.N. 53=20 A.L.J. 994—1922 P.C. 281

(b) *Bheema* v. *Behari*, 44 M. 733—48 I.A. 482—26 C.W.N. 374—24 Bom. L.R. 600 —41 M.L.J. 648—14 L.W. 398=1921 M.W.N. 713—1922 P.C. 162 (2); *Krishna Rao* v. *Sundara*, 54 M. 440=58 I.A. 148=1931 P.C. 109.

(c) *Nagalutchmee* v. *Gopoo*, 6 M.I.A. 309.

which the property has been acquired, or of the sensuality and corruption to which it has been devoted". (d) As in the Roman Law in which the testamentary power is a development of the law of gifts *inter vivos*, so also the introduction of gifts by will into general use has followed in India, as in other countries, the conveyance of property *inter vivos*. Whatever doubts might have once been entertained as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions recognizing the validity of gifts by will as part and parcel of the general law of the Hindus. (e) The law of will has grown up, so to speak, naturally from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. (f)

FORM OF GIFT AND WILL.

372. Form of Gift.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by, or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property the transfer may be effected either by a registered instrument signed as aforesaid or by delivery (See S. 123 of the Transfer of Property Act). These are the conditions in cases of Hindu gifts governed by the Transfer of Property Act, though under the Hindu Law no writing would be necessary for the same. (g)

373. Form of Will.—All Hindu wills and codicils executed before the 1st day of September 1870 might be oral or in writing and if in writing did not require registration or attestation. But all Hindu wills and codicils made after 1st September 1870 within or relating to immovable property situate within the Province of Bengal or within the local limits of the Ordinary Original Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay and all other Hindu wills or codicils executed on or after the 1st of January 1927 must be in writing and attested by at least two witnesses (See the Indian Succession (Amendment) Act 1926 and Ss. 57 and 63 of the Succession Act, 1925). Apart from those provisions, a Hindu will need not be in any prescribed form provid-

(d) 2 Str. H.L. 453.

(e) *Baboo Beer Pertab* v. *Rajender*, 12 M.I.A. 1; *Nagalutchmee* v. *Gopoo*, 6 M.I.A. 309.

(f) *Tagore* v. *Tagore*, Sup. I.A. 47—18 W.R. 359 P.C.; *Baboo* v. *Rajender*, 12 M.I.A. 1.

(g) *Balaram* v. *Appa*, 9 Bom. H.C.R. 121.

ed it contains the testamentary wishes of the executant[h] and documents like petitions addressed to officials,[h] a matrimonial arrangement deed[i] or an assignment deed,[j] have been held to satisfy the description of wills on the ground that they embodied the testamentary dispositions of the executant.

374. Gift when complete.—Though writing is not necessary, delivery of possession to the donee is essential for a valid gift under the Hindu Law,[k] though such delivery may in particular cases be only constructive.[l] The reason for delivery of possession being made necessary is to prevent against gift being subsequently resumed,[l] and if the donor has done all that he can to complete the gift and is not able to deliver possession of the property owing to the property being held by another adversely to the donor, the gift is complete and the person in possession cannot be heard to say that the gift is invalid on the ground that it is not followed by delivery of possession.[l] In other words, under Hindu Law, a gift of property, whether movable or immovable, may operate, where no question of resumption arises, to give to the donee a right to obtain possession, and it is not invalid by reason of its not being immediately followed by possession.[l] When the donee is a minor and is living with the donor, actual delivery of possession ought not to be insisted on for upholding the gift, if it is established that there was a *bona fide* intention to pass title and that from the date of the transfer the property has been held by the donor in trust for the donee.[m] Thus such change of possession as the nature of the case admits of, will be sufficient to satisfy the requirement for a valid gift under the Hindu Law.[n] But in cases governed by the Transfer of Property Act the necessity for delivery of possession has been taken away by S. 123 of the Act, and what is necessary for the completion of a gift under the Act is only a compliance with its provisions.[o]

(h) *Mahomed Shumsool* v. *Shewukram*, 2 I.A. 7; *Balbhaddar* v. *Sheo Narain*, 26 I.A. 194=27 C. 344 .4 C.W.N. 203 (P.C.).

(i) *Din Tarini* v. *Krishna*, 36 C. 149= 1 I.C. 791=13 C.W.N. 291.

(j) *Ishri* v. *Baldeo*, 10 C. 792=11 I.A. 135 (P.C.).

(k) *Ramamirtha* v. *Gopala*, 19 M. 433 =6 M.L.J. 207; *Abaji* v. *Mukta*, 18 B. 688; *Lakshimoni* v. *Nittyananda*, 20 C. 464; *Venkatachella* v. *Thathammal*, 4 M.H. C.R. 460; *Bhagwan* v. *Gian Chand*, 1936 L. 49. 38 P.L.R. 376; *Chandrabhaga* v. *Anandrao*, 1938 N. 142.

(l) *Kalidas* v. *Kanhaya Lal*, 11 I.A. 218 - 11 C. 121; *Jotaram* v. *Ramakrishna*, 27 B. 31.

(m) *Valji Dayabhai* v. *Virji*, 1931 Sind 188; *Sarwan* v. *Mansa*, 119 I.C. 271=1929 L. 145.

(n) *Anwari* v. *Nizam-ud-din*, 21 A. 165; *Bai Kushal* v. *Lakshma*, 7 B. 452.

(o) *Dharmodas* v. *Nistarini*, 14 C. 446; *Rambai* v. *Mani* 23 B. 234; *Debi Saran* v. *Nandalal*, 1929 P. 591; *Kalyanasundaram* v. *Karuppa*, 50 M. 193=54 I.A. 89=1927 P.C. 42; *Lalu* v. *Gur*, 45 A. 115= 1922 A. 467; *Atmaram* v. *Vaman*, 49 B. 388=1925 B. 210.

375. Capacity to make a gift or will.—Every person, whether male or female, if of sound mind[p] and not a minor,[q] can dispose of his absolute property by way of gift or will. Although there is no mention in the ancient Hindu treatises of testamentary dispositions, yet, modern authorities have determined that a Hindu has testamentary power, which may be exercised at least within the limits prescribed by the law to alienations by gift *inter vivos*.[r]

376. Minor's Will.—A person who has not attained majority under the Majority Act cannot make a valid will.[s]

377. Coparcener's gift or will.—No coparcener under the Mitakshara can, except with the consent of the other coparceners, dispose of his undivided interest in the joint family property either by way of gift or by will.[t] His interest in the joint property ceases at his death and the title of his co-sharers by survivorship which vests in them at the moment of his death leaves nothing upon which the will can operate.[u] But this rule does not apply to the separate property of the coparcener or to his ancestral property when he happens to be the sole surviving coparcener[v] or a coparcener under the Dayabhaga. But where a coparcener wills away his undivided interest to a stranger, and his separate property to the surviving coparceners, then if the surviving coparceners elect to take the self-acquired properties, they cannot object to the validity of the will in favour of the stranger of the undivided interest.[w] So also in the case of a will of family property made by all the coparceners, its validity will be upheld on the ground that when they so join together, they constitute one absolute owner of the property and as such they are in a position to make a will.[x] The same consideration applies even in the case of a bequest of coparcenary property by only one of the coparceners when he has obtained the

(p) *Ali Mijl* v. *Uzir.* 1938 C. 157=42 C.W.N. 14.

(q) *Krishnamacharlar* v. *Krishnamacharlar*, 38 M. 166=1913 M.W.N. 355=24 M.L.J. 517=19 I.C. 452; *Hardwari* v. *Gomi*, 33 A. 525=9 I.C. 1017=8 A.L.J. 385; *Bai Gulab* v. *Thakoredai*, 36 B. 622 =14 Bom. L.R. 748=17 I.C. 86.

(r) *Baboo Beer Pertab* v. *Rajender*, 12 M.I.A. 38.

(s) *Krishnamacharlar* v. *Krishnamacharlar*, 38 M. 166=1913 M.W.N. 355=24 M.L.J. 517=19 I.C. 452; *Hardwari* v. *Gomi*, 33 A. 525=9 I.C. 1017=8 A.L.J. 385; *Vijayaratnam* v. *Sudarsana*, 53 I.A. 305= 1925 P.C. 196=48 M. 614=23 A.L.J. 799= 49 M.L.J. 247=1925 M.W.N. 522=27 Bom. L.R. 1062=22 L.W. 435=30 C.W.N. 193 P.C.; *Bai Gulab* v. *Thakoredai*, 36 B. 622 =14 Bom. L.R. 748=17 I.C. 86.

(t) *Babu Singh* v. *Mt. Lal Kuer*, 1933 A. 830=1933 A.L.J. 1547; See S. 272. This rule, however, does not apply where the testator has already become divided in status from his coparceners.

(u) *Lakshman* v *Ramchandra*, 5 B. 48 =7 I.A. 181; *Villa* v. *Yamenamma*, 8 M H.C.R. 6; *Lakshmi Chand* v. *Anandi*, 48 A. 313=53 I.A. 123=1926 P.C. 54=24 A L.J. 609=28 Bom. L.R. 910=51 M.L.J. 52=1926 M.W.N. 529=31 C.W.N 101.

(v) *Alamu Sah* v *Kundan Sah*, 1933 A. 916=1933 A.L.J. 1366; *Basanta Kumar* v. *Ram Sankar*. 58 C. 859=55 C L.J. 205 =1932 C. 600.

(w) *Kishan* v. *Narinjan*, 10 L. 389= 1928 L. 967.

(x) *Lakshmi Chand* v. *Anandi*, 45 A. 245=1923 A. 109=21 A.L.J. 73.

consent of the other coparceners for the same.[y] The powers of a coparcener are the same even in the case of a gift.[z] See S. 272.

378. Father's gift.—Though a father of an undivided Mitakshara family has full power of disposition over his self-acquired property,[a] he has no such power in respect of the joint family property. But he can make, within reasonable limits, gifts of immovable or movable property of the joint family for pious purposes[b] or to a daughter[c] but not to a daughter's daughter[d] or daughter's son[e] or to a stranger,[f] or even to his wife or mother[g] except as a reasonable provision for her maintenance[g] (See also S. 302). In other respects, so far as his right to make a gift or will is concerned, he is in the same position as an ordinary coparcener. But a father of a Dayabhaga family has absolute powers of disposal either by will or by gift in respect of both his self-acquired and ancestral property,[h] he being the absolute owner of such property.

379. Subject matter of disposition.—The property over which a person has an absolute disposing power can be the subject matter of a gift or a devise by him. Thus the separate property of every person, whether he be a divided or undivided member of a joint Hindu family, the coparcenary property under the Dayabhaga, the ancestral property in the hands of a Dayabhaga father and of the sole surviving coparcener under the Mitakshara, and an impartible estate in the absence of a custom or statute prohibiting alienation, can be validly disposed of by gift or devise by their respective owners. In addition to these, powers of disposition by gift or will

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(y) *Patracharlar* v *Srinivasa*, 40 M. 1122 -5 L.W. 544 40 I.C. 118=32 M L J. 364—1917 M.W.N 355 But see *Subbarami* v. *Ramamma*. 43 M 824=12 L.W 249=59 I C 681=1920 M W.N. 529

(z) *Radhakant* v *Nazma*. 45 C 733=16 A L J 537=20 Bom. L R 724=22 C W N. 649 35 M L J. 99 -1918 M.W N. 386=1917 P C. 128 ; *Lakshman* v. *Ramchandra*, 5 B. 48—7 I A. 181 at 195 ; *Parvatibai* v. *Bhagwant*, 39 B 593 =31 I C. 280=17 Bom. L.R. 646.

(a) *Balwant* v. *Kishori*, 20 A. 267=25 I.A. 54=2 C.W.N 273

(b) *Sri Thakurji* v. *Nande*, 43 A. 560 1921 A. 333 ; *Ramalinga* v. *Sivachidambara*, 42 M. 440=36 M L.J. 575—1919 M.W.N. 426=9 L.W. 224=49 I.C. 742 ; Mitak.. 1-1-28 ; *Raghunath* v. *Gobind*, 2 A. 76.

(c) *Ramalinga* v. *Narayana*, 45 M. 489 —49 I.A. 168=1922 M.W.N. 399—26 C.W.N. 929 =43 M.L.J. 428—20 A.L.J. 839=24 Bom. L.R 1209=16 L.W. 639=1922 P.C. 201 ; *Sitamahalakshmamma* v *Kotayya*, 44 L W 289 · 71 M L J 259 1936 M. 825 *Sundararamayya* v *Sitamma*, 35 M 628 21 M L J 695. (1911) 1 M.W N 422 ; *Ramasami* v. *Venkidusami*, 22 M. 113=8 M L.J. 170 (gift to son-in-law upheld) ; *Chuvaman* v *Gopi*. 37 C I See contra in *Jinnappa* v *Chinnavo*. 59 B 459 1935 B 324.

(d) *Sitamahalakshmamma* v. *Kotayya*, 44 M.L.W. 289 71 M.L.J. 259=1936 M. 825.

(e) *Sridhara* v. *Srinivasa*, 39 M.L.W. 88 =1933 M.W.N. 1288=1934 M. 81.

(f) *Baba* v. *Timma*, 7 M. 357 (F.B.); *Ganga* v. *Pirthi*, 2 A. 635 ; *Rizsat* v. *Iqbal*. 16 Lah. 659=1935 Lah. 827.

(g) *Subba Rao* v. *Ademma*, 20 L.W. 440 —83 I.C. 72—47 M.L.J. 465=1924 M.W.N. 680=1925 Mad. 60 ; *Subbarami* v. *Ramamma*, 43 M. 824=1920 M.W.N. 529=12 L.W. 249—59 I.C. 681.

(h) *Nagalutchmee* v *Gopoo*, 6 M I.A. 309.

by female holders of property are recognised by the law for which see Ss. 486 and 538. Only that property can be bequeathed which can be the subject of a gift. "The analogous law in this respect is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to property which they can transfer and the persons to whom it can be transferred".(i) Both the subjects and objects of the bequest should be ascertainable: otherwise it cannot be given effect to.(j)

TO WHOM PROPERTY CAN BE GIFTED OR BEQUEATHED

380. Persons qualified to take.—A bequest can be made to any person, though he be a minor, an idiot or one incapable of inheriting by reason of some personal disability.(k) But under the Hindu Law the donee must be in existence either in fact or in contemplation of law at the time the gift or bequest takes effect.(l) (See S. 383).

381. Persona designata.—When a bequest is made to a particular person describing him as an aurasa or adopted son, the bequest to him will take effect even though he is found not to satisfy the description, if it could be said from the consideration of the language employed in the instrument and of the surrounding circumstances, that his being the aurasa or the adopted son was not the reason or the motive for making the bequest and that it was the intention of the donor that the donee should take the property even though he failed to satisfy the description given. The distinction between what is description only and what is the reason or the motive of the gift, may often be very fine, and whether the testator intended the donee to take as *persona designata* or not is in any particular instance to be gathered from all the circumstances of the case.(l) If a testator makes a gift to his "wife A. B" believing the person named to be his lawful wife, and he has not been imposed upon by her and falsely led to believe that he could lawfully marry her, and it afterwards appears

(i) *Tagore* v. *Tagore*, 9 Beng L R 377 (P.C.)—I.A. Supp. 47.

(j) *Morice* v. *Bishop of Durham*, 9 Ves. 399; 10 Ves. 522, followed in *Ranchordas* v. *Parvatibai*, 23 B. 725—26 I.A. 71 :1 Bom. L.R. 607 :3 C.W.N 621 P.C.

(k) *Kooldebnarain* v. *Mt. Wooma*, 1863 Marsh. 357. But a murderer of the testator cannot claim any benefit under the will; *Re. Houghton*, (1915) 2 Ch. 173.

(l) *Venkata Surya* v. *Court of Wards*, 26 I.A. 83—22 M. 383—3 C.W.N. 415—9 M L.J. Sup. 1—1 Bom L.R. 277 (P.C.); *Bai Dhondubai* v. *Laxmanrao*, 47 B 65—1922 B. 352 24 Bom. L.R. 794; *Hari* v. *Radha*, 37 B. 116—14 Bom. L.R. 1129—17 I.C. 834; *Lali* v. *Murlidhar*, 28 A. 488—33 I A. 97· 8 Bom. L.R. 402—3 A L J. 415:—10 C.W.N. 730 P C.; *Subbarayar* v *Subbammal*, 24 M. 214—27 I.C. 162—14 C.W.N. 805—2 Bom. L.R 982 (P.C.); *Fanindra* v *Rajeswar*, 12 I A 72—11 C. 463; *Ali Bahadur* v *Hafiz*. 9 Luck. 530—1934 Oudh 137.

that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift and the lawfulness or otherwise of the marriage does not make any difference in the testator's intention.[m]

382. Gift to two or more persons.—If an estate granted is limited to two or more jointly, some of them capable of taking, the others not, those who are capable shall take the whole.[n] When they do take, they take as tenants-in-common and not as joint tenants.[o] The principle of joint tenancy is unknown to Hindu Law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara which under that law passes by survivorship.[p] Where a gift is made to persons who are members of a coparcenary the High Courts are not agreed on the question whether they take the property as joint tenants or tenants-in-common. But the test laid down by the Madras High Court in a recent decision[q] that in the absence of a contrary intention expressed in the instrument of gift, they would take the property as tenants-in-common except in a case where the donees would have taken the property as ancestral property in the absence of the disposition seems to be an easy and simple test

383. Gift to a class and unborn persons.—S. 15 of the Transfer of Property Act, IV of 1882, as amended by Act XX of 1929 runs as follows.

"If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in Ss. 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class."

Ss. 13 and 14 are as follows: —

S. 13:—*"Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."*

S. 14:—*"No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."*

(m) *Fanindra* v. *Rajeswar*, 12 I.A. 72 =11 C. 463; See also S. 168 where this question is fully discussed.

(n) *Nandi Singh* v. *Sita Ram*, 16 C. 677 =16 I.A. 44 (P.C.).

(o) *Jogeswar Narain* v. *Ram Chandra*, 23 I.A. 37=23 C. 670=6 M.L.J. 75 (P.C.).

(p) *Bahu Rani* v. *Rajendra*, 8 Luck. 121 =60 I.A. 95=1933 P.C. 72=35 Bom. L.R. 490=37 C.W.N. 464=64 M.L.J. 555=37 L.W. 396=1933 M.W.N. 286=1933 A.L.J. 445.

(q) *Krishnaswami* v. *Avayambal*, 1933 Mad. 204.

Similar provisions regarding bequests are embodied in Ss. 113, 114 and 115 of the Succession Act.

The well-known doctrine of Hindu Law is that a gift to persons unborn is absolutely void.(r) Difficulties however arose in the case of a gift to a class of persons of whom some were and some not in existence at the date of the gift. In *Rai Bishen Chand* v. *Asmaida Koer*,(s) the Judicial Committee overruled the contention that the gift would not be valid even in respect of those donees who were in existence at the time of the gift.(t) By the passing of Madras Act I of 1914 and the India Acts XV of 1916 and VIII of 1921 gifts or bequests to persons unborn are declared valid, provided they do not offend the rule of perpetuity as laid down in the provisions respectively of S. 14 of the Transfer of Property Act and S. 114 of the Indian Succession Act, 1925.

Exceptions to the rule as to unborn sons.—Under the Hindu Law a person can take under a will though in fact he does not exist at the testator's death, provided he is then in existence in contemplation of law.(u) Thus a person in the womb and a child adopted after the testator's death come under this category. Similarly the future wives of the sons in whose favour a bequest is made also fall within the exception to the general rule,(v) provided they were in existence at the testator's death though they became the sons' wives only later.(w)

384. Rule of perpetuities and exceptions thereto.—S. 14 of the Transfer of Property Act, already quoted in S 383, and S. 114 of the Succession Act enact the rule against perpetuity. This rule prevents the creation of any interest by way of gift or will which is to take effect after the lifetime of one or more persons living at the date of the gift or the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing gifted or bequeathed

(r) *Bhagabati* v. *Kalicharan*, 38 I.A. 54 =10 I.C. 641 38 C. 168=15 C.W.N. 393 8 A.L.J. 433 13 Bom L.R. 375=21 M.L.J. 387=(1911) 2 M.W.N. 295 (P.C.) ; *Tagore* v. *Tagore*, 9 Beng L.R. 377=I.A. Sup. 47.

(s) 6 A. 560=11 I.A. 164.

(t) *Bhagabati* v. *Kalicharan*, 38 C. 468= 38 I.A. 54=15 C.W.N. 393=8 A.L.J. 433= 13 Bom. L.R. 375=21 M.L.J. 387=(1911) 2 M.W.N. 295 ; *Ram Lal* v. *Kanai*, 12 C. 663 ; *Madhavrao* v. *Raghunath*, 52 B. 176 =1928 P.C. 33=54 M.L.J. 245=30 Bom. L.R. 282=27 L.W. 400=26 A.L.J. 560=32 C.W.N. 925=55 I.A. 74 ; *Radha Prasad* v. *Ranimoni*, 38 C. 188=8 I.C. 1061=15 C.W.N. 113, same case on appeal *Rani-moni* v. *Radha Prasad*, 41 Cal. 1007=18 C.W.N. 873=16 Bom. L.R. 787=26 M.L.J. 653 1 L.W. 731=1914 M.W.N. 624=1914 P.C. 149=41 I.A. 176 ; *Gordhandas* v. *Bai Ramcoorer*, 26 B. 449=3 Bom. L.R. 857 ; *Ramanadha* v. *Bhagirathi*, 29 M. 412.

(u) *Tagore* v. *Tagore*, I.A. Sup. 47=9 Beng. L.R. 377=18 W.R. 359 (P.C.).

(v) *Dines Chandra* v. *Biraj Kamini*, 15 C.W.N. 945=39 C. 87=11 I.C. 67.

(w) 39 L.W., Short notes, p. 6 ; See also *Kuppuswami* v. *Jayalakshmi*, 58 M. 15= 67 M.L.J. 525—1934 M.W.N. 488=40 L.W. 570=1934 M. 705 ; *Nakshetramali* v. *Braja*, 12 Pat. 708.

is to belong. This rule applies to all transfers except those for religious and charitable purposes.(x)

385. Accumulations.—Accumulation of income can be validly directed only for so long a time as the absolute vesting of the entire interest can be withheld or the corpus of the property rendered inalienable.(y) In other words accumulations are permissible only for the period during which the course of the devolution of the property can be directed or controlled by the person directing the accumulations.(z)

S. 17 of the Transfer of Property Act runs as follows:—

"*17(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—*

(a) the life of the transferor, or

(b) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred; and such direction may be made accordingly."

S. 117 of the succession Act also contains simular provisions:

"*117(1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.*

(x) *Ratkishori* v. *Debendranath*, 15 C. 409=15 I.A. 37 (P.C.); See also *Raja of Ramnad* v. *Sundara*, 42 M. 581=46 I.A. 64 =1918 P.C. 156 to the effect that the Rule does not apply in the case of a charge created for payment of annuities to a person and his heirs from generation to generation. *Kayastha Patsala* v. *Mt. Bhagwati*, 64 I.A. 5=45 L.W. 38=(1937) 1 M.L.J. 166=1937 P.C. 4.

(y) *Watkins* v. *Administrator-General*, 47 C. 88=56 I.C. 376.

(z) *Amrito Lall* v. *Surnomoye*, 24 C. 589—1 C.W.N. 345. (See S. 17 of the Transfer of Property Act and S. 117 of the Succession Act.).

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the testator or any other person taking any interest under the will, or

(ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

(iii) the preservation or maintenance of any property bequeathed; and such direction may be made accordingly."

386. Gift of income.—Where a gift, though in the form of a gift of income of an estate, is one unlimited in point of time, and there is no restriction in the gift and no limitations beyond the actual beneficiaries, the income carries with it the whole estate and the gift is taken as an absolute one.(a)

387. Gift reserving life interest.—There can be a valid gift of immovable property even though the donor under the gift reserves to himself the enjoyment of its usufruct for his lifetime.(b) Even a life estate with full powers over the corpus may be reserved under a gift, and the gift is not invalid on that account.(c)

388. Donatio mortis causa.—A donatio mortis causa made in contemplation of death and revocable on the donor recovering from illness is valid under the Hindu Law,(d) and the principles of the Mahomedan Law relating to Marz-ul-mauz are not applicable to a Hindu gift.(e) But before upholding such a gift, the Court must be satisfied that it was the free voluntary act of the party by whom it purports to have been executed and that it expressed his real intention.(f)

389. Power of appointment.—A Hindu can grant a power of appointment to another to regulate the final devolution of his estate at the termination of the previously created interests. Such power of appointment is not contrary to any principle of Hindu Law and the appointment made in the exercise of the power will be valid if made in favour of persons in whose favour the grantor of the power himself could have made a valid gift or bequest.(g) As was observ-

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(a) *Madhavrao* v. *Raghunath*, 55 I.A. 74=54 M.L.J. 245=30 Bom. L.R. 282=27 L.W. 400=26 A.L.J. 560=32 C.W.N. 925=1928 P.C. 33=52 B. 176 P.C.; *Faiz* v. *Muhammad*, 25 C. 816=25 I.A. 77=2 C.W.N. 385.

(b) *Lalta Singh* v. *Gur Narain*, 45 A. 115=1922 A. 467=20 A.L.J. 744 (F.B.).

(c) *Venkata* v. *Venkata Rao*, 53 M.L.J. 557=105 I.C. 775=1927 M.W.N. 215=1928 M. 39.

(d) *Visalatchmi* v. *Subbu Pillai*, 6 M.H.C.R. 270, *Bhaskar* v. *Saraswati*, 17 B. 486.

(e) *Sat Narain* v. *Krishna Dutt*, 87 I.C. 900=1925 Oudh. 383.

(f) *Geresh Chunder* v. *Mt. Bhuggobutty*, 13 M.I.A. 419.

(g) *Bai Motivahoo* v. *Bai Mamubai*, 24 I.A. 93=21 B. 709=1 C.W.N. 366 (P.C.).

ed in *Motivahoo's case* "There is an analogy to it in the law of adoption. A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this they think they ought also to say that, in their opinion, the English law of powers is not fit to be applied generally to Hindu wills."

390. Conditional gift or devise.—A gift or devise may be conditional or absolute. The condition may be a condition subsequent or a condition precedent. The principles of Ss. 25 to 34 of the Transfer of Property Act and those of Ss. 126 to 137 of the Succession Act are equally applicable to such gifts or bequests by Hindus.

391. Gift with condition subsequent.—There may be a valid devise of an absolute estate defeasible on the happening of a certain event.(h) Where an absolute transfer of property is made subject to a condition that if the transferor returns from the place to which he is going he is to get back the property, the condition of reverter on his return is valid and enforceable both against the transferee and his heirs.(i) So also where a gift is made to another in the expectation of certain services from the donee, the gift is revocable if the donee fails to do what has been conditioned he should do.(j) Where a will provides for the cesser and determination of the life interest created thereunder in the event of the non-performance of the condition prescribed therein, such interest would cease on the happening of that event notwithstanding that the conditions over had been declared void.(k) So also where a gift deed provided that the donee was to pay annually a certain sum of money for the maintenance of the donor and certain relations of his and that on the donee failing to do so the gift was to be null and void, the donor would be entitled to get back the properties gifted on the failure of the donee to make the stipulated payments.(l) (See S. 31 of the Transfer of Property Act).

(h) *Soorjeemoney* v. *Denobundo*, 9 M.I A. 123.

(i) *Venkatarama* v. *Aiyasami*, 16 L.W. 552=69 I.C. 673=1922 M.W.N. 657=43 M L J 340=1923 M. 67.

(j) *Balbhadar* v. *Lakshmi*, 1930 A. 669 = 1930 A.L.J. 623.

(k) *Tagore* v. *Tagore*, 18 W.R. 359 (P.C.)=I.A. Sup. 47—9 Beng. L.R. 377.

(l) *Mahant Rai* v. *Mt. Lachmina*, 26 L.W. 94=1927 M.W.N. 456=31 C.W.N. 1087 1927 P.C. 123.

392. Illegal or immoral conditions.—A gift or bequest upon a condition, the fulfilment of which would be contrary to law or to morality is void. (See S. 127 of the Succession Act and S. 25 of the Transfer of Property Act). But where the condition attached to a gift, and not the consideration for it, is immoral the case would fall under the general rule of law that a gift to which an immoral condition is attached remains a good gift, while the condition is void.[m]

393. Conditions repugnant to the estate created.—Any condition in a will or gift prohibiting alienation,[n] or partition,[o] or postponing partition of,[p] or restricting,[q] the interest in the absolute estate created under the instrument is invalid and the bequest or gift is good.[r] As was observed by the Judicial Committee in *Tagore* v. *Tagore*,[s] if the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant to, or as being an attempt to take away, the power of transfer which the law attaches to the estate which the donor has sufficiently indicated his intention to create, though he adds a qualification which the law does not recognise.

394. Creation of estates unknown to Hindu Law.—All estates of inheritance, created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such.[t] No man can create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or policy,[u] and a person attempting by gift or will to make property

(m) *Ram Saroop* v. *Mt. Bola*, 11 I.A. 44 —6 A. 313 (P.C.); See Ss 25 and 32 of the Transfer of Property Act and Ss. 127 and 135 of the Succession Act. But see *Ghumna* v. *Ramchandra*, 47 A 619 where the consideration is immoral and the gift is held void.

(n) *Chundi Churn* v *Siddheswari*, 16 C. 71—15 I.A. 149 (P.C.); *Sarojbala* v *Jyotirmayee*, 58 I.A 270—59 C 142 1931 A.L.J. 555 -35 C.W.N. 903 34 L.W. 51—33 Bom. L.R. 1257 -1931 M.W.N. 989—61 M.L.J. 501—1931 P.C. 179; *Tagore* v. *Tagore*, I.A. Sup. 47—18 W.R. 359 (P.C) =9 Beng. L.R. 377; *Muthukumara* v. *Anthony*, 38 M. 867—24 I.C. 120; *Rukminibai* v. *Laxmibai*, 44 B. 304=1920 B 73.

(o) *Anantha* v. *Nagamuthu*, 4 M. 200: *Narayanan* v. *Kannan*, 7 M. 315.

(p) *Ratkishori* v. *Debendranath*, 15 C. 409.

(q) *Bhaidas* v. *Bai Gulab*, 46 B. 153= 19 I A 1 20 A L.J 289—24 Bom L.R. 551 —26 C.W N 129- 42 M L J 385- 15 L.W. 412. 1922 P C. 193. *Sarajubala* v *Jyotirmayee*. 58 I A 270. 59 C 142 1931 A.L.J. 555 35 C W.N 903 34 L W. 51—33 Bom L R. 1257 1931 M.W.N. 989 61 M.L.J. 501—1931 P C. 179.

(r) *Umrao Singh* v. *Baldev Singh*, 14 Lah. 353—143 I.C. 615 -34 P.L.R. 685—1933 L. 201; *Narayanan* v. *Kannan*, 7 M. 315; *Rameshwar* v. *Balraj*, 1935 A.L.J. 1133 -37 Bom L.R. 862—40 C.W.N 8.=1935 M.W N 1122—1935 P C. 187; *Muthukumara* v *Anthony*, 38 M. 867=24 I C. 120.

(s) *Tagore* v. *Tagore*. I.A. Sup 47—18 W.R. 359—9 Beng L.R. 377.

(t) *Tagore* v. *Tagore*, I A. Sup 47=18 W.R. 359—9 Beng. L.R. 377.

(u) *Soorjeemoney* v *Denobundoo*, 6 M. I A. 526; *Manohar* v. *Bhupendranath*, 60 C. 452—1932 C 791

inheritable otherwise than as the law directs is assuming to legislate and the gift must fail and the inheritance take place as the law directs.[v] Unless the course of succession directed under a will or gift is one known to the Hindu Law, the gift or bequest cannot take effect except to the extent allowed by that law and one of such estates not known and repugnant to the Hindu Law, is one described in terms which English law would designate as an estate tail.[w] Thus the creation of an order of succession which excludes the ordinary legal heirs, whether male[w] or female, [x] or heirs by adoption, [y] is invalid and inoperative.

395. The Tagore case.—In the well-known Tagore case,[z] a Hindu testator vested his estate in certain trustees with directions to convey the estate to the use of the persons ascertained by reference to the following limitations:

1. To J for life.

2. To J's eldest son, born during testator's lifetime, for life.

3. In strict settlement upon the first and other sons of such eldest son successively in tail male.

4. Similar limitations for life in tail male upon the other sons of J born in the testator's lifetime, and their sons successively.

5. Limitations in tail male upon the sons of J born after the testator's death.

6. "After the failure or determination of the uses and estates hereinbefore limited, to S for life."

7. Like limitations for his sons and their sons.

8. Upon failure or determination of that estate, like limitations in favour of the sons of L, who was dead at the making of the will, and their sons.

The testator's only son was excluded under the provisions of the will. The will contained provisions prohibiting alienation by the incumbents, excluding women from inheritance, and adopting primogeniture in the male line through males. In a

(v) *Tagore* v. *Tagore*, I.A. Sup. 47—18 W.R. 359=9 Beng L.R. 377.

(w) *Mooriyat* v. *Mooriyat*, 32 M. 315=1 I.C 195.

(x) *Tarokessur* v. *Soshi*, 10 I.A. 51=9 C. 952 (P.C); *Madura Permanent Fund Ltd.* v. *Kamalakshi*, 50 M.L.J. 355=1926 M W.N. 137—1926 M. 492 (2); *Purna Shashi* v. *Kalidhan*, 38 I.A. 112—38 C. 603 8 A L.J. 681 =13 Bom L R. 451=21 M.L.J. 1119=15 C.W.N. 693 = (1911) 2 M.W.N. 403 (P C.); *Bai Dhanlaxmi* v. *Hari Prasad*, 45 B. 1038—1921 B 262. *Ganesh Chunder* v. *Lal Behary*, 63 I.A. 448—38 Bom. L.R. 1250=41 C.W.N. 1 =71 M.L J. 740 1936 P.C. 318. See also *Madhav Rao* v. *Raghunath*, 52 B. 176—55 I.A. 74=1928 P.C. 33.

(y) *Suriya Rau* v. *Raja of Pittapur*, 13 I.A. 97=9 M. 499 P.C.

(z) *Tagore* v. *Tagore*, I A. Sup. 47—18 W.R. 359=9 Beng. L.R. 377.

a suit by the excluded son to set aside the will, the Privy Council held as follows:

i. That the provision in the will for vesting the property more or less absolutely, in some trustees for the benefit of others was not invalid:

ii. That the life estate to J was valid and that it was not the law that a Hindu could not bequeath anything less than "his whole bundle of rights: "

iii. That the estates following upon the life estate of J were void being in the nature of estates tail wholly unknown and repugnant to the Hindu Law:

iv. That the plaintiff was entitled to the whole estate as heir at law after the termination of the life estate of J:

v. That a donee must be a person capable of taking at the time when the gift takes effect and must in fact or in the contemplation of law be in existence at the death of the testator:

vi. That neither S nor L's grandson, though born before the testator's death, was entitled to succeed after J inasmuch as the incapacity of J's line to succeed by reason of the illegality of the will did not amount to the actual exhaustion of the line of J, on which alone they were intended to take under the will: and

vii. That the intervention of the trustees did not validate what the testator could not validly do directly without the trust.

The following is the relevant portion of the judgment of the Judicial Committee which discusses and decides several points which often arise in respect of gifts and wills in Hindu Law.

"The questions presented by this case must be dealt with and decided according to the Hindoo law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindoo system, in which property, whether movable or immovable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personality—a distinction not known in Hindoo Law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property [*Tyler* v. *Walford*(a)]. In the Hindoo Law of Inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

(a) 5 Moore. P.C. 304.

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does Inheritance is a rule laid down (or, in the case of custom, recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat 2413).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjomoonee Dossee* v. *Denobundoo Mullick*.(b) "A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that, if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be entered to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo law (as, under the present state of law, it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such

(b) 6 Moore, I.A. 385 4 W.R.P.C. 144, Suth. P.C. Cases 291.

a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that, by Hindu law, no person can succeed thereunder as heir to the estates described in the terms which, in English law, would designate estates-tail.

It remains, however, to be considered whether the persons described as heirs-in-tail or heirs of inheritance not recognized by law are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power, and subject to the restrictions, sought to be imposed by the will upon the successive heirs-in-tail, or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindoo Law of Gifts during life and Wills, and the extent of the testator's power, whether in respect of the property he deals with, or the person upon whom he confers it. The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be alienated by the holder, without the concurrence of those who are interested in the succession; but by the law as prevailing in Bengal at least,(c) the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence, and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhaga, Chapter I., v. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument), it is distinguishable, because of the peculiar law applicable to that relation. The Hindoo law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law, such child is begotten by the father who adopts him, or for, and on behalf of, whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death, having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that

(c) As to Madras, see to the same effect *Vallinayagam Pillai* v. *Pachche*, 1 M.H. C.R. 326; 1 Norton L.C. 334, S.C.

the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice, in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law" 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator, as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of will has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal, dealing with a case new in the instance, to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wensleydale in the opinion delivered by him as a Judge in the House of Lords, in the case of *Mirehouse* v. *Rennell*,(d) in accordance with principles generally recognized.(e) "This case," said Lord Wensleydale, "is in some sense new, as many others are which continually occur, but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by Lord Justice Knight Bruce, in the case of *Sreemuthy Soorjeemoney Dossee* v. *Denobundoo Mullick*(f) was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindoo succession, and Mr. Justice Phear, upon the authority

(d) 1 Clark and Finnelly 546.
(e) 9 Moore I.A. 135.
(f) 9 Moore I.A. 135=4 W.R.P.C. 114; Suth. P.C. Cases 291.

of that case, held that "there is nothing in Hindoo law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council) if at all, immediately on the close of a life in being." The expression in the Judgment of the Lord Justice thus relied upon, was as follows: "We are to say whether there is anything against public convenience, anything generally mischievous or any thing against the general principles of Hindoo law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied, will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry*,(g) in which the testamentary power of disposition by Hindoos in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindoos in India. It is obvious, therefore, that the conclusion arrived at in the lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact, or in contemplation of law, be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principle of Hindoo law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage, or other family provision, for which authority may be found in Hindoo law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next, to those which affect the will in question.

It was argued on behalf of the plaintiff, in the first place, that the will is void by reason of its being founded upon the creation of an estate in trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be

(g) 10 M.I.A. 279=3 W.R.P.C. 15=Suth. P C. Cases 574.

held in trust, can have no existence by the Hindoo law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument, that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the plaintiff also gives the go-by to the consideration that, if the trusts be void, they are not illegal, and that, if they are struck out as void, the estates capable of being created by the will, and which the trusts were introduced to secure and maintain would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay A an annuity, and subject thereto in trust for B; if the trust be void, it should simply be struck out, and B would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in, and ought not to be introduced into, Hindoo Law. But it is obvious that property, whether moveable or immoveable, must, for many purposes, be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases.

Implied trusts were recognized and established here in the case of a benamee purchase in *Gopeekrist Gosain* v. *Gungapersaud Gosain*,(h) and in cases of a provision for charity or for other beneficent objects, such as the professorships provided for by the will under consideration, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that, under the guise of an unnecessary trust of inheritance, the testator could not indirectly create beneficiary estates of a character unauthorised by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, after the determination of those interests, the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails.

As for the argument that the trust failed, because one of the trustees had renounced, or, more correctly speaking, had not acted, their Lordships think this criticism unfounded in law, and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

(h) 6 Moore I.A. 53=4 W.R.P.C. 46.

Having disposed of the question whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another; the next subject for consideration involves the objections raised on behalf of the plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estate and personalty settled therewith, is as follows.—

2,500 rupees per month to the "*person or persons* for the time being entitled," under the will, "to the beneficial enjoyment of the said real property;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible;"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustee or trustees are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations, "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "If any such law there shall be;"

The limitations referred to were as follow in the present tense, and therefore to operate at the moment the will took effect, though "subject always to the devise to" the trustees.—

1. To the defendant, Jotendromohun Tagore, for life;

2. To his eldest son born during the testator's lifetime for life;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male;

4. Similar limitations for life and in tail male upon the other sons of Jotendromohun Tagore, born in the testator's lifetime, and their sons successively;

5. Limitations in tail male upon the sons of Jotendromohun Tagore, born after the testator's death;

6. "After the failure or determination of the uses and estates hereinbefore limited" to (the defendant) Sourendromohun Tagore for life;

7. Like limitations for the sons of Sourendromohun Tagore and their sons as for the sons of Jotendromohun Tagore. Under these limitations the defendant, Promodecoomar Tagore, who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life-estates of Jotendromohun Tagore and of his father;

8. Like limitations in favour of the sons of Lullitmohun Tagore, who was deceased at the date of the will, and their sons in tail male, as for the sons of Jotendromohun Tagore. Under these limitations (if the will be valid), the defendant Suteendurmohun Tagore, as the son of a son (his father having died during the testator's lifetime) would take an estate in tail male. He is the only defendant in that situation.

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred."

This clause shows an intention that each tenant, though of inheritance, should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Abergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that, upon the face of it, the will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male, which is a novel mode of inheritance inconsistent with the Hindoo law.

The first life-interest in Jotendromohum Tagore next requires attention. It was objected to on two grounds: *First*, because it was said that Hindoo law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, and so forth. *Secondly*, it was said that the life-interest was void, because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of 2,500 rupees per month, so that it is said this life-estate may never come into existence, because the legacies and annuities and interest on arrears may never be completely satisfied.

As for the first objection, it amounts to this: That because there is, as was contended, only one estate technically known to Hindoo law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because, in the law we are dealing with, the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the plaintiff that annuities given and charged upon land are valid; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits, and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that is no objection to a similar interest being given by will.

As to the second objection to the life-interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life-interest was to

begin at once. It was subject to the devise to trustees who were to receive the rents, allow the life-holder 2,500 rupees per month out of the net proceeds, apply the remainder in aid of the interest of the personalty to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession to enjoy the whole. If the trust is not to be read to make estates valid, which otherwise would be void, so neither is it to be read to defeat interests, which without the trust would be valid. Their Lordships read this will, alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above 2,500 rupees per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that, upon the ground of public policy, such law ought to extend to India, which the character of law of gifts there seems to render unnecessary.

Whether Jotendromohun Tagore took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favour of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindoo law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents would be disregarded as an attempt to legislate. Accordingly it has been argued in support of the will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created, ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the will, and conferred either upon Jotendromohun Tagore, whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life-estate as converted or expanded into an estate of inheritance, according to Hindoo law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will, which will have the effect of creating an estate at variance not merely in details, but in substance and effect, with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. [Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nichols* v. *Nichols*.(1)] The proposed construc-

(1) 2 W. Bl. 1159.

tion would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. [Testing this alone by English precedents, it might plausibly be maintained by *Pitt* v. *Jackson*.(j)] The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance, which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which show, in common with the rest of the will, that the intention of the tetator was to give, and to give only, such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guess work as to what the testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed.

These observations dispose of the case of *Humberston* v. *Humberston*(k) so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the testator, estates of inheritance will be inferred against the particular expression, in order to benefit, as nearly as may be in a lawful way, all whom the testator intended to benefit. To infer a general estate of inheritance in this case would, at the same time, defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English Law) against the authority of *Monypenny* v. *Dering*.(l) Their Lordships are of opinion that no estate of inheritance, other than the void estate in tail male, can be read or deduced from the will.

There is, however, another point of view in which, the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life-estate to the first taker is clear, and, if an estate in tail male stood first in the will effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death except Suteendurmohun Tagore, and the validity of his claim to a life-interest in succession stands upon the same ground as that of Sourendromohun Tagore and his son, whose position must next be discussed.

Upon this, the question arises whether Sourendromohun Tagore, Promodecoomar Tagore, and Suteendurmohun Tagore take life-interests successively

(j) 2 Brown. C.C. 51.
(k) P Wms. 1.
(l) 2 De Gex., Macnaghten, and Gordon 145.

after that of Jotendromohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked and upon the failure or determination of which they were to arise. This may be considered in reference to Sourendromohun Tagore, as these other claimants, in this respect, stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations except Jotendromohun Tagore, and no person who came into existence afterwards could, in point of law, so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life, after the death of Jotendromohun Tagore, then became vested in Sourendromohun Tagore. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine, upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.

If Jotendromohun Tagore should beget or adopt a son, and die leaving the son, and Sourendromohun Tagore both surviving, either Sourendromohun Tagore (and after him his son) must take at once and enjoy, to the exclusion of the son of Jotendromohun Tagore, in spite of the will; or the heir-at-law (who though in terms excluded from benefit "under the will" cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and enjoy during the life of Jotendro's son, and of his issue male, actual or adopted, and Sourendromohun Tagore (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law whose intervention was not contemplated by the testator.

If Jotendromohun Tagore were to die leaving power to adopt a son who was afterwards, in fact, adopted, Sourendromohun Tagore would either enjoy absolutely to the exclusion of the son in spite of the will, or the heir at law would enter as before stated.

Many other cases might be supposed in which the rights of Sourendromohun and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate, and handing it on from one to another, whilst there was a male representative or the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion, either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event, not appearing to have been contemplated by the testator, of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact of an estate or estates which the testator considered sufficient in law, and that

these limitations over were, in the scheme of this will, intended to follow the creation of the prior estates of inheritance, and must fall therewith.

Their Lordships are thus of opinion that a life-interest has been created in Jotendromohun Tagore, and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the question how far the personalty not settled with the realty, but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with—whether the bequest of the *corpus* is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (Appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time and he treated the gift of the fund of money and securities for money as a gift of the *corpus* to an uncertain person who might be one of those who, for failure of the estate in tail male, cannot take the realty. MR. JUSTICE NORMAN declined to reject the words "or person," and he suggested, amongst others, the construction that the person then in possession and his successors should take the entire income and profits without deduction, but he lent to the alternative that it was uncertain whether the testator meant to make an absolute gift, or only to give the interest in succession, *reddendo singula singulis*, and upon this ground, he concurred in holding the gift to be void. The decree gives Jotendromohun Tagore the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently-accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows, viz., that the surplus in the hands of the trustees and the subsequently accruing interest of the personal fund is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty in the same manner as the rents of the realty. The words "or persons." instead of being rejected as inconsistent with a gift of the *corpus*, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words " or persons " in the plural were proper in the clause directing the trustees, not to convey, but to stand " possessed of, and interested in, the trust moneys and securities, and the interest, dividends, and the annual proceeds thereof in trust " absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words " absolutely" and "absolute" are used, not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the " absolute " en-

joyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have the a distinct meaning as applied to each holder, whether for life, or in tail male. The result, in their Lordships' opinion, is that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons, for the time being, successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.

In this respect, the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of Jotendromohun Tagore, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also in the interest of the personalty after such falling in or satisfaction.

As to the plaintiff's claim to maintenance, their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage-gift ought to be rejected. The plaintiff admits a marriage-gift of his father of real property, producing at the time Rs. 7,000 per year, which *prima facie* is an adequate maintenance. He does not state the present income. His averment of its insufficiency is, not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prosonocoomar Tagore's property."

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally and not of the particular claimant), may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage-gift of a *prima facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which, in this case, must be regarded as sufficient, and, in respect of which, the plaintiff has laid no foundation for further inquiry, either in law or fact.

The plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law, he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact until he comes into its enjoyment. He has averred upon information and belief that the trustees, "against the directions contained in the will," sold securities for money consisting of Government paper, "out of the *corpus* of the estate of the said testator, and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (Original Ordinary Civil Jurisdiction), MR. JUSTICE PHEAR considered this statement of the plaintiff insufficient, because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty, and the selling of the Government paper, of which the plaintiff complains, may, as far as anything goes which is stated by the plain-

tiff, have been effected for that purpose." The High Court (Appellate Jurisdiction), however, directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the defendants' knowledge, and not within the plaintiff's, and that the statement, as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view, their Lordships concur, and hold that the plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life-interest of Jotendromohun Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdale* v. *Briggs*,[m] where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible in the judgment of the Lord JUSTICE TURNER, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions, as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose or may dispose, of the rights of those parties, ought to be incorporated in the decree." *Jotendromohun Tagore* v. *Gnanendramohun Tagore*, 18 W.R. 359 at 364-374.

396. Revocation of gift.—Except where a gift is vitiated by fraud, coercion or undue influence, or made with the intention to defraud creditors, a gift once completed cannot be revoked[n] and is valid even as against the creditors.[o]

397. Revocation and alteration of wills.—All Hindu wills executed on or after the 1st day of September 1870 in, or in respect of immovable property situate within, the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the Local limits of the Ordinary Original Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay, and all Hindu wills executed on or after the 1st day of January 1927, can be revoked or altered only in accordance with the provisions respectively of Ss. 70 and 71 of the Succession Act, 1925. These sections run as follows :—

"70. No unprivileged will or codicil, nor any part thereof, shall 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 hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some

(m) 8 De Gex. Macnaghten and Gordon 391.

(n) *Ganga Baksh* v. *Jagat Bahadur*, 22 I.A. 153—23 C. 15. But a gift though made under a duly executed and registered deed can be validly revoked prior to its acceptance by the donee; *Kalyanasundaram* v. *Karuppa*, 50 M. 193=54 I.A. 89=25 A.L.J. 113=29 Bom. L.R. 833=31 C.W.N. 509=53 M.L.J. 346=25 L.W. 336=8 Pat. L.T. 527=1927 P.C. 42; *Kamalabai* v. *Pandurang*, 1938 B. 318; *Papathi Ammal* v. *Doraiswamy*, 48 L.W. 764.

(o) *Nasir* v. *Mata*, 2 A. 891; *Rai Bishanchand* v. *Asmaida*, 6 A. 560 (P.C.) =11 I.A. 164.

person in his presence and by his direction with the intention of revoking the same."

"71. No obliteration, interlineation or other alteration made in any unprivileged will after the execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the will:

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

In the case of all other wills the revocation may even be oral without the actual destruction of the instrument provided the intention to revoke it is clearly indicated.(p) No formal words are necessary to constitute revocation in such cases, the only requisite being the *animo revocandi* clearly expressed by words or conduct.(q) If definite authority to destroy a will is given by the testator, that would be sufficient to constitute revocation although the will is not in fact destroyed.(r) Where the will is in respect of self-acquired property of a Hindu, neither the subsequent birth nor adoption of a son to him during his lifetime will have the effect of revocation of the will, though such event will have that effect in respect of the ancestral property under the Mitakshara, if the son happens to survive the testator.(s) But a will is not revoked by the subsequent marriage of a Hindu, though such will be the effect in the case of Christians. A revocation which is shown to be made upon a mistake either of fact or of law and is not intended by the testator except on the mistaken assumption being correct is, however, inoperative.(t)

398. Revocation by subsequent will.—The question whether a prior will is revoked by a later will which is inconsistent with the prior one is really a question of intention and turns upon the application of the doctrine of dependent relative revocation. In 39 M. 107,(u) the following were the facts: A Hindu at a time when he

(p) *Venkayyamma* v. *Venkataramanayyamma*, 29 I.A. 156=25 M. 678=4 Bom. L.R. 657=7 C.W.N. 1=12 M.L.J. 299 (P.C.).

(q) *Chelikani* v. *Appa*, 20 M. 207=7 M.L.J. 143 affirmed in *Venkayyamma* v. *Venkataramanayyamma*, 25 M. 678=29 I.A. 156=4 Bom. L.R. 657=7 C.W.N. 1=12 M. L.J. 299 (P.C.)

(r) *Periab Narain* v. *Subhao Kooer*, 3 C. 626=4 I.A. 228 (P.C.).

(s) *Alikhu Ram* v. *Raman*, 1933 A. 7 (case of a posthumous son); *Mt. Lalita Devi* v. *Ishar*, 14 L. 178=33 P.L.R. 478=1933 L. 544; *Venkatanarayana* v. *Subbammal*, 43 I.A. 20=39 M. 107=29 M.L.J. 851=(1916) 1 M.W.N. 97=1915 P.C. 37=14 A.L.J. 178=18 Bom. L.R. 372=20 C.W.N. 234; *Hanmant* v. *Bhimacharya*, 12 B. 105. See Bodi v. *Venkataswami*, 38 M. 369 for the case of the death of the son during the testator's life-time.

(t) Hals. Vol. 28 p. 574, para 1144.

(u) *Venkatanarayana* v. *Subbammal* 3 L.W. 177=39 M. 107 43 I.A. 20=1915 P.C. 37=14 A.L.J. 178=18 Bom. L.R. 372 =20 C.W.N. 234=29 M.L.J. 851=(1916) 1 M.W.N. 97.

was without male issue disposed of his ancestral property by a will, and also gave his widow authority to adopt in a certain event. Subsequently he made an adoption and then executed another will disposing of his property in a different manner, without expressly revoking the prior will. This will was invalid in Law as the testator could not validly dispose of his ancestral property, he then having another coparcener in his adopted son. The testator then predeceased the adopted son by about a year. Later on, after the adopted son's death, the widow made an adoption purporting to act under the authority conferred upon her by her husband's first will. In holding that the later will did not revoke the authority to adopt given to the widow in the earlier will and that the adoption was consequently valid, their Lordships proceeded to observe as follows:

"If by his will a testator gives property to A and by a codicil gives the same property to B, and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in the testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B and if B cannot take, the gift to A should remain. If, as in *Tupper* v. *Tupper*,(*v*) the testator's language is that (1) he revokes the gift to A and (2) in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler*,(*w*) the donee of a power to charge, does by his will charge with 4000*l* to be paid to A and 3,000*l* to be paid to B, C and D equally, and then by codicil revokes the aggregate charge of 7,000*l* made by his will and charges with 7,000*l* for A, the charge in the will is no doubt gone for all purposes. If, as in *Baker* v. *Story*,(*x*) A takes absolutely under the will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by will is not gone altogether. But none of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick*,(*y*) although a case upon two dispositions, of which the former contained a power of revocation, and not upon two wills, contains a principle applicable to the present case, viz., that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property." (*z*)

399. Proof of written wills.—The burden of proving a will is upon the person who propounds the will. Such proof relates to two things, (1) that the will was executed by the person by whom it purports to have been executed and (2) that he had executed it at a time when he had a sound disposing mind.(*a*) A will is one

(*v*) 1 K and J. 665.
(*w*) L.R. 6 Eq. 225.
(*x*) 31 L.T.N.S. 631.
(*y*) *Alexander* v. *Kirkpatrick*, L.R. 2 H.L Sc. 397.
(*z*) *Venkatanarayana* v. *Subbammal*, 3 L.W. 177—39 M. 107—43 I.A. 20=1915 P.C. 37=14 A.L.J. 176=18 Bom. L.R. 372=20 C.W.N. 234—29 M.L.J. 851=(1916) 1 M.W.N. 97; See also (1934) 1 Ch. 384.
(*a*) *William Robins* v. *National Trust Co*., 101 I.C. 903=1927 P.C. 66 (P.C.); *Bur Singh* v. *Uttam Singh*, 38 C. 355=38 I.A. 13—9 I.C. 33—15 C.W.N. 177—13 Bom. L.R. 59—(1911) 1 M.W.N. 86=8 A.L.J. 123=21 M.L.J. 100 (P.C.).

of the most solemn documents known to law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature, or to explain the circumstances in which it was executed, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of the law.[b] In order to constitute testamentary capacity or sound disposing mind, the testator must not only be able to understand that he is, by his will, giving his property to the object of his regard, but he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from participation of his property.[c] If he has capacity to understand his position and to appreciate his property and is able to form a judgment with respect to the parties whom he chooses to benefit by his will, then that capacity is sufficient to constitute testamentary capacity.[d] The following rules relating to burden of proof have been correctly and succinctly stated by Wadia, J. in *Ganpatrao* v. *Vasantrao*[e]:—(1) Generally speaking, the law presumes sanity and if the will is not challenged, it is enough for the purpose of proving the will that the testator was not a minor and that he was otherwise capable of making a will under the law and that he duly executed the will; (2) If the testator's sanity is disputed the burden is upon the propounder of the will to establish affirmatively the testator's sound disposing mind in the sense that he knew, understood and approved of its contents; (3) If the testator's insanity before the date of the will is established, the propounder must prove that it was made during a lucid interval; (4) If, however, insanity is not established or habitual insanity does not exist, the burden of proving actual insanity at the date of the execution falls upon the person attacking the will; (5) If the propounder takes an appreciable benefit under it, that is an element of suspicion, and the burden is upon him to remove that suspicion, and establish that the will was the free will of the testator;[f] (6) If this suspicion is displaced by sufficient evidence and the will has been properly proved, it is not open to any party to say that the testator ought not to have made such a will; (7) In order to find the will good, it is not necessary that the testator should have been in perfect health with a mind clear enough to give complicated instructions for his will. It is sufficient if, when the will was read out and explained

(b) *Ram Gopal* v. *Atma Kunwar*, 44 A 495—49 I.A. 413 :27 C.W.N 485—21 A.L.J 402.:1922 P.C. 366.

(c) *Barry* v. *Butlin*, 2 Moo. P.C. 480.

(d) *Saradindunath* v. *Sudhir Chandra*, 50 C. 100—1923 C. 116.

(e) 34 Bom L.R 1371 1932 B. 588.

(f) *Vellaswami* v *Sivaraman*, 57 I.A. 96:8 R. 179 31 L.W. 185 :34 C.W.N. 206 :58 M.L.J. 114 32 Bom. L.R. 511:1930 M.W.N. 394.

to him, he was capable of understanding whether his instructions have been carried out or not.[g]

399-A. Right as executor or legatee when established.—S. 213 of the Succession Act of 1925, provides that

> No right as executor or legatee can be established in any court of justice, unless a court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

and that this provision shall only apply in the case of wills made by a Hindu where such wills are of the classes specified in clauses (a) and (b) of S. 57 of the Succession Act, that is:

(a) Wills made on or after the 1st day of September, 1870, within the territories which at the said date, were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Madras and Bombay; and

(b) Wills made outside those territories and limits so far as relates to immovable property situate within those territories or limits.

It must be remembered that even in cases governed by S. 213 the grant of a probate of a will is not a condition precedent to the institution of a suit by the executor or legatee and the only effect of the above provision is that he will not be entitled to a decree unless probate is granted to him before the passing of the decree. Hence if the probate is granted prior to the date of the decree, a decree cannot be refused to the plaintiff on the ground that the grant was made subsequent to the institution of the suit.[g-a] Nor does this provision prevent the legal heirs of the testator from maintaining a suit as such heirs for the benefit of the estate, so long as any other claimant does not establish his right to the same under the will.[g-b] But under S. 214 of the Succession Act of 1925, no court can pass a decree against the debtor of a deceased person or proceed to execute a decree against such a debtor at the instance of a person claiming to be entitled to the effects of the deceased except on the production by such claimant of a probate or letters of administration or a Succession certificate even though the claim-

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(g) *Bai Gangabai* v. *Bhugwandas*, 29 B. 530=32 I.A. 142 :15 M L.J. 271=7 Bom. L.R. 854=3 A.L.J. 68=9 C.W.N. 769.

(g-a) *Prabhatnath* v. *Ramendrakumar*, 61 C. 1081=1935 C. 158; *Raichand* v. *Jivraj*, 56 B. 65=33 Bom. L.R. 1372=1932 B. 13; *Chandra Kishore* v. *Prasanna*, 38 C. 327—38 I.A. 7=9 I.C. 22.

(g-b) *Gopal Lal* v. *Amulya*, 59 C. 911—1933 C. 234; *Sivasankara* v. *Amaravathi*, 46 L.W. 880=1937 M.W.N. 1153; *Raja Parthasarathy* v. *Rajah Venkatadri*, 46 M. 190=16 L.W. 369.

ant happens to be the son of the deceased,[g-c] except where it is shown that the moneys belonged to a joint family and had come to the son by right of survivorship.[g-d]

400. Proof of oral wills.—The words of a nuncupative will must be proved with the utmost precision with every circumstance of time and place.[h] The propriety of the contents of an alleged oral will does not make it any the less necessary for the Court to be on its guard and to scrutinise closely the evidence of execution in respect of its clearness and cogency.[i]

401. Construction of will.—In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions.[j] There is no difference between the English and Hindu Laws as to the materials from which the testator's intention is to be collected. Primarily the words of the will are to be considered.[k] In so doing the Court is entitled and bound to bear in mind other matters than merely the words used, such as the surrounding circumstances, the position of the testator, his family relationships and many other things which are often summed up in the somewhat picturesque figure "the Court is entitled to put itself into the testator's arm-chair." Among such surrounding circumstances, none would be more important than race and religious opinions, and the Court is bound to regard as presumably, and in many cases certainly, present to the mind of the testator influences and aims arising therefrom.[l] It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to India. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and it is a very serious thing

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(g-c) *Gresham Life Insurance Company* v. *Collector of Etawah*, 54 A. 1026 = 1932 A.L.J. 1015 = 1933 A. 1; *Vairavan* v. *Srinivasachariar*, 44 M. 499 = 1921 M. 168 (self-acquired property of father).

(g-d) *Sheetalchandra* v. *Lakshmimanee*, 63 C. 15; *Jagmohandas* v. *Allu*, 19 B. 338 See also *Gopalaswamy* v. *Meenakshi*, 7 R 39 = 1929 R. 99.

(h) *Beer Pertab* v. *Rajender*, 12 M.I.A. 1.

(i) *Ramanujacharyulu* v. *Narasamma*, 1933 M.W.N. 1118.

(j) *Indira Rani* v. *Akhoy Kumar*, 59 I.A. 419 = 60 C. 554 = 1933 A.L.J. 382 = 35 Bom. L.R. 211 = 37 C.W.N. 153 = 64 M.L.J. 48 = 37 L.W. 1 = 1932 M.W.N. 1301 = 1932 P.C. 269.

(k) *Soorjeemoney* v. *Denobundoo*, 6 M.I.A. 526; *Basanta Kumar* v. *Ram Shankar*, 59 C. 859 = 1932 C. 600 = 55 C.L.J. 205; *Kamakhya* v. *Kushal Chand*, 9 Luck. 349 = 61 I.A. 145 = 1934 A.L.J. 299 = 38 C.W.N. 477 = 36 Bom. L.R. 399 = 39 L.W. 415 = 1934 M.W.N. 255 = 66 M.L.J. 294 = 1934 P.C. 72 (ascertaining testator's vocabulary by reference to other provisions).

(l) *Narasimha* v. *Parthasarathy*, 41 I.A. 51 = 23 I.C. 166 = 12 A.L.J. 315 = 16 Bom. L.R. 328 = 18 C.W.N. 554 = 26 M.L.J. 411 = 1914 M.W.N. 299 = 37 M. 199; *Soorjeemoney* v. *Denobundoo*, 6 M.I.A. 526; *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*, 52 I.A. 214 = 23 A.L.J. 261 = 48 M.L.J. 627 = 27 Bom. L.R. 823 = 1925 M.W.N. 441 = 29 C.W.N. 989 = 1925 P.C. 105 = 48 M. 312 P.C.; *Rameshwar* v. *Balraj*, 1935 A.L.J. 1133 = 37 Bom. L.R. 862 = 40 C.W.N. 8 = 1935 M.W.N. 1122 = 1935 P.C. 187.

to use such rules in interpreting the instruments of Hindus, who view most transactions from a different standpoint, think differently, and speak differently from Englishmen and who have never heard of the rules in question.[m] The English rule of construction that under a father's testamentary gift to children as a class, his illegitimate children, although recognised by him during his lifetime, could not be permitted to share jointly with his legitimate children ought not to be applied in India where the word children is ordinarily understood to embrace a man's illegitimate issue also.[n] Courts are not at liberty to construe the words of one will by the construction of more or less similar words in a different will adopted by a Court in another litigation[o] or to invent for a testator a will which will have the effect of creating an estate at variance not merely in details, but in substance and effect with what he has said.[p] A man may act foolishly and even heartlessly; but if he acts with the full comprehension of what he is doing, the Court will not interfere with the exercise of his volition[q] by adding to the terms of the will.[r] But the construction to be placed upon the words should be a benignant construction and the fact of the language being ungrammatical or technical or incorrect or mistaken as to the name or description, should not prevent the Court from enforcing to the extent and in the form allowed by the law the meaning of the document if it can be reasonably ascertained from the language used.[s]

402. Construction of gifts.—The principles applicable to the construction of a will apply *mutatis mutandis* to the construction of a gift as well. It is the real meaning of the parties and not so much the form of expression or the literal sense of the words that is to be regarded in ascertaining the intentions of a Hindu donor. Where an interest or ownership is created entitling the donee to deal with the subject of the gift according to pleasure, the gift will

(m) *Bhagabati* v *Kalicharan*, 38 I A. 54. = 10 I.C. 641 15 C.W.N. 393 -8 A.L.J. 433 -13 Bom L.R. 375-21 M L.J. 387 - (1911) 2 M.W.N. 295-38 C. 468 P.C. ; *Norendra Nath* v. *Kamalabasini*, 23 C. 563 -23 I.A. 18 P C.; *Indira Rani* v. *Akhoy Kumar*, 59 I.A. 419—37 L.W. 1=1932 M. W. N. 1301=64 M L.J. 48=14 P.L.T. 101-1932 P.C. 269—60 C. 554=1933 A.L.J. 382=35 Bom. L.R. 211=37 C.W.N. 153.

(n) *Sher Bahadur* v. *Ganga Baksh*, 36 A. 101—41 I.A. 1—12 A.L.J. 188—16 Bom. L.R. 306-18 C.W.N. 401=1914 M.W.N. 184 - 26 M.L.J. 291; *Barlow* v. *Orde*, 13 M. I.A. 277.

(o) *Sastman* v. *Shib Narain*, 1 P. 305=49 I A. 25=26 C.W.N. 425=3 P.L.T. 133=15 L.W. 434 42 M.L.J. 492—24 Bom. L. R. 576. 20 A.L.J. 362=1922 M.W.N. 368= 1922 P C 63; *Annada* v. *Ratan*, 1934 C. 370.

(p) *Tagore* v. *Tagore*, I.A. Sup. 47=9 Beng. L.R. 377- 18 W.R. 359.

(q) *Motibai* v. *Jamsetjee*, 19 L.W. 437 22 A.L.J. 98=1924 M.W.N. 173=26 Bom. L.R. 579=29 C.W.N. 45=80 I.C. 777 P.C.

(r) *Narasimha* v. *Parthasarathy*, 37 M. 199—41 I.A. 51 =23 I.C. 166=26 M.L.J. 411 .12 A.L.J. 315=16 Bom. L.R. 328=18 C. W.N. 554—1914 M.W.N. 299.

(s) *Tagore* v. *Tagore*, I.A. Sup. 47=9 Beng. L.R. 377- 18 W.R. 359.

be deemed absolute. Where a gift is equally capable of being construed as a gift for life or an absolute gift but it is not limited in any way but is followed by a general power of appointment and a gift over in default of appointment, the first gift should be treated as an absolute gift. (t)

403. Bequest to charity and the cy pres doctrine.— A valid charitable bequest is one for the benefit of the public or mankind such as for starting a "Sadavart,"(u) or for periodical feasting of Brahmins. (v) But the subject of such bequest must be reasonably certain and ascertainable; thus a mere bequest for 'Dharm', meaning virtue or legal duty and law, is very vague and is wholly void. (w) On a failure of the specific charitable bequest, the Court has jurisdiction to act upon the *cy pres* doctrine, whether the residue be given to charity or not, unless upon the construction of the will, a direction can be implied that the bequest, if it fails, should go to the residue. (x) The *cy pres* doctrine is applied where, from the lapse of time and change of circumstances or other reasons, it is no longer beneficial to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means. (y)

404. Gift to females whether passes absolute estate.—In construing the will of a Hindu in favour of female relations, it is not improper to take into consideration what are known to be the ordinary notions and wishes of a Hindu, with respect to the devolution of property. It may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estate of inheritance which they are able to alienate. (z) But it is not the law that in the case of a gift to a Hindu widow, she has no power to alienate unless such power is expressly conferred. It is possible, by the use of words of sufficient amplitude such as "malik", "from generation to generation" etc., to convey the fullest rights of ownership including the power to alienate. Thus if words are used conferring absolute ownership on the wife, unless the circumstances of the case are sufficient to show that such absolute

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(t) *Kandarpa* v. *Akhoychandra*, 61 C. 106=1934 C. 379=38 C.W.N. 156.

(u) *Jamnabai* v. *Khimji*, 14 B. 1.

(v) *Lakshmibai* v. *Vaijnath*, 6 B. 24.

(w) *Motivahoo* v. *Mamoo Bai*, 21 B. 709=24 I.A. 93=1 C.W.N. 366 (P.C.); *Ranchordas* v. *Parvatibai*, 23 B. 725=26 I. A. 71=1 Bom. L.R. 607=3 C.W.N. 621 (P.C.).

(x) *Mayor of Lyons* v. *Advocate-General*, 1 C. 303=3 I.A. 32 (P.C.)

(y) *Bai Krishna* v. *Vinayak*, 139 I.C. 594=34 Bom. L.R 113=1932 B. 191.

(z) *Mahomed Shumsool* v. *Shewokram*, 2 I.A. 7.

ownership was not intended, [a] it cannot be successfully contended that the wife has no power to alienate unless the power of alienation is conferred upon her in express terms. [b] But in the case of a simple gift or bequest to the wife or widow without there being any words conferring absolute ownership, the presumption will be that she takes only a limited estate. The same principles, it is submitted, will apply even in the case of gifts or bequests to the other female relations such as a daughter,[c] or a daughter-in-law, [d] and the rulings to the effect that the presumption of qualified estate does not apply in the case of gifts to female relations other than the wife or widow, [e] cannot, it is respectfully submitted, be correct, in view of the fact that this rule or presumption was formulated in the case of a devise to a daughter-in-law, [f] and the rule was applied in a later case by the Privy Council in respect of gift to a daughter. [g] But this rule of construction is only to be applied where the terms of the instrument do not make it clear whether what was intended to pass was a limited estate or an absolute estate.[h] Thus where a father-in-law granted to his daughter-in-law certain property for her support and maintenance under an instrument and it recited that the daughter-in-law was

(a) *Ashrafi* v. *Bidya*, 20 L.W. 425 : 26 Bom L.R. 776 : 47 M.L.J. 585 : 1924 M. W.N. 819 : 1924 P.C. 191 ; *Subbamma* v. *Rama Naidu*, 45 M.L.W. 153 (1937) 1 M.L.J. 268 ; *Ramaraj* v *Manraj*, 10 Luck. 606 : 1935 Oudh. 198 ; *Swami Dayal* v. *Ramadhar*, 6 Luck 715 : 1931 Oudh. 358; *Manunallaswami* v. *Narayanaswami*, 63 M.L.J 107 : 1932 M.W.N. 798 : 35 L.W. 756 : 1932 M. 489.

(b) *Jaymohan* v. *Pandit Sri Nath*, 32 L.W. 605 : 57 I.A. 291 : 32 Bom. L.R. 1609 : 1930 A.L.J. 1261 : 35 C.W.N. 4 : 1930 M. W.N 961 : 59 M.L.J. 446 : 1930 P.C. 253; *Ramachandra Rao* v. *Ramachandra Rao*, 45 M. 320 : 49 I.A. 129 16 L.W. 1 : 1922 M W N 359 : 26 C.W N. 713 : 20 A.L.J. 684 43 M.L.J. 78 24 Bom. L.R. 963 : 1922 P C. 80, *Shaiq Ram* v *Charanjit Lal*, 57 I A 282 11 Lah 645 : 34 C.W.N. 1073 : 32 L.W. 376 59 M.L.J 437 : 32 Bom. L.R. 1578 1930 P.C. 239; *Fateh Chand* v. *Sup Chand*, 38 A. 446 : 18 Bom. L.R. 900 : 21 C.W.N. 102 : 4 L.W. 597 : (1916) 2 M W.N 567. 43 I.A. 183 : 1916 P.C. 20; *Bhaidas* v. *Bai Gulab*, 46 B. 153 : 49 I.A. 1. 20 A.L.J. 289 : 24 Bom. L.R. 551 : 26 C.W.N. 129 : 42 M.L.J. 385. 15 L.W. 412 : 1922 P.C. 193; *Surajmani* v. *Rabi Nath*, 30 A. 84 : 5 A.L.J. 67 : 12 C.W.N. 231 : 10 Bom. L.R. 59 : 18 M.L.J. 7 : 35 I.A. 17.

(c) *Mangamma* v. *Doraysya*, 44 L.W. 684 : 1937 M. 100 : 71 M.L.J. 688; *Radha Prasad* v. *Ranee Mani*, 35 C. 896 : 35 I.A. 118 : 12 C.W.N. 729 : 5 A.L.J. 460 : 10 Bom. L.R 604 : 18 M.L.J 287 (P.C.).

(d) *Brij Lal* v *Suraj Bikram*, 34 A. 405 39 I.A 150 : 14 Bom L.R. 827 : 23 M. L.J 38 : 1912 M.W.N 646 : 9 A.L.J. 802 : 16 C W.N. 745 : 16 I.C. 32 (P C.)

(e) *Kotayya* v. *Varadhamma*, 1930 M. 744 59 M.L.J. 481 : 32 L.W. 584; *Rajamanicka* v. *Manickam*, 20 L.W 672 : 47 M L.J 723 : 1925 M.W.N. 120 : 1925 M. 254; *Mahimchandra* v. *Hara Kumari*, 42 C. 561 : 30 I.C. 798; *Atul* v. *Sanyasi*, 32 C. 1051 : 9 C.W.N. 784.

(f) *Mahomed Shamsool* v. *Shewukram*, 2 I.A. 7.

(g) *Radha Prasad* v *Ranee Mani*, 35 C. 896 : 35 I A. 118 : 12 C.W.N. 729. 5 A.L.J. 460 10 Bom. L.R. 604 : 18 M.L.J. 287 (P.C.): See also *Narayanaswamy* v. *Gopalaswami*, 46 M.L.W. 258 : 1938 M. 6 which lays down the relevant considerations to be borne in mind; *Bibhabati* v. *Mahendra*, 1938 C 34 I.L.R. (1937) 1 C. 400; See also *Mt. Rameshwar* v. *Shiolal*, 14 P. 640 1935 P. 401; *Doraysya* v. *Mangamma*, 69 M.L.J. 320 : 1936 M. 130 affirmed in 71 M.L.J. 688 : 44 L.W. 684 : 1937 M. 100.

(h) *Ramachandra* v. *Ramachandra*, 42 M 283 : 36 M.L.J. 306 : 52 I.C. 94; See also *Manekial* v. *Keshav*, 1938 B. 71 laying down that the life-estate conferred under a will may be distinct from what is ordinarily understood as a Hindu widow's estate.

to remain absolute owner (*malik mustakil*) of the property, the Privy Council held that the donee took an absolute estate in the property and not one which determined with her life. (i) In such a case any subsequent clause in the instrument providing for a gift over on the termination of the first donee's interest is inoperative and ineffective to cut down her absolute estate. (j) So also any subsequent clause prohibiting alienation is to be rejected as being repugnant to the absoluteness of the estate created by the former clause. (k) Where a Hindu left a will devising his estate to a female as "*malik*" with a proviso that in the event of her death his nephew was to be his heir, on the female surviving the testator, it was held that the female took an absolute estate and the gift over to the nephew had no operation. (l) The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void. But where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative. If a gift over is to take effect, the terms of the bequest taken as a whole must not confer an absolute estate on the first donee. (m)

The oft-recurring question whether a gift of immovable property by a husband to his wife confers on her an absolute estate or only a qualified estate was recently discussed by the Privy Council as follows:—

"In this appeal the Board have again to consider a question which has been discussed under different guises in a number of cases within the last few

(i) *Bishnath Prasad Singh* v. *Chandika*, 35 Bom. L.R. 341=37 C.W.N. 417=64 M.L.J. 302=60 I.A. 56=55 A. 61=1933 P.C. 67=37 L.W. 407=1933 M.W.N. 239=1933 A.L.J. 347; See also *Partap Chand* v. *Mt. Mokhni*, 14 Lah. 485=1933 Lah. 365; *Kamala Prasad* v. *Murli*, 1934 P. 398=13 P. 550=15 P.L.T. 715; *Saraju Bala* v. *Jyotirmoyee*, 58 I.A. 270=59 C. 142=33 Bom. L.R. 1257=1931 A.L.J. 555=34 L.W. 51=1931 M.W.N. 989=35 C. W.N. 903=61 M.L.J. 501=1931 P.C. 179 (a case of gift to daughter).

(j) *Partap Chand* v. *Mt. Makhni* 14 Lah. 485=1933 Lah. 365; *Bhupati* v. *Chandi*, 39 C.W.N. 390; See also *Thayalai* v *Kannammal*, 1935 M. 704 and *Govindbhai* v. *Dahyabhai*, 38 Bom. L.R. 175=1936 B. 201 for the validity of a gift over of what remains of a prior absolute estate. See also *Subbamma* v *Rama Naidu*, 45 L.W. 153=(1937) 1 M L.J. 268 (1937) M W N. 164 for the position that it is permissible to create an interest analogous to a woman's estate with a gift over

(k) *Lala* v. *Dal Koer*, 24 C 406; *Umrao* v. *Baldev*, 14 L. 353=1933 Lah. 201.

(l) *Kamla Prasad* v. *Murli*, 1934 P. 398=13 P. 550=15 P.L.T. 715.

(m) *Rameshwar* v. *Sheo Lal*, 14 P. 640=1935 P 401.

years, viz., whether, under Hindu Law, a woman taking immovable property by gift from her husband has power to alienate it.

The most recent decision on the subject is in *Pandit Shalig Ram* v. *Bawa Charanjit Lal*(n) which cited and followed the judgment of LORD BUCKMASTER in *Bhaidas Shivdas* v. *Bai Gulab*.(o) Reference was also made to *Ramachandra Rao* v. *Ramachandra Rao*(p) in which LORD BUCKMASTER made certain remarks explanatory of the decision in *Surajmani* v. *Rabi Nath Ojha*,(q) another case in which a widow's power of alienation had been called in question, but their Lordships have no doubt that these remarks were not intended to qualify in any way the pronouncement in *Bhaidas Shivdas* v. *Bai Gulab*.(o) There is also an exhaustive judgment of Sir John Edge in *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*(r) to which LORD BUCKMASTER was a party and which was heard a few days only after *Bhaidas Shivdas* v. *Bai Gulab*.(o)

Under these circumstances their Lordships feel that the doctrine upon which the decision of the present appeal depends is so well established that no further discussion of the authorities is required.

If, as in the present case, the donor does not confer upon the lady express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. There is, their Lordships think, no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the right of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male.

In the preset case, one Gaind Singh executed a deed of gift, dated the 7th May, 1877, in favour of his wife Musammat Agind Kuar. The subject-matter of the gift was part of an estate in Oudh known as Bhiti Risalpur, of which

(n) 32 L.W. 376 (P.C.)=57 I.A. 282=11 Lah. 645 34 C.W.N 1073 . 59 M.L.J. 437—32 Bom L.R. 1578 .1930 P.C. 239. In this case the will of a Hindu which laid down that his two wives and daughter-in-law were the "heirs" to his property contained no provision for dealing with the property after the death of the devisees. There was nothing in the circumstances or in the context to indicate that it was the intention of the testator to limit the estate of any of the three devisees to a life-estate or to a limited estate similar to a "widow s estate" under the law of inheritance. Their Lordships held that the will conferred upon each of his two widows and his daughter-in-law full proprietary rights in an one-third share of the testator's estate. This case lends support to the view that even in the case of a simple gift to a female, she must be held to take an absolute estate with full powers of alienation unless it can be shown from the circumstances or the context that the intention of the testator was to confer only a limited estate. This view has been taken in *Krishnaswami* v. *Ramachandra*, 67 M.L.J. 821=40 L.W. 302=1934 M. 646; *Nagasi* v. *Anandi*, 35 Bom. L.R. 952 :1933 Bom. 445; *Hiralsing* v. *Udesing*, 39 Bom. L R 1217—1938 B. 125 and the fact that the notions of the Hindus have *changed* since the ruling in *Mahomed Shumsool's* case has much to recommend the view in favour of a presumption for an absolute estate even in the case of a female donee

(o) 49 I.A 1 =46 Bom. 153=20 A.L.J. 289—24 Bom. L.R. 551=26 C.W.N. 129=42 M. L.J. 385 :15 L.W. 412 (P.C.).

(p) 49 I.A. 129—45 Mad. 320=16 L.W. 1 1922 M.W.N. 359=26 C.W.N. 713=20 A. L.J. 684=43 M.L.J. 78=24 Bom. L.R. 963—1922 P.C. 80.

(q) 35 I.A. 17=30 All. 84=5 A.L.J. 67= 12 C.W.N. 231=10 Bom. L.R. 59—18 M.L.J. 7 (P.C.)

(r) 49 I.A. 25=1 Pat. 305—15 L.W. 434 —26 C.W.N. 425=3 P.L.T. 133=42 M.L.J. 492—24 Bom. L.R. 576=20 A.L.J. 362= 1922 M.W.N. 368 (P.C.)

Gaind Singh was the proprietor. He had no son and had already made over other considerable portions of his estate to his two daughters. After her husband's death, Musammat Agind Kuar by a sale-deed of the 8th September, 1881, transferred a portion of the property to one Chedi Ram Misr, whose interest is now represented by the respondents. The sole question raised for determination by their Lordships is whether she had power so to do. The appellants claim as the ultimate reversioners to whom the property would pass if the alienation was invalid.

The deed of gift is in the following terms:—

"I am Gaind Singh, son of Nokhe Singh, caste Chattri Bais, resident of Mauza Mareman, pargana Pachhamrath, and Seerdar and Taluqdar of Bhatti, pargana Tanda, district Fyzabad.

Whereas the entire village Fatehpur and half of village Nau Sanda constitute my Zamindari Haqiat without any coparcenership which are in my exclusive possession, having been granted by the Government as reward for my loyalty, and I am in proprietary possession and enjoyment thereof up to the time of the execution of this deed whereas I am now old and no reliance can be placed on this borrowed life; whereas I am afraid that this estate might be destroyed after me as I have no male issue and whereas Musammat Agind Kuar is my lawfully wedded wife besides whom I have no other co-sharer and coparcener, so, with a view to safeguard the aforesaid property, I, while in the enjoyment of sound health and unimpaired intellect, without reluctance and coercion, have specially gifted the Zamindari in the aforesaid villages with all the original and accreted rights, cultivated and uncultivated lands, Seer, Suer, *jalkar, bankar* and all the rights held by me, to my wife Musammat Agind Kuar and I do hereby covenant and reduce to writing that the said lady shall, generation after generation, remain in possession and enjoyment of Zamindari Haqiat in the said villages on payment of the Government revenue. Now, after the execution hereof, if I or any one of my heirs and co-sharers lays any sort of claim to the aforesaid property against the donee the same shall be deemed false and untenable by the powers that be. With the exception of the lady-donee, no one else shall have any power of interference and meddling with regard to the gifted property.

Wherefore these few presents have been reduced to writing by way of a specific deed of gift, so that it may serve as an authority and be of use when required."

Their Lordships have no doubt that reading this deed as a whole it must be construed as conferring upon Musammat Agind Kuar an absolute estate in the property. Both the Courts in India by whom the case was heard came to the same conclusion, and their Lordships think it unnecessary, therefore, to discuss the document in detail. They would, however, remark that not only does the donor transfer to her all his rights in the property, but he says that she is to remain in possession and enjoyment of it "from generation to generation," words which have come to have almost a technical meaning in many parts of India as conveying a heritable and alienable estate; *Ram Lal Mookerjee* v. *Secretary of State for India*(s) and *Lalit Mohun Sing Roy* v. *Chukkan Lal Roy*.(t)

In their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly." *Jagmohan Singh* v. *Pandit Sri Nath*, 32 L.W. 605.

(s) 8 I.A. 46 at p. 61=7 Cal. 304 (P.C.) 1 C.W.N. 387 (P.C.).
(t) 24 I.A. 76 at p. 85=24 Cal. 834=

CHAPTER XII.

THE LAW OF INHERITANCE

405. Foundation of the Rules of Inheritance.—The text of Manu "sons take the property, to the nearest sapinda, the inheritance next belongs" (*Manu*, ix. 187) is the foundation of the Rules of Inheritance of the Hindus.[a] Jimutavahana, the author of the Dayabhaga, considers sapinda relationship to mean "community in the offering of funeral oblations," while Vignaneswara, the author of the Mitakshara, takes it to arise from community of blood, or, to use the quaint language of Hindu writers, "community of particles of the same body".[b] The term sapinda is derived from two words in Sanskrit "*sah*" meaning "with," and "*pinda*" which means a "ball" or "body." The Mitakshara accepts the latter meaning of the word *pinda* and selects the heirs upon the basis of propinquity, but the Dayabhaga prefers the former meaning and chooses the heirs upon the efficacy of their obsequial offerings to the manes of the departed in the Parvana Shradh. In other words, according to the Mitakshara the preferential right to inherit is determined by family relationship or the community of corporeal particles,[c] while in the Dayabhaga it is determined by the capacity to perform funeral rites. It may happen that in some instances, the same person would be the preferential heir, whichever test is applied, but in others the two tests do not point to the same person.[d] It is this difference in the tests adopted that led to the difference in the heirs between the two schools of the Mitakshara and the Dayabhaga. But the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood when a question of preference arises in doubtful cases.[e]

(a) *Adit Narayan* v *Mahabir Prasad* 48 I.A. 86—14 L.W. 20 19 A.L.J. 208=23 Bom. L.R. 692—25 C.W.N. 842 :1921 M.W.N. 153=2 P.L.T. 97—40 M.L.J. 270=1921 P.C. 53.

(b) *Ramchandra* v. *Vinayak*, 42 C 384 41 I A 290=12 A.L.J. 1281=16 Bom. L.R. 863 .18 C W.N. 1154—27 M.L.J. 333 —1 L.W. 831=1914 M.W.N. 835 .1914 P.C. 1 , *Buddhu Singh* v. *Lalta Singh*, 37 A. 604 .42 I A. 208—13 A.L.J. 1007—17 Bom. L.R. 1022—20 C.W.N. 1 - 29 M.L.J. 434=2 L.W. 897—1915 M.W.N. 772=1915 P.C. 70.

(c) *Jadunath* v. *Bisheshar*, 59 I.A. 173 —36 C.W.N. 1073—1932 A L.J. 632—63 M.L J 287=1932 M.W.N. 1037=1932 P.C. 142.

(d) *Lallubhai* v. *Cassibai*, 5 B. 110—7 I.A 212

(e) *Buddha Singh* v. *Lalta Singh*, 37 A 604 .42 I.A. 208—1915 P.C . 70—13 A L J 1007—17 Bom. L.R. 1022- 20 C W.N. 1 29 M.L.J. 434 .2 L.W. 897—1915 M.W.N. 772 ; *Jatindra* v. *Nagendra*, 55 C. 1153 . 32 C.W N. 548—1928 C. 289 affirmed in 34 L W 465 .58 I.A. 372 -35 C.W.N. 1153 1931 M.W.N. 978 61 M.L.J. 442=33 Bom. L.R. 1411 1931 A.L.J. 1009—1931 P C 268 ; *Dulahin* v *Bisheshar*, 59 I.A. 173—36 C.W.N. 1073=1932 P.C. 142 —1932 A L.J. 632—63 M.L.J. 287—1932 M.W.N. 1037.

406. Exclusion from inheritance.—Hindu Law recognises certain disqualifications as disabling a person from inheriting as the heir of another, the onus of proving which is upon the person alleging them,[f] and these disqualifications, some of which have been removed by legislation, may be conveniently classified as (1) Physical, (2) Mental, (3) Moral, (4) Religious, and (5) Equitable.

407. Physical Disqualifications.—Congenital blindness,[g] congenital deafness and dumbness,[h] the want of any limb or organ, if congenital,[i] deformity and unfitness for social intercourse arising from a virulent and disgusting nature of a disease like leprosy,[j] all these were held to disqualify a person from inheriting, but not an incurable tumour on the nose and in the nasal cavity.[k] The onus of proving the congenital nature of the disqualification is upon the person asserting it.[l] All these disqualifications have now been removed by the Hindu Inheritance (Removal of Disabilities) Act of 1928. This Act which came into force on 20th September 1928 is, however, not retrospective and does not apply to any person governed by the Dayabhaga School of Hindu Law.

408. Mental disqualifications.—A person who is a lunatic at the time the succession opens, though the lunacy is not congenital, is disqualified from taking the inheritance,[m] the principal reason being his incapacity to perform the religious duties.[n] But in order to disqualify a person from inheriting on the ground of lunacy or idiocy, it must be shown that he is not capable of distinguishing between right and wrong.[o] Under the Hindu Law governed by the Mitakshara a congenital disqualification may prevent property arising from birth, but a disqualification (such as lunacy) that supervenes later merely causes a suspension of the right of a coparcener thus afflicted to a share on partition and for the rest leaves his coparcenary interest intact. Therefore his right as a coparcener is not so affected by the supervening disqualification as to prevent him taking the whole estate by survivorship after the death of his copar-

(f) *Chunder* v. *Kristo*, 18 W.R. 375.

(g) *Pudiava* v. *Pavanasa*, 45. M. 949—16 L.W. 563—1922 M.W.N 693—43 M.L.J 596—1923 M. 215 F.B; *Gunjeshwar* v *Durga Prashad*, 44 I.A. 229—1917 P.C 146—16 A.L.J. 1—20 Bom. L.R. 38—22 C.W.N. 74—34 M.L.J. 1—7 L.W 94—1918 M.W.N. 16—45 C. 17.

(h) *Hira Singh* v. *Ganga Sahai*, 6 A. 322—11 I.A. 20; *Savitribai* v. *Bhaubhat*, 51 B. 50—1927 B. 103—29 Bom L.R. 64; *Mt. Budha* v. *Mt. Sahodra*, 11 P. 35—12 Pat. L. T. 489—1931 P. 367.

(i) *Venkata* v *Purushottam*, 26 M. 133—12 M.L.J. 262.

(j) *Rangayya* v. *Thanikachalla*, 19 M. 74; *Ramabai* v *Harnabai*, 48 B. 383—51 I.A 177—26 Bom. L.R 308—46 M.L.J. 537 1924 M W.N. 357 .22 A L.J 384 :20 L.W. 8—29 C.W.N. 129—1924 P.C. 125.

(k) *Subba* v. *Venkatrama*, 26 M.L.J. 508—23 I.C. 528.

(l) *Budh Sagar* v. *Bishun*, 47 A. 327—1925 A. 366 23 A.L.J. 141.

(m) *Ram* v. *Bhani*, 38 A. 117—32 I.C. 127—14 A L.J. 11.

(n) *Ran Bijai* v. *Jagatpal*, 17 I.A. 173—18 C. 111.

(o) *Ran Bijai* v. *Jagatpal*, 17 I.A. 173—18 C. 111; *Bodhnarain* v. *Umrao*, 13 M. I.A. 519; *Golb Singh* v. *Kurun Singh*, 14 M. I A. 176.

ceners.[p] After the Hindu Inheritance (Removal of Disabilities) Act of 1928 came into force, an idiot or lunatic who is not governed by the Dayabhaga School would be disqualified from inheriting only if his disability is congenital. Where a person is sought to be excluded on the ground of his mental defect the onus is on the party alleging it to make out his allegation.[q]

409. Moral disqualifications.—*Unchastity* disqualifies a woman from inheritance under the Dayabhaga, whatever be her relationship to the last owner,[r] provided the last full owner was a male and not a female.[s] Under the Mitakshara, unchastity operates as a disqualification only in the case of the widow of the last owner.[t] But once the property has validly vested in a woman, her subsequent unchastity would not divest it.[u]

410. Illegitimacy.—Illegitimacy is a bar to inheritance in respect of the estate of a deceased male holder unless he happens to be a Sudra separated from his collaterals and the illegitimate person is his son born to his exclusively and permanently kept concubine. (Sec. Ss. 71, 72, 350 and 433).

411. Religious disqualifications.—Loss of caste and conversion to an alien faith are disqualifications for purpose of inheritance under the Hindu Law. They have ceased to be such disqualifications after the passing of the Caste Disabilities Removal Act of 1850. (See S. 31). But the adoption of the holy order and complete renunciation of all worldly ties will operate as civil death so as to exclude a person from inheritance.[v] (See also S. 415).

412. Equitable disqualifications.—No one is entitled to succeed to the estate of the person whom he has murdered and both he and the person claiming through him should be excluded from inheritance, if not under Hindu Law, at least under the principles of equity, justice and good conscience. The murderer must, for the purpose of inheritance, be treated as if he were dead when the inheritance opened and as not being a fresh stock of descent. The exclusion extends to the legal as well as beneficial estate, so that neither can he himself succeed, nor can successsion be claimed

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(p) *Mt. Ditraj* v. *Rikheswar*, 13 Pat. 712=15 Pat. L.T. 479=1934 P. 373; *Muthusami* v. *Meenammal*, 43 M. 464=55 I.C. 576= 1920 M. 652=38 M.L.J. 291=1920 M. W.N. 253; *Vithaldas* v. *Vadilal*, 1936 B. 191=38 Bom. L.R. 257.

(q) *Surti* v. *Narain*, 12 A. 530.

(r) *Rajabala* v. *Shyama*, 22 C.W.N. 566=45 I.C. 714; *Sundari* v. *Pitambari*, 32 C. 871=9 C.W.N. 1003; *Ramnath* v. *Durga*, 4 C. 550.

(s) *Nogendra* v. *Benoy*, 30 C. 521=7 C.W.N. 121.

(t) *Vedammal* v. *Vedanayaga*, 31 M. 100=18 M.L.J. 70; *Baldeo* v. *Mathura*, 33 A. 702=8 A.L.J. 811=11 I.C. 43; *Adoyapa* v. *Rudrava*, 4 B. 104; *Ram Pergash* v. *Mt. Dahan Bibi*, 3 P. 152=1924 P. 420=5 P.L.T. 203.

(u) *Monitram* v. *Kerri Kolitani*, 5 C. 776=7 I.A. 115.

(v) *Gouri* v. *Niader*, 18 C.W.N. 59=23 I.C. 287; *Parshottam* v. *Bezaibhai*, 34 Bom. L.R. 853=1932 B. 459.

through him.[w] In addition to this, the texts lay down that a person who displayed active and malignant hostility to the deceased is not entitled to succeed to his estate.[x]

413. Effect and extent of disability.—The disqualification is only personal and does not taint the blood and hence the next heir,[y] though he claims through a disqualified heir,[z] is entitled to succeed to the estate except when he happens to be the adopted son of the disqualified heir.[a] But in the case of a murderer, not only is he excluded from inheritance, but also is every other person claiming through him[b] such as a son[c] or a sister of the murderer;[d] in a Bombay case, however, the wife of the murderer was held entitled to succeed as gotraja sapinda to the estate of the deceased, on the ground that she could not be said to claim the estate through her husband.[e] The fact that subsequent to the opening of the inheritance the defect has been removed will not entitle a person to divest the estate which has already vested in another.[f]

414. Vesting never in suspense.—The right of succession to an estate of a deceased owner vests immediately on his death in his then nearest heir and cannot be held in abeyance except when a nearer heir is then in the womb.

415. Divesting of the vested estate.—Once the estate of the deceased has vested in a person who was his nearest heir at the time of his death, it cannot be divested by the subsequent birth of a preferable heir unless he was, at the time the succession opened, in his mother's womb.[g] But in the case of an estate vesting in the widow or some other remoter heir of the last holder, her adoption

(w) *Kenchava* v. *Girimallappa*, 48 B. 569=51 I.A. 368—26 Bom. L.R. 779=20 L.W. 417—47 M.L.J. 401—22 A.L.J. 962—29 C.W.N. 271=1924 M.W.N. 719—1924 P.C. 209; *Vedanayaga* v *Vedammal*, 27 M 291=14 M.L.J. 297. The principle grounded on public policy which prevents a same murderer from benefiting under the will of his victim applies with equal force to the case of a victim dying intestate so as to preclude the murderer or his personal representative from claiming the property in respect of which his victim died intestate: *Sigsworth, In re. Bedford* v. *Bedford*, (1935) 1 Ch. 89. See also the recent decision of the House of Lords in *Beresford* v. *Royal Insurance Co.* (1938) 2 All E.R. 602 to the effect that no one can be allowed to benefit from his crime.

(x) *Khetermoni* v. *Kadambini*, 16 C.W.N. 964=17 I.C. 83; *Mukandi* v. *Jamni*, 73 I.C. 875; *Dharma* v. *Amulyadhan*, 33 C. 1119=10 C.W.N. 765.

(y) *Bodhnarain* v. *Omrao*. 13 M. I.A. 519

(z) *Gangu* v *Chandrabhagabai*, 32 B. 275-10 Bom. L.R. 149; See contra in *Mt Budha* v *Mt. Sahodra*, 11 Pat 35=1931 P 367.

(a) Mit. ii-10-11.

(b) *Har Bhagwan* v. *Hukum Singh*, 3 L 242=1922 L. 243.

(c) *Jind Kaur* v. *Inder*, 3 Lah. 103—1922 L. 293.

(d) *Kenchava* v. *Girimallapa*, 48 B. 569 —51 I.A 368 26 Bom. L.R. 779—20 L.W. 417 47 M.L.J. 401—22 A.L.J 962—29 C.W.N. 271 1924 M.W.N. 719 1924 P.C. 209

(e) *Gangu* v. *Chandrabhagabai*, 32 B. 275—10 Bom L.R. 149.

(f) *Deo Kishen* v *Budh*, 5 A. 509.

(g) *Khagendra* v. *Monmotho Nath*, 38 C.W.N. 90 1934 C 469; *Bajava* v. *Parvateva*, 35 Bom. L.R. 118=1933 B. 126.

would divest the estate[h] even though the adopted boy was not even conceived till long after the death of the last holder.[i] Once the estate of the deceased has in law vested in his heir, a mere disclaimer by the latter subsequent to such vesting that he has no interest in that estate and does not want to claim any, does not have the effect of vesting it in a remoter heir, unless the disclaimer takes the form of a complete renunciation of the world by entrance into a religious order of asceticism[j] or takes the form of a conveyance in favour of the remoter heir.[k] But a renunciation in order to amount to civil death must be a complete and final withdrawal from earthly affairs by entering into a religious order so as to make it certain that he will not change his mind and return to his family. It must be remembered in this connection that the religious order of Sanyasi by entrance into which a man renounces all wordly connection and becomes civilly dead is not open to the Sudras.[l]

416. Fresh stock of descent.—Inheritance is always to be traced to the last full owner, who becomes a fresh stock of descent. Such owner may be a male or female. But except in the case of Stridhana and in certain cases of descent in the Bombay Presidency, property obtained by a female by inheritance whether to a male or to a female is held by her as a qualified owner so that she cannot become a fresh stock of descent in respect of that property. (See S. 474).

417. Alteration of the rule of inheritance.—A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or policy.[m] The Crown has in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case.[n]

418. Modes of devolution—Survivorship and inheritance.—There are two modes of succession recognised by the Hindu Law.

(h) *Amarendra* v *Sanatan*, 38 L W. 1 =12 P 642 · 60 I.A. 242=1933 P.C. 155 = 1933 M. W. N. 769=14 P L.T. 399=35 Bom. L.R. 859=37 C.W.N. 938=65 M.L.J. 203=1933 A.L.J. 710.

(i) *Bamundoss* v. *Tarinee*, 7 M I A 169 ; See Ss. 158 and 159.

(j) *Parshottam* v. *Besaibhai*, 34 Bom. I. R. 852 -1932 B. 459=139 I.C. 809

(k) *Dattatraya* v. *Narayan*, 1936 N 186.

(l) *Krishnaji* v. *Hanmaraddi*, 58 B. 536=36 Bom L.R. 814=1934 B. 385 ; *Dharmapuram Pandarasannadhi* v *Virapandian*, 22 M 302 ; *Sobhaddi* v. *Govind*, 46 A. 616 ; *Harish Chandra* v *Atir*, 40 C. 545.

(m) *Soorjemoney* v. *Denobundoo*, 6 M.I.A. 526.

(n) *Rajindra* v. *Raghubans*, 40 A. 470 45 I.A. 134=20 Bom. L.R. 1075=23 C.W.N. 101=9 L.W 570 -1918 M.W.N. 831=1918 P.C. 25.

succesSion by survivorship and succession by inheritance. Both the modes are operative under the Mitakshara Law of succession while only the mode of succession by inheritance is recognised in the Dayabhaga system except that in the case of widows or daughters jointly inheriting to a male they take the property with rights of survivorship both under the Dayabhaga and the Mitakshara. So long as there was no separate property and the Hindu joint family continued its corporate character in its pristine purity, there could be no such thing as one person being treated as the heir of another for purposes of inheritance. The only rule that could have then prevailed was the rule of survivorship. But the march of economic laws can be thwarted but not stopped for ever, and the desire for self-acquisition and freedom from the trammels of corporate life ultimately established the institutions of partition and separate ownership, and necessitated the formulation of rules of inheritance applicable to property held in absolute severalty by its last owner.

419. Joint tenancy and tenancy-in-common.—The general rule is that in case of obstructed inheritance two or more persons succeeding to an estate take the property as tenants-in-common and not as joint tenants, and that the doctrine of survivorship is limited to unobstructed succession and to succession to the joint property of re-united coparceners. To this there are these exceptions: co-widows in all the schools,[o] co-daughters except in the Bombay Presidency,[p] sons of the same daughter living as members of a joint family[q] except under the Dayabhaga, and coparceners under the Mitakshara succeeding to the self-acquired property of their paternal ancestor.[r]

420. Principle of representation.—When a paternal ancestor dies, his son, his grandson by a predeceased son, and his great-grandson whose father and grandfather are both dead, succeed as coparceners to his separate property, the grandson representing his father and the great-grandson representing his grandfather. This rule of representation does not apply to any other case in Hindu Law. Thus a son of a deceased brother cannot claim to represent his father in competition with his uncle when succession opens to the estate of another deceased uncle. Thus if A, B and C are three divided brothers and C dies leaving a son D, D cannot claim to represent C and claim to inherit along with B, the estate

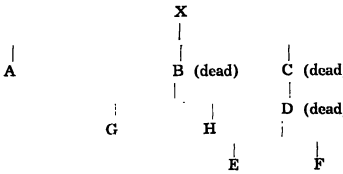
(o) *Bhugwandeen* v. *Mynae Baee*, 11 M.I.A. 487; *Cholay Lall* v. *Chunnoo Lall*, 4 C. 744=6 I.A. 15.

(p) *Vithappa* v. *Savitri*, 7 I.C. 445=34 B. 510=12 Bom. L.R. 487.

(q) *Venkayyamma* v. *Venkataramanayyamma*, 25 M. 678=29 I.A. 156=4 Bom. L.R. 657=7 C.W.N. 1=12 M.L.J. 299 (P.C.).

(r) *Jogendro* v. *Nityanand*, 18 C. 151=17 I.A. 128; *Venkayyamma* v. *Venkataramanayyamma*, 25 M. 678=29 I.A. 156=4 Bom. L.R. 657=7 C.W.N. 1=12 M.L.J. 299 (P.C.)

of A on A's death. When partition takes place subsequently among descendants who have succeeded to their ancestor on this rule of representation, they take the property *per stirpes* and not *per capita*.



In this illustration X dies leaving behind him, a son A, two grandsons G and H by his pre-deceased son B, and two great-grandsons E and F whose father D and grandfather C are both dead. The separate property of X will be taken by all his living descendants as coparceners, A standing for himself, G and H representing their deceased father B, and E and F representing their deceased grandfather C. If subsequently a partition is come to between these persons, the property will be divided *per stirpes* into three shares representing the lines of the three sons of X, and a share will be allotted to each branch. Thus A will take a share representing the 1/3rd of X's property, G and H will take the 2nd share representing another 1/3rd, and E and F will take the third share representing the remaining 1/3rd. But as between G and H, or E and F, the division will be *per capita*. that is, G, H, E, and F will each get 1/6th of the property of X.

421. Different rules of inheritance to males and females.—The rules governing inheritance to the property of males are not the same as those governing inheritance to the property of females.

422. Spes successionis.—The right of a person to inherit to another in future is a mere chance or *spes successionis* and hence is not transferable by will or by an act *inter vivos*. It cannot even be made the subject of a contract,[s] the reason being, that it can be defeated at any moment by the owner's disposition.[t]

423. Spes successionis different from vested interest and contingent interest.—An estate or interest is called vested, as distinguished from contingent, either when enjoyment of it is presently conferred or when its enjoyment is postponed, if the time of enjoy-

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(s) *Bahadur Singh* v. *Mohar Singh*, 24 A. 94=29 I.A. 1=6 C.W.N. 169=12 M.L.J. 56=4 Bom. L.R. 233 (P.C.).

(t) *Lalliteshwar* v. *Rameshwar*, 36 C. 481=2 I.C. 290=13 C.W.N. 838.

ment will certainly come to pass; in other words, an estate is called vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed or if, in the case of a gift to take effect in the future, it cannot be ascertained in the meantime whether there will be any one to take the gift at all; in other words an estate is contingent when the right of enjoyment is to accrue on an event which is dubious or uncertain. The event of a person attaining a given age or the death of somebody beyond which his enjoyment is postponed is not regarded by law as uncertain because the event is sure to happen if he lives long enough. A *spes successionis*, which is distinguished from vested or contingent interest, is merely an expectation or hope of succeeding to property, a chance or possibility which may be defeated by an act of somebody else.(u)

424. Whole blood and half blood.—In the case of heirs of the same degree of relationship to the propositus, the whole blood excludes the half blood(v) except in the Presidency of Bombay where the rule is confined in its applicability to the cases of brothers and brothers' sons.(w) Having regard to the general scheme of the Hindu Law of succession the preference of the whole blood over the half blood is confined to the relations of the same degree.(x)

425. Asceticism.—In order that the adoption of asceticism by a person may have the effect of a civil death so as to open the succession to his property it must be shown that he has absolutely abandoned all secular property and completely and finally withdrawn from earthly affairs. The mere fact that he has gone through the necessary ceremonies by which one becomes a sanyasi is no conclusive proof of renunciation of worldly affairs especially when he has already executed a will providing that during his lifetime he would retain control over his property.(y)

(u) *Basantakumar* v. *Ramshankar*, 59 C 859=1932 C. 600=55 C.L.J. 205.

(v) *Ganga* v. *Kesri*, 30 I.C. 265=2 L.W 837=37 A. 545 P.C. =42 I.A. 177=13 A.L.J. 999=17 Bom L.R. 998=19 C.W.N. 1175=29 M.L.J. 329 (1915 M.W.N. 713 1915 P.C. 81; *Nachiappa* v. *Rangaswami*, 2 L.W. 69 =26 I.C. 757 28 M.L.J. 1. 1915 M.W.N. 53 (F.B); *Suba Singh* v. *Sarafraz*, 19 A. 215 (F.B.); *Garuddas* v. *Laldas*, 1933 A.L.J. 774. :37 C.W.N. 637 35 Bom. L.R. 595 64 M.L.J. 660=1933 M.W.N. 557 :60 I A. 189 =37 L.W. 772=1933 P.C. 141; *Sham Singh* v *Kishun Sahai*, 6 C.L.J. 190.

(w) *Vithalrao* v. *Ramrao*, 24 B. 317=2 Bom. L.R. 139

nath, 51 B. 194=1

(x) *Ganga* v. *Kesri*, 37 A. 545=42 I.A. 177=2 L.W. 837=13 A.L.J. 999=17 Bom. L.R. 998=19 C.W.N. 1175=29 M.L.J 329=1915 M.W.N. 713 =1915 P.C. 81; *Garuddas* v. *Laldas*, 60 I A. 189=37 L.W. 772 :64 M. L.J. 660: 37 C.W.N. 637 35 Bom L.R. 595 =1933 M W.N 557 14 P.L.T. 365 :1933 A. L J. 774.=1933 P C. 141.

(y) *Parshottam* v *Besaibhai*, 139 I.C. 809=34 Bom. L.R. 852=1932 B. 459. See also Ss. 411 and 415.

INHERITANCE TO MALES UNDER THE MITAKSHARA

426. Inheritance and heritable property.—The Law of Inheritance applies only to property held in absolute severalty by its last owner. Thus it excludes property which is subject to the rule of survivorship. Thus the only property of a male which is heritable is

(1) his separate and self-acquired property ; or

(2) property held by him as sole surviving coparcener ; or

(3) property held by him after he has become separated from all his coparceners. It will be seen that in cases of property falling under groups (2) and (3) the property includes also the ancestral property which survived to him or came to him on partition.

427. Ascertainment of heirs.—As was already observed, propinquity and not religious merit is the test of heirship under the Mitakshara. The text of Manu " to the nearest sapinda, the inheritance next belongs " is the basis of the elaborate rules formulated for ascertaining the nearest heir. Under the Mitakshara sapinda relationship arises from community of blood in contradistinction to the Dayabhaga notion of community in the offering of funeral oblations.[z] This is due to the difference in the meanings given to the word *Pinda* by the respective commentaries, the Mitakshara taking it for body, the Dayabhaga taking it for funeral cake. But even under the Mitakshara, in doubtful and difficult cases of preference, where the test of propinquity fails to solve the problem the doctrine of religious efficacy may be resorted to, to resolve the doubt or remove the difficulty.[a]

428. Sapindas, Samanodakas and Bandhus.—Though Vijnaneswara in the Acharakanda of the Mitakshara treats of sapinda relationship in connection with marriage, inasmuch as no further definition of sapindas is given in those parts of his book where he treats of inheritance, it must be taken that the same definitions and limitations relate to inheritance also.[b] Sapinda relations are by the

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(z) *Buddha Singh* v. *Lalta Singh*, 37 A. 604 :42 I.A. 208 :13 A.L.J. 1007=17 Bom. L.R. 1022=20 C.W.N. 1=29 M.L.J. 434=2 L.W. 897=1915 M.W.N. 772=1915 P.C. 70.

(a) *Vedachela* v. *Subramania*, 44 M. 753 :48 I.A. 349=26 C.W.N. 159=24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402=1921 M.W.N. 669=2 P.L.T. 707=1922 P.C. 33 ; *Jatindra* v. *Nagendra*, 34 L.W. 465=58 I.A. 372=35 C.W.N. 1153=1931 M.W.N. 978=61 M.L.J. 442=33 Bom. L.R. 1411=1931 A.L.J. 1009=1931 P.C. 268 ; *Buddha Singh* v. *Lalta Singh*, 37 A 604 :42 I.A. 208 :13 A.L.J. 1007=17 Bom. L.R. 1022=20 C.W.N. 1=29 M.L.J. 434 :2 L.W. 897 : 1915 M.W.N. 772 1915 P.C. 70.

(b) *Ramchandra* v. *Vinayak*, 42 C. 384 41 I.A. 290 : 12 A.L.J. 1281=16 Bom. L.R. 863=18 C.W.N. 1154=27 M.L.J. 333 : 1 L.W. 831=1914 M.W.N. 835=1914 P.C. 1 ; *Lallubhai* v. *Cassibai* 5 B. 110 :7 I.A. 212 (P.C.)

Mitakshara divided into two groups, namely, samana gotra sapindas (blood relations of the same gotra or stock), and bhinna gotra sapindas (consanguinous relations belonging to another gotra), in other words, blood relations connected through females who have passed into other families or gotras. The bhinna gotra sapindas on whom the law confers the right of inheritance are the inheriting bandhus.[c] Samana gotra sapindas, known also as gotraja sapindas, are those related to the deceased only by males[d] and are classified under two heads (1) Sapindas and (2) Samanodakas. The order of heritable heirs is as follows:—(1) Sapindas, (2) Samanodakas and (3) Bandhus; that is, first come the sapindas; if there be no sapinda, then come the samanodakas, and the bandhus are entitled to succeed only if neither a sapinda nor a samanodaka is available as heir to the propositus.[e]

429. Sapindas (Sagotra). Sagotra sapindas according to the Mitakshara are the six agnatic relations of a person in the male line, whether descending or ascending, the wives of the six paternal ancestors in the male line, the six male descendants in the collateral male line of each of the six paternal male ancestors, and the widow, the daughter and the daughter's son, and they are in all 57 in number computed as follows:

1.	Six male descendants of the propositus in the male line	.. 6
2.	Six male ascendants of the propositus in the male line	.. 6
3.	The wives of the said six male ascendants	. 6
4.	The six male descendants in the male collateral line of each of the said six male ascendants 6 x 6	.. 36
5.	Widow, daughter and daughter's son	.. 3
		.. 57

It will be seen that the daughter's son being related to the propositus through a female, is a bhinna gotra sapinda; but he has been included among the sagotra sapindas and has been given a very high place in the order of succession (as will be seen hereafter) by force of special texts and a very high position of affection which he occupied in the archaic Hindu society.

(c) *Vedachela* v. *Subramania*, 44 M. 753 =48 I A. 349—26 C.W.N 159 -24 Bom. L.R 649=41 M L.J. 676—14 L.W. 402—1921 M. W.N. 669- 2 P.L.T. 707- 1922 P C. 33.

(d) *Ratna Mudaliar* v. *Krishna*, 45 M.L. W. 253=1937 M. 353; *Dalahin* v. *Bisheshar*, 59 I.A. 173—36 C.W.N. 1073=1932 P.C. 142= 1932 A.L.J. 632=63 M L J. 287=1932 M.W.N. 1037.

(e) *Thakoor Jeebnath* v. *Court of Wards* 2 I A. 163—23 W.R. 409.

ORDER OF SUCCESSION AMONG SAPINDAS

430. (Heirs 1 to 3) Son, grandson and great-grandson.—On the death of a Hindu, his estate devolves upon his son, grandson and great-grandson as a single heritage with rights of survivorship *inter se*[f] and divisible between them *not per capita* but by *stirpes* as explained in S. 420. The principle of representation by which a grandson or great-grandson can claim to stand in the shoes of his father or grandfather respectively is applicable even where a Hindu dies leaving behind him a separated son and a grandson or great-grandson of another separated son.[g] Where a father was joint at the time of his death with some only of his sons, the others having already separated from him, those who remained joint with him, whether they were sons born before[h] or after[i] the partition, succeed to the whole property, whether ancestral or self-acquired, to the exclusion of the divided sons.[j] But the Oudh Chief Court takes the view that division from the father does not destroy the divided son's right to take the self-acquired property of the father, and that in respect of such property, both the divided and the undivided sons have equal rights of inheritance.[k] The Madras High Court recently stuck to its former view taken in *Nana Tawker* v. *Ramachandra Tawker*,[l] that on the death of a Hindu leaving self-acquired property, his undivided sons succeed to it to the exclusion of the divided sons.[m] This is the only correct view to take. Other things being equal, jointness with the deceased is a ground of preference as is illustrated by the reunion cases.[n] The decision in *Badri Nath's case*[k] ignores this principle of preference and the view therein that the decision in *Kunwar Bahadur* v. *Madho Prasad*[o] which it purports to follow is in its favour is due to a misapprehension of the actual decision in the case, as was pointed out by the learned judges who decided 55 M.. 577.[p]

431. Sons of anuloma marriage.—An anuloma marriage such as that between a Brahmin and a Sudra woman is valid and a son of that marriage is hence legitimate. But being an inferior son he is entitled only to 1 /10th share whether it be in his father's estate or

(f) *Madivalappa* v. *Subbappa*, 1937 Bom. 458: 39 Bom. L.R 895; *Gangadhar* v. *Ibrahim*, 47 B. 556.

(g) *Marudayi* v. *Doraisami*, 30 M. 348=17 M L.J. 275; *Apaji* v *Ramachandra*, 16 B. 56.

(h) *Fakirappa* v. *Yellappa*, 22 B 101; *Vairavan* v *Srinivasacharlar*, 44 M. 499=13 L.W. 475=1921 M.W.N. 290=40 M.L.J. 481=1921 M. 168 (F.B.)

(i) *Nawal Singh* v. *Bhagwan Singh*, 4 A. 427.

(j) *Narasimham* v. *Narasimham*, 55 M 577=35 L.W. 475=1932 M.W.N. 200=62 M. L.J 436=1932 M. 361.

(k) *Badri Nath* v. *Hardeo*, 5 Luck. 649 =1930 O. 77.

(l) 32 M. 377=2 I.C. 519.

(m) *Narasimham* v. *Narasimham*, 55 M. 577=35 L.W. 475=1932 M. 361=62 M.L.J. 436=1932 M.W.N. 200.

(n) Mitak. ii-9 See Ss. 368 and 442.

(o) 17 A.L.J. 151=49 I.C. 620 (1).

(p) *Narasimham* v. *Narasimham*, 55 M. 577 35 L.W. 475=1932 M.W.N. 200=62 M. L.J. 436=1922 M. 361.

in that of his uncle.[q] (See for discussion in respect of shares of sons through wives of different castes *Natha* v. *Mehta*.[q])

432. Son bought.—Under the Hindu Law, a bought son is not entitled to inherit[r] to his father.

433. Illegitimate son.—An illegitimate son is not entitled to inherit in the three upper castes, but if he is the son of a Sudra father who has died separated from his collaterals, and is the offspring of continuous and exclusive concubinage neither incestuous[s] nor adulterous at the time he was conceived,[t] he is entitled to inherit to his putative father's property whether ancestral or self-acquired,[u] provided the mother of the illegitimate son is not a Brahmin.[v] But in competition with an aurasa or adopted son or the widow, daughter or daughter's son of the Sudra father, he takes only ½ of what he would have taken had he been legitimate. Thus when a Sudra dies and his illegitimate son takes half the estate and his widow the other half, the illegitimate son is not entitled to claim a further moiety in the widow's one half when the widow dies subsequently leaving a daughter or daughter's son, since the doctrine of reverter cannot apply to such a case.[w] (*See* also Ss. 71, 72 and 350).

434. (Heir No. 4) Widow.—On failure of the son, son's son, or son's son's son, the widow of a Hindu, being his sapinda as his surviving half under the texts, succeeds to his estate, not as an heir absolutely entitled to hold it, but as one who has only a limited interest therein. Hence she does not become a fresh stock of descent in respect of the property inherited from her husband, and on her death, the person entitled to succeed to the property is the then nearest heir of the husband and not her own heir. But her heritable capacity is dependent upon her chastity at the time the inheritance opens, though once the estate has vested in her, her subsequent unchastity will not divest that estate, the general rule of Hindu Law being that an estate once vested by inheritance is not to be divested by any act which, before succession, would have formed a ground of exclusion from inheritance.[x] Even where she had been un-

(q) *Natha* v. *Mehta*, 55 B. 1—1931 B 68—32 Bom. L.R. 1348.

(r) *Vachereddy Chinna Basavappa* v *Gowdappa*, 1 Suth. 41 (P.C.)

(s) *Rajani Nath* v *Nitai Chandra*, 48 C. 643—25 C.W.N. 433—1921 C. 820 (F.B.); *Bai Nagubai* v. *Bai Monghibai*, 50 B. 604—53 I.A. 153—24 A.L.J. 729—1926 M.W.N. 514—24 L.W. 309—28 Bom. L.R 1143—31 C.W.N. 128—51 M.L.J. 577—1926 P.C. 73.

(t) *Tukaram* v *Dinkar*, 33 Bom. L.R. 289—1931 B. 221.

(u) *Vellaiyappa Chetty* v. *Natarajan*, 58 I.A. 402—55 M. 1—35 C.W.N. 1278—33 Bom L.R. 1526—61 M.L.J. 522—1931 A.L.J. 1193—1931 M.W.N. 848—1931 P.C. 291 31 L.W. 589; *Raja Thambiran* v *Arunachi*, 1933 M. 397—37 L.W. 462—64 M.L.J. 500—1933 M.W.N. 632.

(v) *Ramchandra* v *Hanamnaik*, 60 B. 75—37 Bom. L.R. 920—1936 B. 1.

(w) *Karuppayee* v *Ramaswami*, 35 L.W. 638—137 I.C. 645—55 M. 856—62 M.L.J. 698—1932 M. 140.

(x) *Moniram* v *Kerri Kolitani*, 7 I.A. 115—5 C. 776.

chaste during her husband's lifetime, if the husband had condoned it, the condonation removes her disability from inheriting to the estate on the ground of unchastity.[y] Two or more widows jointly inheriting their husband's estate take it with rights of survivorship *inter se*, which, however, can be relinquished by a mutual agreement as between them, oral or written.[z] Where several co-widows succeed to their husband's property as a single heir and the property is impartible, the senior widow alone is entitled to hold and manage it, the others being entitled only to maintenance out of the estate.[a]

435 (Heir No. 5) Daughter.—After the death or re-marriage[b] of the widow or all the widows, if more than one, comes the daughter in the order of succession, her right being declared by the text "As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth" (Mitakshara ii-2). A daughter takes a restricted interest in the property similar to that taken by the widow.[c] When there are two or more daughters, unmarried daughters take the inheritance to the exclusion of the married daughters.[d] An unmarried daughter who has been approached by a man can succeed only after a married daughter, because such an unmarried daughter is not a kanya within the meaning of the text.[e] If all the daughters are married, though some of them are widowed,[f] the daughters unprovided for "exclude the daughters enriched".[g] If a marked difference is found in the financial position of the daughters, and one of them is in straitened circumstances, that is sufficient to bring her within the description of "unprovided for" so as to give her precedence over her sister who is "enriched." The case has to be looked at from the point of view of comparative poverty of the respective daughters, and if one of them has married into a family of position and wealth and her

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(y) *Radhe* v *Bhawani*, 40 A 178=16 A. L J 91=43 I.C. 553; *Gangadhar* v *Yellu*, 36 B 138=12 I C. 714=13 Bom L R 1038

(z) *Ammani* v *Perasami*, 45 M L J 1=1923 M W.N. 652=1924 M 75; *Ramakkal* v. *Ramasami*, 22 M 322=9 M.L.J 101; *Lakshmanammal* v *Ganganmmal*, 34 M. 72=1910 M W.N. 692=7 I.C 858; *Kaliani Anni* v. *Thirumalayappa*, 92 I C 355=1927 M 115.

(a) *Vutsavoy* v *Vutsavoy*, 1 Mad Dec. 453.

(b) *Vithu* v. *Govinda*, 22 B. 321; *Matangini* v. *Ram Rutton*, 19 C. 289; *Vitta* v *Chatakondu*, 8 L W. 480=48 I.C. 50 35 M.L.J. 317=1918 M W.N. 625=41 M. 1078; *Rasul* v *Ram*, 22 C. 589.

(c) *Kondama* v *Kandasami*, 47 M. 181=51 I.A 145=19 L.W. 107 22 A.L.J. 16=46 M L J. 172=1924 M.W.N. 86=26 Bom. L.R. 198 28 C.W.N 1050=1924 P C 56=79 I.C 961 (P.C.)

(d) *Bajarao* v. *Parvatava*, 35 Bom. L.R. 118=1933 B. 126. *Sheo Gobind* v. *Ram Adhin*, 8 Luck. 182=1933 Oudh. 31.

(e) *Tara* v. *Krishna*, 31 B. 495=9 Bom. L.R. 774.

(f) *Rajrani* v. *Gomati*, 7 P. 820=1928 P. 466=9 P.L.T. 456.

(g) *Manki* v. *Kundan*, 47 A. 403=1925 A. 375=23 A L J. 183; *Totawa* v. *Basava* 23 B. 229.

surroundings are such that she should be regarded as a rich woman, this is sufficient to exclude her as against a daughter less favourably circumstanced, even though the "poor" sister is not able to point out any definite acquisition of property by the "rich" one.[h] In the case of succession by married daughters, the question whether they have issue, or are likely to have issue, or whether they have no issue or are not likely to have them is absolutely irrelevant.[i] Two or more daughters inheriting their father's estate take it as qualified owners with rights of survivorship, though the right of survivorship can be put an end to as between them by their dividing the property and arranging that each will enjoy her share with rights of alienation etc.[j] An agreement to give up the right of survivorship can be made even orally and no registered document is necessary under the law.[k] A daughter is not entitled to inherit if she is suffering from any disability which will operate as a bar to inheritance in the case of a male heir,[l] but her unchastity is not a ground of exclusion[l] except under the Dayabhaga school.[m] In the case of succession by one class of daughters excluding another class, on the death of all of the daughters in the first class who have taken, the daughters of the excluded class will come in as heirs[n] before the daughter's son.[o] The general principle that an estate once vested cannot be divested applies even in the case of succession by daughters, and a daughter who has already taken the estate as a qualified heir, as for instance on account of her comparative indigence, or on account of her not being married, thus excluding another daughter who was at the time of such inheritance more opulent or married, cannot be deprived of the whole or a portion of the estate on the daughter taking the estate becoming married or more well-to-do than the daughter originally excluded.[p]

436. In the Bombay Presidency the daughters take an absolute estate as tenants-in-common without rights of survivorship, so that on the death of any daughter, her interest passes to her own heirs.[q]

(h) **Manki** v. **Kundan**, 47 A. 403=1925 A. 375=23 A.L.J. 183.

(i) See p. 446 foot note (f)

(j) **Sundarasiva** v. **Vijyamma**, 48 M. 933 22 L.W. 398=49 M.L.J. 266. 1925 M.W.N. 643=1925 M. 1267; **Latchamma** v. **Subharagudhu**, 82 I.C. 788=1925 M. 343.

(k) **Alamelu** v. **Balu**, 43 M. 849=26 I.C. 455=28 M.L.J. 685—1915 M.W.N. 26

(l) **Bakubai** v. **Manchhabai**, 2 Bom. H. C.R. 5.

(l) **Adoyapa** v. **Rudrava**, 4 B. 104; **Tara** v. **Krishna**, 31 B. 495=9 Bom. L.R. 774; **Baldeo** v. **Mathura**, 33 A 702 8 A L.J. 811 : 11 I.C. 43; **Vedammal** v. **Vedanayaga**. 31 M. 100 18 M.L.J 70

(m) **Ramananda** v. **Ratkishori**, 22 C 347.

(n) **Dowlut Koer** v. **Burmadeo**, 14 Beng. L.R. 246 (note).

(o) **Tirumoni** v **Nibaran**, 9 C 154.

(p) **Amritlalji** v. **Rajonee**, 2 I.A. 113.= 15 Beng. L.R. 10.

(q) **Bulakhidas** v. **Keshavlal**, 6 B. 85; **Vithappa** v. **Savitri**, 34 B. 510=12 Bom. L.R. 487. 7 I.C. 445.

437. Daughter's unchastity does not operate as a disqualification for inheriting the father's estate.[r] But if the competition is between a daughter who is married and chaste and an unmarried daughter who is a prostitute, the latter is excluded by the former on the ground that the prostitute is neither a Kulastri nor a Kanya inasmuch as she is neither a married woman nor a virgin.[s] Though a daughter who is unchaste is not under the same rule of exclusion as a widow and is not prohibited by reason of such unchastity from inheriting her father's estate,[t] she is not entitled to inherit to her father, if she happens to be the daughter of a Dancing Girl, because Dancing Girls do not have legal husbands so as to invest their daughters with the capacity to inherit to their so called husbands.[u]

438. Illegitimate daughter.—An illegitimate daughter cannot inherit to her father, though he happens to be a Sudra.[v] The text giving the right of inheritance to the illegitimate son was relied upon to show that the daughter also was entitled to inherit, the argument being that the word "son" was comprehensive enough to include a daughter, but the argument was repelled as unsound on the ground that the texts which do not generally favour the claims of females must not be construed to refer to them in the absence of a clear indication to that effect, and that the claims of only such of those females as are expressly mentioned as heirs in the text should be allowed.[w] But she can inherit to her illegitimate brother born of the same mother.[x]

439. (Heir No. 6) Daughter's son.—The daughter's son, though a binnagotra sapinda, occupies a very high position in the line of a man's heirs, his rank being the 6th in the order of succession, the reason being that in ancient days, as the son of an appointed daughter or putrika putra, he occupied the position of an aurasa son of her father and remained a member of his family, and this circumstance continued to retain for him the special position of preference even after the institution of *putrika putra* fell into desuetude. Besides, according to Hindu religious ideas, he stands in the place of a son and like a son is *putrika* or a liberator from

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(r) *Kojiyadu* v. *Lakshmi*, 5 M. 149.

(s) *Tara* v *Krishna*, 31 B. 458.

(t) *Annapurnamma* v. *Venkamma*, 24 L W 318 51 M.L.J. 387=1926 M W.N. 661 1926 M. 1017=97 I.C. 604 ; *Ram Pergash* v *Mt. Dahan Bibi*, 3 P. 152 .1924 P. 420 . 5 P L.T. 203.

(u) *Ramayya* v. *Ramayya*, 118 I.C. 779 =1930 M. 329.

(v) *Bhikya* v. *Babu*, 32 B. 562=10 Bom. L.R. 736 ; *Ram Singh* v. *Bhani*, 38 A. 117 =32 I.C. 127=14 A.L.J. 11 ; *Balraj* v. *Jai Karan* 1931 A. 407

(w) *Bhikya* v. *Babu*, 32 B. 562=10 Bom. L R. 736.

(x) *Dattatraya* v. *Matha Bala*, 1934 B. 36=58 B. 119=35 Bom L.R. 1131.

put,[y] and the texts that consider the daughter's son as son's son in regard to the obsequies of ancestors (Mit. ii. 2-6) might have helped him in securing the place of precedence which he still holds in these days.

A daughter's son is entitled to succeed to his deceased maternal grand-father's estate only after all his daughters are dead, either in fact or in contemplation of law by a surrender. But unlike his mother, he takes the estate absolutely, and after his death, his own heirs succeed to the property.[z] When there are two or more sons of daughters, they take the inheritance as tenants-in-common and are entitled to share in it *per capita* except that when they happen to be coparceners of the same joint family, being the sons of the same daughter, they take the property with rights of survivorship *inter se*.[a] In the case of impartible estate, after the death of all the daughters of the last male-holder, the eldest of their sons even though he happens to be the son of a daughter other than the last survivor among the daughters is entitled to succeed to the estate and the rule that all the sons of daughters take an interest in the estate *per capita* does not apply to such a case.[b] The right of a daughter's son to inherit to his maternal grandfather does not depend upon his existence either in fact or in the contemplation of law at the time of the grandfather's death, nor does it arise so long as any of the daughters is alive. His is only a *spes successionis* during the lifetime of his own mother or her sister and if he should die during the existence of any of the daughters, his son cannot claim to inherit in the right of his father on the death of the last daughter.[c]

440. (Heir No. 7) Mother.—The mother's right to inherit to his son is declared by the text "Besides, the father is the common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text 'to the nearest sapinda, the inheritance next belongs.'"[d] Her place is next to the daughter's son under the Mitakshara,[e] and she takes, like a widow or a daughter, only a limited estate. The term mother in-

(y) *Narsingh* v. *Maha Lakshmi*, 55 I.A. 180=50 A. 375=28 L.W. 171=55 M.L.J. 42 =26 A.L.J. 897=30 Bom. L.R. 1331=32 C.W.N. 1065=1928 P.C. 156; *Panchapakesa* v. *Gopalan*, 48 L.W. 887; *Narasaraju* v. *Satyavatamma*, 48 L.W. 908.

(z) *Muthuvaduganadha* v. *Periasami*, 23 I.A. 128=19 M. 451=6 M.L.J. 149.

(a) *Venkayyamma* v. *Venkataramanayyamma*, 29 I.A. 156=4 Bom. L.R. 657=7 C.W.N. 1=12 M.L.J. 299=25 M. 678 (P.C.) See also *Muhammad Husain* v. *Babu Kishva Nandan*, 64 I.A. 205=(1937) A.L.J. 1032=39 Bom. L.R. 979=41 C.W.N. 1029=I L.R. 1937 A. 655=46 L.W. 1=(1937) 2 M.L.J. 151 1937 P.C 233.

(b) *Muttu Vaduganadha* v. *Dorasinga*, 3 M. 290=8 I.A. 99; *Kattama Nachiar* v *Dorasinga*, 6 M.H.C.R. 310; *Muthuvaduganadha* v. *Periasami*, 23 I.A. 128=19 M. 451=6 M.L.J. 149.

(c) Dharup v. Gobind, 8 A. 614; *Kattama Nachiar* v. *Dorasinga*, 6 M.H.C.R. 310; *Muttu Vaduganadha* v. *Dorasinga*, 3 M. 290=8 I A. 99.

(d) Mit ii-3-3.

(e) *Balakrishna* v. *Lakshman*, 14 B. 605.

cludes "adoptive mother,"[f] but not a step-mother,[g] because the step-mother is not mentioned in the table of succession. In the case of a mother, as in the case of a daughter, neither unchastity[h] nor remarriage[i] operates as a bar to her claim to succeed to her son. Heritable blood exists even between a mother and her bastard son.[j]

Mayukha.—Under the Mayukha, the father comes before the mother.[k] Besides, a step-mother is an heir as a sagotra sapinda.[l]

441. (Heir No. 8) Father.—Under the Mitakshara, the father, meaning also the adoptive father, takes after the mother, though under the Mayukha and the Dayabhaga he is preferred to the mother on spiritual considerations. A step-father has no place in the line of inheritance, but a Sudra putative father is entitled to inherit to his illegitimate son on the ground of community of blood existing between them.[m]

442. (Heir No. 9) Brother.—Where there are two or more brothers, they take as tenants-in-common, a full brother excluding a half brother.[n] The reason for preferring a full brother to a half brother is that in nature, as well as by the test of spiritual benefit, he is nearer, and therefore satisfies the description "nearest of kin."[o] Even among half brothers, those born of the same mother, but by a different father are never heirs.[p] But illegitimate brothers born of the same mother to the same putative father can succeed to each other as in their case the existence of heritable blood as between them cannot be denied.[q] Again an undivided

(f) *Anandi* v. *Hari*, 33 B 404=3 I.C. 745=11 Bom. L.R. 641.

(g) *Jagatpal* v. *Jageshar*, 30 I.A. 27=25 A 143 7 C.W.N. 209 (P.C.); *Collector of Madura* v *Mootoo Ramalinga*, 12 M.I.A. 397; *Seethai* v. *Nachiar*, 37 M. 286=1 L W. 11=1914 M.W.N. 28=26 M.L.J. 10=22 I C. 18; *Ram Prasad* v *Babu Lal*, 86 I.C. 849 1925 A. 417; *Tahaldai* v. *Gaya Prasad*, 37 C. 214=5 I.C. 135 14 C.W.N. 443; *Nanhi* v *Gauri Shankar*, 28 A. 187=2 A L.J. 654; *Navaneetha Krishna* v. *Collector of Tinnevelly*, 69 M.L.J. 632=1935 M.W.N. 1001=42 L W. 875· 1935 M 1017.

(h) *Baldeo* v. *Mathura*, 33 A. 702=8 A. L J. 811=11 I.C. 43. *Vedammal* v. *Vedanayaga*, 31 M. 100=18 M.L.J. 70.

(i) *Akora* v. *Boreani*, 2 Beng. L.R. (A. C.J.) 199; *Basappa* v. *Rayava*, 29 B. 91=6 Bom. L.R. 779; *Kundan* v. *Secretary of State*, 7 L. 543=1926 L. 673; *Lakshmana* v. *Siva*, 28 M. 425=15 M.L.J. 245; *Vedammal* v. *Vedanayaga*, 31 M. 100=18 M.L.J. 70; *Jamini* v. *Thakur*, 39 C.L.J. 88=1922 C. 140 26 C.W.N. 925.

(j) *Tripura* v. *Harimati*, 38 C. 493=9 I.C. 657=15 C.W.N. 807; *Arunagiri* v. *Ranganayaki*, 21 M. 40; *Jagarnath* v. *Sher Bahadur*, 57 A 85=1935 A.L.J. 150=1935 A. 329.

(k) *Khodabhai* v. *Bahdhar*, 6 B. 541; *Balkrishna* v. *Lakshman*, 14 B. 605.

(l) *Rassoobai* v. *Zoolekhabai*, 19 B. 707; *Appaji* v. *Mohanlal*, 54 B. 564.

(m) *Subramania* v. *Rathnavelu*, 41 M. 44 6 L.W. 149 42 I.C. 556=33 M. L.J. 224 1917 M.W.N. 688 (P B.)

(n) *Neelkisto* v. *Beerchunder*, 12 M.I.A. 523; *Sumbhoochunder* v. *Naraini Debia*, 1 Suth. 25=5 W.R. P.C. 100; *Anant Singh* v. *Durga Singh*, 37 I.A. 191=32 A. 363= 20 M.L.J. 604=12 Bom. L.R. 504=7 A.L.J. 704=14 C.W.N. 770=1910 M.W.N. 324 P.C.)

(o) *Neelkisto* v. *Beerchunder*, 12 M.I.A. 523.

(p) *Ekoba* v. *Kashiram*, 46 B. 716=1922 B. 27(1)=24 Bom. L.R. 229.

(q) *Mayna Bai* v. *Uttaram*, 8 M.I.A. 400; See also *Viswanatha* v. *Doraiswami*, 48 M. 944.

full brother excludes a divided full brother,[r] but an undivided half brother shares equally with the divided full brother.[s] The same principle will apply in the case of a reunion between brothers, and a half brother who becomes reunited gains by the reunion a better position than otherwise he would have had and is brought to the level of a whole brother who has not become reunited so as to be entitled to succeed equally with him.[t] Sons of a deceased brother cannot claim to succeed along with their uncles on the principle of representation.[u]

Mayukha.—Brothers of the half blood come in only with the father's father under the Mayukha.

443. (Heir No. 10) Brother's son.—The preference accorded to the whole blood as against the half blood as between heirs of the same degree of kinship extends to all sapindas, and the brothers' sons are no exceptions.[v] Besides, the rule of succession *per stirpes* applies only in the case of succession by sons, grandsons and great-grandsons, and does not apply to any other case Hence the sons of brothers take only *per capita* and not *per stirpes*, the sons of the brother of the whole blood excluding those of the brother of the half blood. But when several brothers succeed to the property of another brother, and subsequently one of those brothers dies, in a partition between the sons of that brother and the surviving brothers, the property is to be divided *per stirpes*. Thus if A dies leaving his three brothers B, C and D, and subsequently B dies leaving three sons E, F and G, the property inherited from A will be divided into three shares, one share being allotted to C, another to D and the third share to E, F and G as representing their father B. But if B had died even before A died, B's sons E, F and G cannot claim any right in the property left by A, the reason being that unless their father B was alive at the time A died, B could not take any interest in A's property which would be taken by A's brothers who were then alive to the exclusion of their nephews the sons of B. A brother's son, though of half blood, excludes a brother's grandson, though of full blood.[w]

444. (Heir No. 11) Brother's son's son.—

Note. Upto the brother's son, there was no difficulty in ascertaining the order of succession among the sapindas. Difficulty arose in ascertaining the order after him. The verse in the Mitakshara

(r) *Devibai* v. *Dayabhoy*, 89 I.C. 164=1926 Sind. 42; *Kesabram* v. *Nandkishore*, 3 Beng. L.R. (A.C.J.) 7.

(s) *Rajkishore* v. *Gobind*, 1 C. 27 (F.B.)

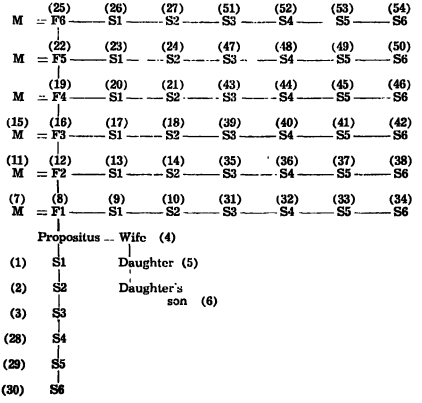
(t) *Sheo Soondary* v. *Pirthee Singh*, 4 I.A. 147.

(u) *Nilkanth* v. *Narayan*, 28 N.L.R. 58 =1932 N. 79.

(v) *Garuddas* v. *Laldas*, 60 I.A. 189=37 L.W. 772=64 M.L.J. 660=37 C.W.N. 637=35 Bom. L.R. 595=1933 M.W.N. 557=14 P.L.T. 365=1933 A.L.J. 774=1933 P.C. 141.

(w) *Nilkanth* v. *Narayan*, 28 N.L.R. 58 =1932 N. 79.

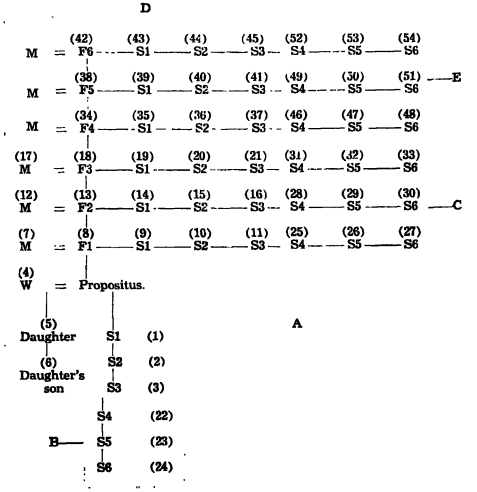
relating to heirship after the brother's son runs as follows " If there be not even brother's son (Putra) gotrajas share the estate. Gotrajas are the paternal grandmother and sapindas and samanodakas." The question was whether the grandmother succeeded immediately after the brother's son, or the brother's line upto the third or the sixth degree should be exhausted before the grandmother could be let in : thus there could be three possible views on the question. The Madras High Court in *Chinnasami* v. *Kunju*,(x) following its own earlier decision in *Suraya* v. *Lakshminarasamma*,(y) favoured the view propounded in the Smriti Chandrika (xi-5-8 to 12) that the term brother's son (putra) does not include the further descendants of the brother, like the brother's grandson, great-grandson etc., and that after the brother's son, the next heir is the grandmother. Similar construction was placed upon the other texts dealing with the uncle's son (putra) and grand-uncle's son (Sunava). On this reasoning the order of heirs was arranged as shown in the following Table :



It will be seen from this that the wives or widows of F4 to F6 have been removed from the category of heirs and that after the son's son in each collateral line, the next heir is ascertained in the

(x) 35 M. 152=11 I.C. 885=21 M.L.J. 856. (y) 5 M. 291.

line beginning from the next remoter ancestor. This computation is on the basis that brother's putra, uncle's putra and grand-uncle's sunava, mean no more than brother's son, uncle's son and grand-uncle's son. In contrast with this view were the view of Mr. Harrington on the one hand and that of Dr. Sarvadhikari on the other. Mr. Harrington, one of the judges of the late Sudder Court of Bengal, takes the view that in each line descendants upto the 7th degree should be exhausted before making an ascent to a remoter line for ascertaining the heir. In this view the paternal grandmother or the paternal grandfather or any of the descendants in the collateral line starting from him cannot inherit till the collateral line starting from the father is exhausted upto the 7th degree counting from the father. Dr. Sarvadhikari, on the other hand, takes the word "putra" or "sunava" in the verses to mean also a grandson so that, according to him, before ascending to the collateral line of the next remoter ancestor, the three descendants of the nearer ancestor must be let in, in the order of succession. The table according to this view is as follows:



It will be seen from this that the heirs according to this view fall into six blocks consisting of the following heirs in the order of preference.

Block, A: Son (1), grandson (2), great-grandson (3), widow (4), daughter (5), daughter's son (6), mother (7), father (8), brother (9), brother's son (10), brother's grandson (11), grandmother (12), grandfather (13), uncle (14), uncle's son (15), uncle's grandson (16), great-grandmother (17), great-grandfather (18), grand-uncle (19), grand-uncle's son (20), and grand-uncle's grandson (21).

Block B consists of the lineal male descendants of the propositus from the 4th upto the 6th degree (heirs 22 to 24).

Block C consists of the male descendants from the 4th to the 6th degree in the collateral male lines commencing from the father, grandfather and great-grandfather (heirs 25 to 33).

Block D consists of the three paternal male ancestors from the 4th to the 6th degree and their descendants in the collateral lines upto the third degree. (heirs 34 to 45).

Block E consists of the descendants of the ancestors mentioned in Block D, from the 4th to the 6th degree (heirs 46 to 54).

Block F consists of the wives of those ancestors from the 4th to the 6th degree whom Sir D. F. Mulla chooses to omit from the computation of heirs. (See Mulla's Hindu Law, page 46).[y-a]

In *Buddha Singh* v. *Laltu Singh*,[z] the question as to which of these views should be accepted had to be considered. The contesting claimants in the case were the paternal uncle's son's son (No 16 of the heirs in the Table according to Dr. Sarvadhikari's view and No. 35 of the heirs according to the view of the Madras High Court in *Chinnasami* v. *Kunju*[a]) and the father's paternal uncle's son (No. 20 of the heirs according to Dr. Sarvadhikari and No. 18 of the heirs according to the Madras view). It was held by the Judicial Committee that the word "putra" as used by Vignaneswara in relation to the last owner, signified and included son, grandson and great-grandson and that 'putra' and its synonym (Sunava) employed by him in connection with other relations, such as brother, uncle or grand-uncle, must be understood in a generic sense as in the case of the deceased owner. In this view they held that the descendants in each collateral line which starts from a nearer ancestor should be exhausted at any rate to the third degree before

(y-a) But see *Jogdamba* v. *Secretary of State*, 16 C. 367 holding them also to be heirs.

(z) 42 I.A. 208=2 L.W. 897=37 A. 604=1915 P.C. 70=13 A.L.J. 1007=17 Bom. L.R. 1022=30 C.W.N. 1=29 M.L.J. 434=1915 M.W.N. 772 P.C.

(a) 35 M. 153=11 I.C. 885=21 M.L.J. 856.

making the ascent to the line next in the order of succession. The reason given for this view in the judgment of the Board was that if Vignaneswara's intention had been to confine the descent in the case of collaterals to the actual sons of brothers and uncles, he would have employed terms which would have exactly conveyed his meaning, such as "atmaja" or "*auras*," which means "sons of one's loins." On this construction of the texts the decision given was that the uncle's son's son was entitled to inherit in preference to the grand-uncle's son. But this decision has not solved the difficulty once for all. No doubt, the view of the Madras High Court in 35 M. has been definitely ruled out but, though their Lordships expressed the opinion that Mr. Harrington's view was perhaps open to the objection that it contravened the rule of Manu, there is no definite disapproval of that view and the decision itself is not in conflict with it. Besides if, as was observed by their Lordships, the word "putra" should be taken to include sons, grandsons and great-grandsons, then brother's "putra" must mean brother's son, brother's grandson and brother's great-grandson, in which case the heirs in each collateral line upto the 4th instead of the 3rd degree should be exhausted before making an ascent to a remoter collateral line. This question of whether Dr. Sarvadhikari's view should be applied or Mr. Harrington's view, however, arose recently in a Madras Case[b] where the contesting claimants were the great-grandson of the great-grandfather and the son of the great-grandson of the grandfather, and Kumaraswami Sastriar, J., after a review of the case-law and the principles involved, decided that the former is the preferential heir as against the latter, definitely rejecting Mr. Harrington's view, and accepting the view of Dr. Sarvadhikari. On a review of the cases and the principles bearing on the question, especially the principle of religious efficacy, one thing seems to be pretty clear. Dr. Sarvadhikari's construction, as was observed by their Lordships of the Privy Council, appears to rest on a logical foundation and his views seem to be consistent and clear. In view of their Lordships' inclination to approve of his construction *in toto* and the definite adoption of that construction by Justice Kumaraswami Sastriar, an eminent and erudite Judge of the Madras High Court, the order of succession given by Dr. Sarvadhikari may be taken as the only proper order to be followed in the ascertainment of heirs, and this conclusion is strengthened by the fact that in another recent case before the Madras High Court Justice Varadachariar, another great Hindu Law Judge and an eminent Sanskritist, followed Justice Sir C. V. Kumaraswami

(b) *Subramiah* v. *Nataraja*, 53 M. 61=31 L.W. 617—1930 M. 534.=58 M.L.J. 468.

Sastriar's view and preferred the father's brother's grandson to the brother's great-grandson.(c)

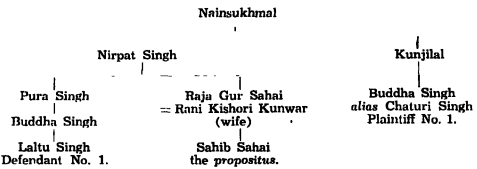
The following is the instructive judgment of the Privy council in *Buddha Singh's case.*

Buddha Singh v. Laltu Singh. 42 I.A. 208=37 A. 604

"*Mr. Ameer Ali.*—The question for determination involved in this Appeal is one of considerable importance under the Hindu Law, and relates to the order of succession under the *Mitakshara* as expounded in the Benares School, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the appeal arises was brought by the Appellant Buddha Singh *alias* Chaturi Singh to establish his right as the nearest reversioner to the estate of one Sahib Sahai who died in 1873 without leaving any male issue. Sahib Sahai was a minor and unmarried at the time of his death; his mother Rani Kishori Kunwar, who survived him, accordingly came into the possession of his estate, which she held for nearly 34 years. She died in 1907, when the succession opened to the male collaterals of Sahib Sahai.

The following genealogical table, on which both the Courts in India have based their judgments, will explain the relative position of the parties to this action :—



The plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the great-grandfather of Sahib Sahai, whilst the defendant Laltu is the great-grandson of Sahib Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The plaintiff's contention is that under the law of the *Mitakshara* he has a preferential title to the inheritance of Sahib Sahai as against the defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the *Mitakshara* :—

'On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."(d)

And he contends that the expression "sons" occuring in this verse must be strictly construed, and so construed, the devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great-grandson, the defendant Laltu, and that after Buddha, by virtue of the

(c) *Venkateswara Rao* v. *Audinarayana*, 58 M. 323=69 M.L.J. 256=1935 M.W.N. 73 =40 M.L.W. 929=1935 M. 129. See also *Ram Sumeran* v. *Kodal*, 1932 A. 117.

(d) Colebrooke's translation, Chap. II. Sec. V. v-4.

immediately following verse, he, as the grandson of the great-grandfather of the deceased, has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the Courts in India have held against the plaintiff's claim; hence this Appeal to His Majesty in Council.

The learned Judges of the Allahabad High Court, in two separate and able judgments, have exhaustively reviewed the authorities bearing on the subject, and as their Lordships agree in the main with their deductions, and the conclusion at which they have arrived on these deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The *Mitakshara* of Vijnaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a Commentary on the Institutes of Yajnavalkya. Vijnaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajnavalkya's text is to be found in the commentary on the rule relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage" had been already shown, he proceeds to quote the rule of Yajnavalkya declaring the order of succession in their default, which runs thus(*e*):—

'The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, a pupil and a fellow-student: on failure of the first among these, the next in order is indeed heir of one who has departed for heaven leaving no male issue. This rule extends to all persons and classes."

Mr. Mandlik's rendering of these two *slokas* of Yajnavalkya is more literal and is as follows(*f*):—

"The wife, daughters, both parents, brothers and likewise their sons, *gotrajas* (gentiles); *bandhus* (cognates); a pupil and a fellow-student. Of these on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven, leaving no *putra*. This rule extends to all (males whether belonging or not to the four) classes.'

The compound word *aputra*, occurring in Yajnavalkya's text has been rendered by Mr. Colebrooke as "leaving no male issue;" by Mr. Mandlik as "leaving no *putra*." He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son" The *Viramitrodaya* says clearly that the word "sonless," which is the literal equivalent of *aputra*, signifies "in default of son, grandson and great-grandson,"(*g*) that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word *putra* as used in relation to the last owner signifies and includes son, grandson and great-grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

(*e*) Colebrooke's translation of the Mitakshara. Chap. II. Sec. 1. para 2.

(*f*) Mandlik's translation of the Institute of Yajnavalkya. p. 220 vv-135, 139. Golab Chundar Sircar's translation, p. 154.

(*g*) Chap III. Part I. v 11. Shastri

The commentary of Vijnaneswara on the above-quoted *slokas* of Yajnavalkya, extends over several sections in Mr. Colebrooke's translation, and makes the work more a Digest than a mere Commentary. In Sect. I of Chapter II, the author deals exhaustively with the right of the widow to inherit the estate of "one who has died *aputra*." Her right of succession is dependent on his leaving no male issue to the third degree. In para. 3 the word *putra* is used again in the same generic sense. After treating of the rights of daughters and parents in Sects. II and III respectively, he deals in Sect. IV with *the succession of brothers and "their sons."* Here, again, the word *putra* is used, whether in the literal or in an extended sense is a matter for consideration.

Sect. V relates to the right of collateral kindred of the same paternal stock or *gotra*, and, therefore, called the *gotraja*, to take the inheritance of the *aputra* in default of "brother's *sons*." Admittedly both the plaintiff and the defendant are Sahib Sahai's *gotrajas*. Reference, therefore, is necessary to the rules embodied in Sect. V.

It is to be noted here the word *putra*, or more correctly *puttra*, which literally means "one who releases from hell (*put*)," is used by Vijnaneswara at the very beginning of his Book on Inheritance. In para, 3, Sec. I, Chapter I, describing the two kinds of property, (*daya*, wealth) to which rights of inheritance attach, *viz.*, the "unobstructed" and "obstructed," he speaks thus of the latter class:—

"but property devolves on parents (or uncles) and 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."

And then comes the significant passage:—

"The same holds good in respect of their sons and other descendants," meaning, clearly, the sons and *descendants* of uncles and brothers. And this is the construction which Balambhatta, one of the best known Commentators of the *Mitakshara*, appears to have put on these words.

As pointed out in the case of *Ramachandra Martand* v. *Vinayak Venkatesh*.(h) the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependent on the existence of the *sapinda* relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the *Mitakshara* (*Lallubhai Bappubhai* v. *Cassibai*(i) and *Ramachandra Martand* v. *Vinayak Venkatesh*(h)) the *sapinda* relationship arises between two people through their being connected by "particles of one body," *viz.*, that of the common ancestor, in other words, from community of blood in contradistinction to the *Dayabhaga* notion of "community in the offering of religious oblations." But, as will be shown later on, the *Mitakshara*, whilst holding that the right to inherit does not spring from the right

(h) L.R. 41 I.A. 290=42 C. 384=12 A.L.J. 1281=16 Bom. L.R. 863=18 C.W.N. 1154=27 M.L.J. 333=1914 M.W.N. 835=1914 P.C.

1 L.W. 831.

(i) 7 I.A. 212; S.C. I.L.R. 5 Bom. 110.

to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of Sect. V erroneously rendered the word *sapinda* as "relations connected by funeral oblations," and *samanodakas* as those connected by "libations of water," which has led to some confusion of ideas. Their Lordships, therefore, propose to follow the translation which was before this Board in *Lallubhai's* case.

The first paragraph stands thus: "If there be no brother's sons, *gotrajas* share the estate. *Gotrajas* are the paternal grandmother and *sapindas* and *samanodakas.*"

Their Lordships understand that the word rendered "sons" in this paragraph is *putra* in the original. Then follows paragraph 2, in which Vijnaneswara develops the position of the grandmother in the following terms:—

"In the first place the paternal grandmother takes the inheritance The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. 'And the mother also being dead, the father's mother shall take the heritage'" (Section 1, paragraph 7). "No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course, succeed immediately after the nephew: and thus there is no contradiction."

Para. 3 then states in general terms that after the grandmother the *sapindas* of the same paternal stock, viz., "the paternal grandfather and the rest inherit the estate, for *bhinnagotra sapindas* (i.e., *sapindas* belonging to another stock) are indicated by the term *bandhu*" (dealt with in Sect. VI).

Paras. 4 and 5 deal specifically with the succession of the *samana gotra sapindas* and run as follows:—

"(4) Here on failure of the father's *descendants*, the heirs are successively the paternal grandmother, the paternal grandfather, and their sons.

"(5) On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather his sons and their issue inherit. In this manner must be understood the succession of the *samana gotra sapindas.*"

It is clear from the observations of both Mr. Mandlik and Dr. Jolly,(*j*) that Mr. Colebrooke, in his translation of para 5, has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage.

Mr. Mandlik translates the last sentence as follows: "In this manner up to the seventh [*sapinda*] the taking of wealth by the *samana gotra sapindas* should be known". Only instead of the expression *samana gotra*, which is in the original, he uses the abbreviated term *sagotra.*

Para 6 then provides as follows:—

"(6) If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly, Vhrat Menu says: 'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra.*"

(*j*) Mandlik's Hindu Law, p. 379; Dr. Jolly's Tagore Law Lectures p. 124.

It is contended on behalf of the appellant on the strength of these several passages that the word "son" used in conjunction with brothers must be literally construed, for, otherwise, it is urged the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well founded, is that the succession in the father's or grandfather's line must cease *ipso facto* on the failure of descendants of the second degree, and the inheritance must be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, *viz.*, in what sense Vijnaneswara has used the term "son" in these passages; and that question can be answered only first by examining his own method of employing the word, and secondly by inquiring in what sense other Hindu jurists of the same school or cognate school have understood the expression. Before proceeding with their examination of Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajnavalkya's rule, already quoted, to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijnaneswara finds a place for her among the *gotrajas*, on the authority of an enunciation of Manu, which he quotes in para 7 of Sect. 1, Chapter II, and which runs thus:

"Of a son dying childless the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognises; in order to reconcile the conflict between Yajnavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as Messrs. West and Buhler also indicate, after the "brother's sons". The question, however, whether he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

Now, in para. 1 of Sect. V, where Vijnaneswara says. "If there be not even brother's sons," the word used is *putra*; in para. 2, where the grandmother's place is declared, the expression employed is brother's *suta*, a synonym of *putra*. In para. 4 again the word putra appears to be used in connection with uncles. In para. 5, where the expression "his sons and their issues" occurs, the original words are said to be *tat putras*, "his sons," and *tat sunavas*,(k) "their sons."

The word "descendants" in Mr. Colebrooke's translation is in the original "*santana*". which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Mr. Justice Telang construes it as meaning "continuation";(l) other learned Sanskritists interpret it to signify "an uninterrupted series" [of progeny or heirs]. Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. *Sunavas*, translated by Mr. Colebrooke as "issue," connotes the same idea.

(k) Plural of *sunu* "offspring." *Sunu* is the old Indo-Aryan word which survives in the English "s

(l) 16 Bom. p. 716.

Having regard to the fact that this great legist, whose logical acumen, judging from his work, seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras*, which, their Lordships understand, mean "son of one's loins."(*m*) Nor can their Lordships appreciate the argument that the meaning of such words as *santana* and *sunavas*, which mean lineal male progeny without limitation, should be arbitrarily cut down to two degrees.

There seems to be great force then in Sir Robert Finlay's contention that the limitation is to be found elsewhere The rule of Manu supplies one limitation :—

"To three (ancestors) water must be offered, to three funeral cake is given the fourth (descendant is) the giver of these (oblations), the fifth has no connection with them."(*n*)

The other is deduced by Mr. Harrington, [See *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*(*o*)] the well-known author of the "Analysis," and one of the most erudite Judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in para 6, Sect. V, where he declares that the succession of the *samana gotra sapindas* extends "in this manner" to "the seventh degree." It is not necessary in their Lordships opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well-founded, as the High Court has considered it to be, it would be sufficient to dispose of this Appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the words putra-pautra ("son-grandson"), used by Vijnaneswara in Sect. I, Chapter I, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the Viramitrodaya shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of the text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Aparārka, another scholiast of Yajnavalkya who flourished about a century later than Vijnaneswara, dealing with the same text, on which the author of the *Mitakshara* has commented at such length, construes, as pointed out by the High Court, the expressions "brother's sons" and "uncle's sons" in a wider sense. That Aparārka's authority is acknowledged by the expositors of the Benares School is clear from the fact, to which Mr. Mandlik refers, that Visweswara Bhatta, the author of the *Subodhini*, a commentary on the *Mitakshara*, has used Aparārka's work among others for the compilation of his *Madanaparijata*. Parts of Aparārka's treatise and of the *Madanaparijata* have been translated by Dr. Sarvadhikari and are to be found in his Tagore Lectures for 1880.

(*m*) See Mandlik, p. 380; and Sutherland's translation of the *Dattaka Mimamsa* (Stoke's Hindu Law Books, p. 547).

(*n*) "Sacred Books of the East" Vol. XXV, v. 186, p. 36.

(*o*) 2 M.I.A. 132, 158.

Nanda Pandita, an esteemed writer of "the Benares School" and the author of the noted work on the Law of Adoption, called the *Dattaka Mimamsa*, a standard treatise among the followers of the *Mitakshara*, has written commentaries both on the *Mitakshara* as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the *Vaijayanti*, in giving the order among the *sagotras* he "states that in the father's line, on failure of the brother's son, the brother's son's son is heir." And he bases this rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term *putra* to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares School, has given expression to the same view. Vidyabhusan Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental Interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well-known work called the *Vyavastha Chandrika*. This learned Hindu writer states in Principle 153 that "a brother's grandson succeeds in default of a brother's son," and refers to the decision of the Calcutta High Court in *Kureem Chund Gurain* v. *Oodung Gurain*(p) without taking any exception to its correctness. In the note to the Principle he states the reason why the brother's grandson succeeds on failure of a brother's son in these words:

"Because the term brother's son is inclusive also of the brother's grandson and because he is *sapinda* and the nearest of the persons understood by the term *gotraja*."

The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the foot-note:—

"It may be asked that when in law the term 'son' (*put-tra*) is inclusive of the grandson and great-grandson, why then the term 'brother's son' does not include also the "brother's great-grandson"?

The answer which he gives to his own question is both interesting and instructive.

"The answer is," he says, "that in law calculation is made from the son of the common ancestor, which, here, is the father of both the deceased and his brother; consequently the term 'son' (of that ancestor) is inclusive of his great-grandson who is "brother's grandson".

Dr. Raj Comar Sarvadhikari, whose authority as an expounder of the Hindu Law has been recognised by the Calcutta High Court and this Board, in his Tagore Law Lectures gives emphatic expression to the view that the word "son" includes three degrees of descendants.

Devananda Bhatta, the author of the *Smriti Chandrika*, whose doctrines, however, are not recognised in Northern India holds the contrary opinion; and Visweswara Bhatta in the *Subodhini* certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the *Madanaparijata*. With regard to these two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contemporary of Aparaka admittedly differs from the author of the *Mitakshara* in several essential rules of law.

(p) (1866) 6 W.R. 158.

It seems, to say the least, doubtful whether an enunciation in the *Smriti Chandrika* can be safely applied except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the *Mitakshara*. The *Subodhini* stands on a different footing; it, no doubt, professes to be a commentary on the *Mitakshara*, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The views of Viswesswara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chunder Shastri, both of whom take their stand on the literal construction of the word *putra*. This thesis has been elaborately worked out by the former writer, but in substance it amounts to this, that as Vijnaneswara has used the expression "son" in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible.

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Raj Comar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the *Mitakshara* propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest *sapindas*) inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous *sapinda* relationship before the next in order can take; so that the parents and "their three successive descendants" take first, then the paternal grandmother and the paternal grandfather, and "their three successive descendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute,(q) and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of "The Sacred Books of the East," are in substantial agreement with Dr Raj Comar Sarvadhikari.

As regards the decided cases there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the *Smriti Chandrika* and the *Subodhini*, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application and deserves, therefore, careful attention.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewany Adalut of the North-West Provinces; they think it sufficient to treat the judgment of Mr. Harrington in *Rutcheputty Dutt Jha*,(r) as a starting point in the current of decisions in Northern India. The question at issue in that case related to the right of *bandhus* or cognates under the *Mitakshara* to the succession to a deceased person in the presence of a *gotraja*. Mr. Harrington, in dealing with the question, examined exhaustively the meaning of the word *putra*, and came to the conclusion that it had been used by Vijnaneswara in a generic sense. His judgment was affirmed on appeal to this Board; and there appears to be no challenge of his interpretations of the

(q) Dr. Jogendra Nath Bhuttacharjee, M.A., B.L., in his commentaries on the Hindu Law, p. 444, Mr. Jogendra Chunder Ghose, Hindu Law, p. 119.

(r) 2 M.I.A. 132, 153.

law. It again received the approval of this Board in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*.(s) Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed, their Lordships do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chand Gurain* v. *Oodung Gurain*(t) also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word *putra* was accepted and it was held that in the scheme of the *Mitakshara*, the term "brother's son" includes "brother's grandson".

In *Kalian Rai* v. *Ram Chander*,(u) the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned Judges of the Allahabad High Court (Burkett and Chamier, JJ.) came to the conclusion that under the law of the *Mitakshara*, as accepted and expounded in the Benares School, the brother's grandson had the right of succession to the deceased before it ascended to the second line, viz., the grand-parental line.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the *Mitakshara* are recognised subject to the interpretation of the *Vyavahara Mayukha* of Nilakanta Bhatta, and although on many points there is considerable divergence between the Benares and the Maharashtra Schools, as regards the question involved in the present case, one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Mr. Justice Telang, a Sanskritist of high order, in *Rachava* v. *Kalingapa*,(v) explains thus the order of descent among the *gotrajas* (enunciated in Chapter II Sect. 5, paragraphs 4-5 of the *Mitakshara*), although, as he points out, each ascending line begins with a female (*gotraja*) ancestress.

"In the *Mitakshara*, Chapter II, Sect. V, pl. 4-5, it is laid down that the propinquity of *gotrajas* is to be determined by lines of descent . . . that is to say, the inheritance is to go first in the line" (the word in the original is *santana*, literally "continuation") of the paternal grandfather, then in default of any one in that line, of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth."

The Madras High Court in two cases, named respectively *Suraya* v. *Lakshminarasamma*,(w) and *Chinnasami Pillai* v. *Kunju Pillai*(x) has held, as already stated, the direct opposite. The *ratio decidendi* in both judgments, which are elaborate and closely reasoned, is of a two-fold character; in the first place the learned Judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the second place they seem to consider the opinions of Devananda Bhatta and of Visweswara Bhatta in the *Smriti Chandrika* and *Subodhini* respectively as conclusively showing that the *Mitakshara* must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the *Subodhini*. Curiously enough there is no reference in either of the Madras judgments referred to above to a previous decision, *Parasara Bhattar* v. *Rangaraja Bhattar*,(y) of

(s) 13 M.I.A. 373.
(t) (1866) 6 W.R 158.
(u) 24 All. 128.
(v) 16 Bom. 716, 719.
(w) 5 Mad. 291.
(x) 35 Mad. 152=11 I.C. 885=21 M.L.J. 856.
(y) 2 Mad. 202.

the same Court to which Turner, C.J., was also a party. In that case the rule of the *smriti Chandrika* was not accepted nor was the literal construction of the *Mitakshara* followed. It is usual in such cases where a difference of opinion arises in the same Court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed, their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one Judge.

In *Suraya* v. *Lakshminarasamma*(z) the Judges say they had "consulted their learned colleague, Mr. Justice Muttusami Ayyar" and acknowledged their obligations to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another Judge not a party to the judgment for the purpose of enforcing the conclusion arrived at The recorded opinion of Muttusami Ayyar, J., would have been of great value had he been associated in the decision.

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the *Mitakshara*, as expounded in the Benares School, the word *putra* and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the *manes* of the common ancestor. Now, it is absolutely clear that under the *Mitakshara*, whilst the right of inheritance arises from *sapinda* relationship or community of blood, in judging of the nearness of blood relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the *Viramitrodaya*,(a) an authoritative commentary on the *Mitakshara*, lays down this doctrine in express terms. He says:

"When there are many claimants to the heritage among *gotrajas* and the like,(b) then the fact of conferring benefits on the proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits."

Dr. Raj Comar Sarvadhikari renders the last part of this passage thus:—

"The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance."(c)

In the case of *Bhyah Ram Singh* v. *Bhyah Ugar Singh*,(d) the Board affirmed this rule in the following words:—

"When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is well founded, and this Appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly."

(z) 5 Mad. 291.

(a) Golap Chunder Shastris translation. p. 91, Chapter II. Part 1. S. 23 A.

(b) Dr. Raj Comar Sarvadhikari construes the word "like" as meaning "other classes of heirs."

(c) "Tagore Law Lectures, for 1880," p. 629

(d) 13 M.I.A. 373.

445. (Heir 12 etc.) Father's mother etc.—The rest of the sapindas may be ascertained by reference to the table given in conformity with the view of Dr. Sarvadhikari.[e] The rules heretofore mentioned relating to the exclusion of half blood by the whole blood and the qualified nature of the estate taken by females may be applied in cases of competition between two sapindas of the same degree and the estate taken by grandmother, great-grandmother and other female ancestors. In the same way the principle of succession *per capita* and not *per stirpes* is to be applied when uncles' sons or grand-uncles' sons jointly inherit to the estate.

446. Statutory heirs in the order of succession of sapindas.—The Hindu Law of Inheritance (Amendment) Act (II of 1929) introduced four more persons in the order of succession among sapindas. The Act itself is a small one and is as follows:

"Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; It is hereby enacted as follows:—

1. (1) This Act may be called The Hindu Law of Inheritance (Amendment) Act, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of the Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

2. A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother:

Provided that a sister's son shall not include a son adopted after the sister's death.

3. Nothing in this Act shall—

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an estate larger than or different in kind from, that possessed by a female in property inherited by her from a male according to the School of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir."

(e) See p. 453.

This Act came into force on 21st February 1929 and applies also to the Jains.(f) It is very limited in its scope and in terms regulates succession only to the separate property of a Hindu male dying in intestacy and does not purport to alter the law in respect of the devolution of other property of a Hindu male or the property of a female. Hence where the question of succession to the Stridhana property of a female arises, and it becomes necessary to find out her husband's heirs who are entitled to succeed to that property, this Act cannot be applied and the ruling of the Lahore High Court in *Mt. Charjo* v. *Dina Nath*(g) that in such a case the Stridhana property should be deemed to be the property of the husband and the heir to the property is to be ascertained by reference to the Hindu Law of Succession as modified by this Act gives the go-by to the plain language of the enactment and is besides vitiated by the erroneous assumption that the property should be treated as the property of the husband.(h) Where a Hindu male died before the coming into force of this Act and his estate was inherited by a female heir, like his mother or widow, and such female heir died subsequent to the coming into force of the Act, this Act is applicable in determining the heirs entitled to succeed to the last male-holder, the reason being that the date with reference to which the heirs to the last male-holder are to be determined is the date of the death of the limited holder and not the date of the death of the last male-holder.(i) The heirs mentioned in the Act become heirs even in those Provinces governed by the Mitakshara where they were not heirs previously,(j) but the Act is not intended to change for the worse the place in the scheme of inheritance which the sister holds in the Bombay Presidency.(k) The word "sister" does not include a half-sister either uterine or consanguine(l) and the words "not disposed of by will" which occur at the end of sub-section (2) of S. 1 are comprehensive enough to cover also the case of such property as cannot be dis-

(f) **Balkisan** v. *Jainabai*, 1938 N. 298.

(g) *Mt. Charjo* v *Dinanath*, 172 I.C. 660 =39 P.L.R. 448=1937 Lah. 196.

(h) *Raj Bachan* v. *Bhanwar*, 4 Luck. 690=1929 Oudh. 296.

(i) *Chulhan* v. *Mt. Akli*, 1934 P. 324=15 P.L.T. 707; *Bandhan* v. *Daulata*, 1933 A. 152=1932 A.L.J. 384; *Shib Das* v. *Nand Lal*, 13 L. 178=1932 L. 361; *Shankar* v *Raghoba*, 1938 N. 97; *Mt. Charjo* v. *Din Nath*, 1937 L. 196; *Pokhan* v. *Mt. Manoa*, 16 P. 215=1937 P. 117 (F.B.); *Mt. Rajpali* v. *Surju*, 58 A. 1041=1936 A. 507=1936 A.L.J. 659=1936 A.W.R. 580 (F.B.); *Shakuntla* v. *Kaushalya*, 17 Lah. 356=1936 L. 124; *Mt. Sattan* v. *Janki*, 136 L. 139; *Lakshmi Ammal* v. *Anantharama*, 46 M.L. W. 37=1937 M.W.N. 587=(1937) 2 M.L.J. 209; *Bindeshwari* v. *Baijnath*, 1937 Oudh. W.N. 672 1937 Oudh. 402.

(j) *Mahabir* v. *Mt. Radha*, 1933 O. 231 =10 Oudh. W.N. 424; *Balkisan* v. *Jainabai*, 1938 N. 298; *Bindeshwari* v. *Baijnath*, 1937 Oudh W.N. 672=1937 Oudh 402.

(k) *Shidramappa* v. *Neelavabai*, 57 B. 377=35 Bom. L.R. 397=1933 B. 272.

(l) *Ram* v. *Mt. Sudesra*, 1933 A. 491=1933 A.L.J. 680=55 A. 725; *Kabootra* v. *Ram Padarath*, 1935 Oudh. 332=11 Luck. 148; *Sahodra* v. *Ram Babu*, 1937 A.L.J. 767=1937 A. 655; *Angamuthu* v. *Sinnapennammal*, 1938 M. 364=47 L.W. 286; See contra in *Shankar* v. *Raghobu*, 1938 N. 97 approved in *Amrit* v. *Thagan*, 1938 N. 134; *Rameshwar* v. *Mt. Ganpati*, 18 Lah. 525=1936 Lah. 652.

posed of by will.[m] The practice by which sisters were excluded from inheritance in Oudh was merely in accordance with the Hindu Law as interpreted there and hence would not fall within the meaning of "special custom" in S. 3 (*a*) of the Act so as to exclude sisters from inheritance after the passing of the Act.[n]

The following extract from the Statement of Objects and Reasons shows the necessity for the passing of this Act.

"The Bill is intended to remove a sex disqualification which under the archaic rules of Hindu Law excludes one's nearest female relations *e.g.*, the sister, the son's daughter, and the daughter's daughter, from inheritance altogether, while it gives the sister's son a very low place among bandhus who can only take in the absence of *gotraja sapindas* and *samanodakas*, that is to say, the owner's agnatic relations even upto the 14th and later degrees, which gives him a very poor chance of succession in many cases. This condition is somewhat ameliorated in the case of persons subject to the Mayukha Law where usage has given female heirs a somewhat better position though in the case of persons subject to the Dayabhaga School of law certain bandhus are not considered inferior to the gotrajas: still even under that system the sister is not an heir though the sister's son is expressly mentioned in the Dayabhaga as the heir, while the son's daughter and daughter's daughter have no place at all. In fairness to Bengal the Bill should have been extended even to that province."

447. Order of Succession among Samanodakas.—The Samanodakas of a person are his agnatic male relations in the descending or ascending line from the 7th to the 13th degree, the male descendants in the male line up to the 13th degree of each of those ascendants and the male descendants in the male line from 7th to 13th degree of the agnatic ascendants upto the 6th degree.[o] Thus they are:

(1) Male descendants in the male line from 7th to 13th degree .. 7
(2) Male ascendants in the male line from 7th to 13th degree .. 7
(3) Male descendants from the 7th to 13th degree of each of the male ascendants upto the 6th degree=6×7 .. 42
(4) Male descendants upto the 13th degree in the collateral lines beginning from the male ascendants mentioned in (2)=7×13 .. 91
147

(m) Pokhan v. Mt. Manoa, 16 P. 215=1937 P. 117 (F.B.).
(n) *Mahabir* v. *Mst. Radha*, 10 Oudh. W.N. 424 .1933 Oudh. 231.
(o) Atmaram v. Bajirao, 62 I.A. 139—39 C.W.N. 646=1935 P.C. 57=68 M.L.J. 673 =37 Bom. L.R. 553=1935 A.L.J. 816=41 M L.W. 613.

Amongst these Samanodakas, succession is governed by the rules that a remoter line is excluded by a nearer line and a remoter kinsman in a particular line is excluded by a nearer kinsman in that line. It must be noticed in this connection that out of the 147 Samanodakas above given, the existence of many, as, for instance, the descendants and the ascendants mentioned in (1) and (2), is not within the region of possibility and is assumed only for purposes of computation.

BANDHUS.

448. Who is a bandhu.—A bandhu meaning "one bound" is a sapinda related to the propositus through one or more female links either directly or through a common ancestor, paternal or maternal. Hence he is a cognate relation, and comes in the order of succession only after the technical sapindas and the samanodakas.[p]

449. Classes of bandhus.—Bandhus are according to Vignanes wara of three classes; (1) Atma bandhus, (2) Pitru bandhus and (3) Matru bandhus, and the classes are stated to contain the following relations:

(1) *Atma bandhus are*:
- (*a*) Father's sister's son
- (*b*) Mother's sister's son and
- (*c*) Mother's brother's son.

(2) *Pitru bandhus are*:
- (*a*) Father's father's sister's son
- (*b*) Father's mother's sister's son and
- (*c*) Father's mother's brother's son.

(3) *Matru bandhus are*:
- (*a*) Mother's father's sister's son
- (*b*) Mother's mother's sister's son and
- (*c*) Mother's mother's brother's son.

The three classes of bandhus specified by the Mitakshara as above mentioned cannot be added to,[q] but the enumeration of the heritable bandhus in the three classes is only an attempt to classify those heirs by sample and is not exhaustive of all such bandhus.[r] Thus a maternal uncle, though not mentioned in the enumeration of

(p) *Thakoor Jeebnath v. Court of Wards*, 2 I.A. 163.

(q) *Gajadhar Prasad v. Gauri Shankar*, 54 A. 698=1932 A.L.J. 533=1932 A. 417 (F.B.); *Ramchandra v. Vinayak*, 41 I.A. 290=25 I.C. 290=42 C. 384=12 A.L.J. 1281=16 Bom. L.R. 863=18 C.W.N. 1154=27 M.L.J. 333=1 L.W. 831=(1914) M.W.N. 835=1914 P.C. 1.

(r) *Muthusami v. Simanbedu*, 23 I.A. 93 6 M.L.J. 113 19 M. 405 (P.C.); *Gridhari Lali v Government of Bengal*, 12 M.I.A. 448; *Vedachela v. Subramania*, 44 M. 753–48 I.A 349–26 C.W.N. 159–24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402 =1921 M.W.N. 669=2 P.L.T. 707=1922 P.C. 33.

bandhus by the Mitakshara, was held to be a heritable bandhu on the ground that his son having been mentioned specifically as such bandhu, it is illogical to hold that the uncle, who is nearer in degree to the propositus, cannot be so.(s) Similar reasoning was applied to uphold the heritable capacity of a sister's son.(t)

450. Determination of heritable bandhus.—The sapinda relationship on which the heritable right of collaterals is founded, ceases in the case of bhinnagotra sapindas (bandhus) with the 7th degree from the common male ancestor upto the 7th degree in the father's line and with the 5th degree from the common male ancestor upto the 5th degree in the mother's line; in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are sapindas of each other, or in other words, there must be a mutuality of sapinda relationship between the propositus and the heritable sapinda.(u) The simple rule to be applied in determining whether a claimant is a heritable bandhu or not is to find out first whether he traces his relationship through his mother or father. If he traces his relationship through his mother he must be within five degrees from the propositus or common ancestor, and if he traces it through his father, he must be within 7 degrees from him or the common ancestor. In the case of relationship being traced through a common ancestor, the propositus himself must be within 7 degrees of the ancestor if the claimant is related to him through his (propositus) father and five degrees, if through his mother. These rules may be illustrated as follows:—

Common ancestor.

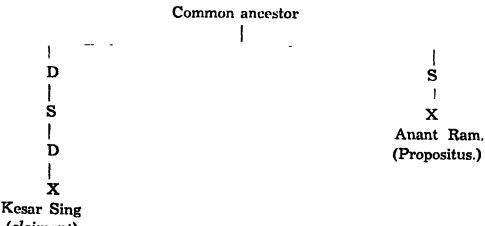
A	X	Son		Son	=	X	G
B	X	Daughter		Daughter	=	X	H
C	X	Daughter		Daughter	=	X	I
D	X	Son		Daughter	=	X	J
E	X	Daughter		Son	=	X	K
F	X	Son		Son	=	X	L

(s) *Gridhari Lali* v. *Government of Bengal*, 12 M.I.A. 448.

(t) *Amrita* v. *Lakshinarayan*, 2 Beng. L.R. 28 (F.B.)

(u) *Ramchandra* v. *Vinayak*, 41 I.A. 290=25 I.C. 290=42 C. 384=12 A.L.J. 1281 =16 Bom. L.R. 863=18 C.W.N. 1154=27 M.L.J. 333=1 L.W. 831=1914 M.W.N. 835 =1914 P.C 1. *Adit Narain* v. *Mahabir*, 48 I.A. 36=14 L.W. 20=1921 P.C. 53=19 A.L.J. 208=23 Bom. L.R. 692=25 C.W.N. 842=1921 M.W.N. 153=2 P.L.T. 97. These decisions lay down quite categorically that binnagotra sapinda relationship for purposes of heritability does not extend beyond the five degrees in any case and since they are the pronouncements of the Privy Council, much of the discussion about the five degrees and the seven degrees here given is not of much practical value.

If D is the propositus and K is the claimant, K cannot succeed because K claims his relationship to D through K's mother and must be related within five degrees to the common ancestor which he is not, though D being related through his mother to K satisfies the test of being within five degrees from the common ancestor. But though K is not a heritable bandhu, his son L is, because, he is within 7 degrees from the common ancestor, though it is illogical that he should inherit, when his father cannot. If instead of D, F is the propositus, L cannot succeed because F being related through his mother to L is more than 5 degrees removed from the common ancestor which disentitles L from claiming to succeed to F. Thus the sapinda relationship must be mutual between the propositus and the claimant; it is not sufficient if one of them alone happens to be the sapinda of the other. Thus in any given case it must be found out whether the propositus and the claimant are related to each other through the father or the mother. If both of them are related to each other through their respective mothers, then they must be both within five degrees from the common maternal ancestor. If one of them alone happens to be so related, then he should be within five degrees from the common ancestor and the other should be within seven degrees from him. This test is simple and more satisfactory than the involved and complicated rules enunciated by Dr. Sarvadhikari, rules which have been definitely disapproved by the Madras High Court in the case of *Kesar Singh* v. *Secretary of State*[1] where the question arose as follows:



The propositus is the son's son of the common ancestor and is third in descent from him. The claimant is the daughter's son's daughter's son of the common ancestor and is the fifth in descent from him. The question arose whether Kesar Singh is a heritable sapinda.

[1] 49 M. 652=24 L.W. 878=51 M.L.J. 16=1926 M.W.N. 540=1926 M. 981.

The case was elaborately argued and Justices Spencer and Venkatasubbarao after a learned review of the case-law and the principles involved in the question rejected Dr. Sarvadhikari's theory that a bandhu to be heritable must belong to the family of the propositus, or that of his mother's father, or that of his father's mother's father or that of his mother's mother's father, and laid down that there are only two tests of capacity for inheriting among bandhus which must be satisfied, these being (i) that sapinda relationship ceases, in the case of bhinnagotra sapindas or bandhus, after the 5th degree from the common ancestor in the mother's line and the 7th degree from the common ancestor in the father's line[w] and (ii) that there must be an element of mutuality between the claimant and the propositus, in other words, they must be so related that they are sapindas of each other. The other proposition of Professor Sarvadhikari that in the case of bandhus on the paternal side there cannot be more than two females between the claimant and the propositus and that if there are two females they must be related to each other as mother and daughter has been definitely disapproved. The obiter dictum in favour of Sarvadhikari's theory in *Umaid Bahadur* v. *Udoi Chand*[x] and the decision following it in *Chinna Pichu* v. *Padmanabha*[y] have been dissented from. Besides, the view of Professor Sarvadhikari finds no support in the texts of ancient commentaries[z] and "though it is developed with rigorous logic from the data put forth by its author, there is no sufficient foundation for these data in the Mitakshara to command its ready acceptance." (Dr. Jolly's Tagore Law Lectures for 1883, p. 216 quoted in *Kesar Singh's case*). The recent Full Bench decision of the Allahabad High Court in *Gajadhar Prasad* v. *Gawri Shankar*[a] approves of Dr. Sarvadhikari's rule and holds that a heritable bandhu cannot be lower than the common ancestor's daughter's grandson or the common ancestor's son's great-grandson, that is, there should be no great-grandmother in the line on either side of the common ancestor.

F—D—S—D—S
|
F
|
Propositus.

In this view the decision in that case was that the last male owner's father's father's daughter's son's daughter's sons are not his heritable bandhus.

(w) See, however, the recent case of *Brij Mohan* v. *Kishun*, 1938 A. 443 where it was held, relying on an observation of the Privy Council in *Ramchandra* v. *Vinayak*, 42 C. 384=41 I.A. 290=1914 P.C. 1, that a bandhu in order to have heritable rights must not be beyond the 5th degree from the common ancestor.

(x) 6 C. 119 (F.B.)

(y) 44 M. 121=12 L.W. 397=39 M.L.J. 417=1920 M.W.N. 609=1921 M. 671.

(z) *Kesar Singh* v. *Secretary of State*, 49 M. 652=51 M.L.J. 16=1926 M.W.N. 540=24 L.W. 878=1926 M. 881.

(a) 1932 A. 417=54 A. 698=1932 A.L.J. 533.

451. Order of Succession among bandhus.—The following rules may be taken as well established for ascertaining the order of succession among bandhus.

Rule 1. Atma bandhus succeed before pitru bandhus and pitru bandhus succeed before matru bandhus.(b)

Note :—Atma bandhus are cognate relatio[illegible] of the propositus in (1) his own line, (2) his father's line, (3) the line of his father's father and (4) the line of his mother's father. Pitru bandhus are those cognate relations who are related through the deceased's father and who are not atma bandhus and matru bandhus similarly are such relations through his mother who are not atma bandhus.

Rule 2. The enumeration of bandhus by the texts as coming within each class is not exhaustive, but only illustrative.(c)

Note :—Cognate relations like daughter's son's son,(d) daughter's daughter's son,(e) brother's daughter's son,(f) sister's daughter's son,(g) father's sister's daughter's son,(h) father's father's father's father's father's son's son's daughter's son,(i) maternal uncle,(j) mother's sister's son's son,(k) father's mother's father's daughter's son(l) etc., have been held to be heritable bandhus, though they do not come within the express enumeration in the texts.

Rule 3. Among bandhus of the same class, propinquity or nearness of blood is the test of preference.(m) Propinquity is to be determined by the proximity of the claimants' lines and hence a claimant in a nearer line excludes a claimant in a remoter line.(n)

(b) *Kenchava* v. *Girimallappa*, 51 I.A. 368=48 B. 569=26 Bom L.R. 779=20 L.W. 417=47 M.L.J. 401=22 A.L.J. 962=29 C.W.N. 271 1924 M.W.N. 719 1924 P.C. 209 ; *Adit Narayan* v. *Mahabir*, 48 I.A. 86=40 M.L.J. 270=19 A.L.J. 208 23 Bom. L.R. 692=25 C.W.N. 842=14 L.W. 20 1921 M.W.N. 153 =2 P.L.T. 97=1921 P.C. 53=60 I.C. 251 ; *Vedachela* v. *Subramania*, 48 I.A. 349=44 M. 753 28 C.W.N. 159=24 Bom. L.R. 649 =41 M.L.J. 676=14 L.W. 402=1921 M.W.N. 669=2 P.L.T. 707=1922 P.C. 33 ; *Muthusami* v. *Muthukumarasami*, 19 M. 405=23 I.A. 83 ; *Balasubramania* v. *Subbayya*, 65 I.A. 93=1938 P.C. 34 : 47 L.W. 110.

(c) *Gridhari Lal* v. *Government of Bengal*, 12 M.I.A. 448 ; *Vedachela* v. *Subramania*, 44 M. 753 26 C.W.N. 159=24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402 =1921 M.W.N. 669=2 P.L.T. 707=48 I.A. 349 1922 P.C. 33.

(d) *Krishnayya* v. *Pichamma*, 11 M. 287.

(e) *Tirumalacharlar* v. *Andal*, 30 M. 496 =17 M.L.J. 285 ; *Rampal* v. *Pan Mati*, 32 A. 640=7 I.C. 292=7 A.L.J. 776.

(f) *Mt. Doorga* v. *Janki*, 10 Beng. L.R. 341.

(g) *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 (F.B.)

(h) *Krishna* v. *Venkatarama*, 29 M. 115.

(i) *Manick Chand* v *Jagat Settani*, 17 C 518

(j) *Vedachela* v. *Subramania*, 44 M 753=26 C.W.N. 159=24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402 1921 M.W.N. 669=2 P.L.T. 707=48 I.A. 349=1922 P.C. 33.

(k) *Adit Narayan* v. *Mahabir Prasad*, 48 I.A. 86=14 L.W. 20=19 A.L.J. 208 23 Bom. L.R. 692=25 C.W.N. 842=1921 M.W.N. 153 =2 P.L.T. 97=40 M.L.J. 270=1921 P.C. 53.

(l) *Ananda Bibee* v. *Navnit Lal*, 9 C. 315.

(m) *Vedachela* v. *Subramania*, 44 M. 753=48 I.A. 349=26 C.W.N. 159=24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402=1921 M.W.N. 669=2 P.L.T. 707=1922 P.C. 33 ; *Jatindra* v. *Nagendra*, 35 C.W.N. 1153=58 I.A. 372=1931 P.C. 268=59 C. 576=61 M.L.J. 442=34 M. L.W. 485=33 Bom. L.R. 1411=1931 M.W.N. 978=1931 A.L.J. 1009.

(n) *Balusami* v. *Narayana*, 20 M. 342=7 M.L.J. 207 ; *Kalimuthu* v. *Ammamuthu*, 1934 M.W.N 820=58 M. 238=67 M.L.J. 503 =40 M.L.W. 376=1934 M. 611.

Thus as between daughter's daughter's son and father's daughter's son, both removed by three links, the former excludes the latter.[o]

Rule 4. Where the degree of blood relationship furnishes no certain guide, the test to be applied to discover the preferential heir is the capacity to offer oblations subject to the condition that, in applying the test of spiritual benefit, its quality is to be preferred to its quantity.[p]

Note.—In *Jatindra's* case, the rival claimants were the mother's sister's son and the father's half sister's son and the latter's claim was upheld as against the former's on the ground of spiritual benefit. The rule of preference of the whole blood to the half blood was held not material in deciding the propinquity of rival bandhus not descended from the same ancestor. In *Vedachela's* case it was held that as between mother's brother and the father's sister's son's son, the former excluded the latter both on the ground of propinquity and on the ground of spiritual efficacy; the rule of exclusion of a bandhu *ex parte materna* by a bandhu *ex parte paterna* is not to be applied where the rule of spiritual benefit is applicable, though where the test of spiritual benefit fails to guide, the rule of *ex parte paterna* excluding *ex parte materna* furnishes quite an intelligible test.[p a] In *Gaddam Ademma* v. *Anam Hanuman*[q] the rival claimants were the father's half-sister's son and mother's brother's son, both atmabandhus, and it was held, following *Jatindra's* case, that as among bandhus of the same class the spiritual benefit is a ground of preference as a measure of propinquity, the former was to be preferred to the latter. But the rule of spiritual benefit is not to be applied where the rule of nearness of blood with reference to the proximity of the claimants to the propositus does not fail to guide the preference. Hence as between the maternal uncle and father's sister's son, the former is the preferential heir as was held in *Navaneetha Krishna* v. *Collector of Tinnevelly*[r] and the Privy Council, while affirming this decision of the Madras High Court, discusses the question as follows in *Balasubramania* v. *Subbayya*[s]:—

"Both of these claimants admittedly belong to the class of cognates known to the Hindu Law as *atma bandhus*, i.e., cognates of the propositus

v. Ammamuthu, 1934 M. M.N. 820=40 M.L.W. 376=1934 M. 611=58 M. 238=67 M.L.J. 503.

(p) *Rami Reddi* v. *Gangi Reddi*, 48 M. 722=1925 M.W.N. 335=21 L.W. 476=1925 M. 807; *Vedachela* v. *Subramania*, 44 M. 753=48 I.A. 349=26 C.W.N. 159=24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402=1921 M.W.N. 669=2 P.L.T. 707=1922 P.C. 33; *Jatindra* v. *Nagendra*, 35 C.W.N. 1153=58 I.A. 372=1931 P.C. 268=59 C. 576=61 M.L.J. 442=34 M.L.W. 465=33 Bom. L.R. 1411=1931 M.W.N. 978=1931 A.L.J. 1009.

(p-a) *Kalimuthu* v. *Ammamuthu*, 58 M. 238; *Ram Charan* v. *Rahim*, 38 A. 416; *Saguna* v. *Sadashiv*, 26 B. 710.

(q) 46 M.L.W. 448=1937 M. 967=1937 M.W.N. 962.

(r) *Navaneethakrishna* v. *Collector of Tinnevelly*, 69 M.L.J. 632=1935 M.W.N. 1001—42 M.L.W. 875=1935 M. 1017. See contra in *Ram Nath* v. *Duni Chand*, 35 P. L.R. 519=1934 L. 622.

(s) 1938 P.C. 34=47 L.W. 110.

(the last male owner) who have precedence in questions of succession over *pitri bandhus*, i.e., cognates of his father, and *matri bandhus*, the cognates of his mother. The question between the claimants is as to the rights of such *atma bandhus inter se*. It is not disputed that Subbayya as the maternal uncle is a step nearer in degree to the propositus than the rival claimant as father's sister's son. But, for the latter it is contended that nearness in degree is no test as between *atma bandhus* and that the sole criterion should be religious efficacy, i.e., which of the two claimants would, by his religious offerings, confer most benefit upon the propositus in the other world, and it is admitted that upon this test Balasubrahmanya's claim would prevail. The question between them therefore seems to be a clear cut one, namely, which of the two is the proper test to apply.

At first sight it would appear that the question is covered by the direct authority of the Board: *Jatindra Nath Roy* v. *Nagendra Nath Roy*.(sa) In this case it was laid down that the test of religious efficacy was applicable between *atma bandhus* only when the parties were equal in degree. At the time the District Judge gave his judgment this case had not come up to the Board, but a decision given ten years previously (*Vedachela Mudaliar* v. *Subramania Mudaliar*,(sb)) in which a question as to the right of succession between *atma bandhus* was discussed, was before him, and relying upon it and upon the view taken in Mayne's Hindu Law he held that Subbayya was the preferential heir.

It was not until six years later—a delay which their Lordships greatly regret—that the appeal was heard in the High Court and by that time the report in *Jatindra's case* was available. The learned Judges thought that any possible doubt as to the rule to be applied was set at rest by this later decision, and they accordingly affirmed the judgment of the District Judge on this point.

Balasubrahmanya has nevertheless appealed to His Majesty in Council against the rejection of his claim. In his petition to the High Court for leave to appeal it was urged that the learned Judges of the High Court had misinterpreted *Jatindra's case*. But before their Lordships, Mr. Dunne, with characteristic courage, admits that he cannot distinguish it, but attacks the decision as unsound and in conflict with the reasoning in the earlier case: *Vedachela Mudaliar* v. *Subramania Mudaliar*.(sb)

It might be sufficient in the present case to say that the question is clearly covered by the latest decision of the Board, but in view of the able argument of Mr. Dunne it may perhaps be desirable to examine the position a little more closely.

The argument put shortly is that in *Vedachela Mudaliar* v. *Subramania Mudaliar* in which the contest was between the father's sister's son's son and the maternal uncle, the Board expressly affirmed certain rules which had been enunciated by Muthusami Ayyar, J. in a previous Madras case (*Muttusami* v. *Muttukumarasami*.(sc)) The last of these rules was "that as between bandhus of the same class the spiritual benefit they confer upon the propositus is, as stated in the Viramitrodaya, a ground of preference." The affirmation of this rule, it was contended, made spiritual benefit the sole test as between members of the class and treated nearness of degree as irrelevant. Mr. Dunne

(sa) 58 I.A. 372=34 L.W. 465=35 C.W.N. 1153=59 C. 576=61 M.L.J. 442 =33 Bom. L.R. 1411=1931 M.W.N. 978=1931 A.L.J. 1009=1931 P.C. 268.

(sb) 44 M 753=48 I.A. 349=26 C W. N. 159=24 Bom. L.R. 649=41 M.L.J. 676=14 L.W. 402=1921 M.W.N. 669=2 P L T. 707=1922 P.C. 33.

(sc) 16 M 23 at 30.

admitted that agnatic succession under the Mitakshara law as interpreted in Madras depends solely upon proximity of blood connection, and that the Bengal doctrine of religious efficacy has no application, but he claimed that the rule quoted above established that among cognates the exact opposite was the case, i.e., that proximity of blood relationship went out altogether and religious efficacy came in as the sole test.

Their Lordships think that such a change over would be, to say the least of it, remarkable. Mr. Mayne, in a passage that has often been quoted before the Board, after a detailed discussion of the Bengal law, says (S. 509):—

"When we go a stage back to Mitakshara and still more to the actual usage of those districts where Brahminical influence was less felt, the whole doctrine of religious efficacy seems to disappear. In the chapters which deal with succession, the Daya Bhaga and the Dayakrahma Sangraha appeal to that doctrine at every step, testing the claims of rival heirs by the numbers and nature of their respective offerings. The Mitakshara never once alludes to such a test."

It is also clear that the Viramitrodaya, Ch. III, pt. VII (5), which is the principal authority for the well recognised priority of *atma* bandhus over the two other classes, clearly bases it on propinquity. Their Lordships think, therefore, that it would be impossible to say that under the Mitakshara the principle of propinquity does not apply beyond agnatic succession.

A reference to the judgment delivered by Mr. Ameer Ali in *Vedachela's case* makes it clear that no such change over in the case of cognates was contemplated, and the rule above referred to, which was affirmed towards the end of the judgment, obviously does not make religious efficacy the only test among bandhus of the same class, though it does make it an admissible test, and it is perhaps worth noting that the view taken by the Subordinate Judge, to whose judgment their Lordships have referred and which was held to be well founded, was that the religious test was only applicable if the proximity test failed. The final conclusion at which the judgment of the Board then arrived is stated as follows (p. 364):—

"In the present case before their Lordships, the appellant and the deceased were sapindas to each other; and he (the appellant) is undoubtedly nearer in degree to the deceased than Subramania (the respondent). He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda. The deceased thus shares the merit, resulting from the appellant's oblations to the manes of his ancestors whereas the father's sister's son's son offers no pinda to the deceased's ancestors. On all these grounds their Lordships think that the view taken by the Subordinate Judge was well founded."

It is difficult to suggest that the Board had discarded the test of nearness of degree, and adopted only that of religious efficacy; they clearly applied both, and it is perhaps not without significance, in view of what the Subordinate Judge had said, that nearness of degree is put first.

In *Jatindra Nath Roy* v. *Nagendra Nath Roy* the question was between *atma bandhus*, admittedly equal in degree, so that the test of proximity was no guide, and it was laid down, strictly as their Lordships think, in accordance with the general scheme of the Mitakshara, that it was only when the test of proximity failed that religious efficacy came in. Their Lordships can see no inconsistency between the two decisions of the Board, and no antagonism between the later decision and the rule enunciated by *Muttusami Ayyar, J.* upon which Mr. Dunne relies so strongly. They must, therefore, confirm the

decision of both Courts of India that, as between claimants 2 and 3, Subbayya as nearer in degree to the last male owner is entitled to succeed to the estate."

Rule 5. Among bandhus equally propinquitous to the deceased, the half blood is excluded by the whole blood: see *Garuddas* v. *Laldas.*(t)

Rule 6. A female bandhu is excluded by a male bandhu.(u) In *Avudai Ammal* v. *Ramalinga,*(v) brother's daughter's son was held a preferential heir to a son's daughter on the ground that female bandhus take only after the male bandhus are exhausted.

The question whether a female atma bandhu is also excluded by a male pitru bandhu or male matru bandhu under this rule has not been so far directly decided though there are observations in the rulings to the effect that this question should be answered in the afirmative leading to the result that the first rule above enunciated of atma bandhu excluding pitru bandhu and the latter excluding a matru bandhu stands qualified to this extent.

Rule 7. Among bandhus equal in degree, a bandhu descended through a female is excluded by one descended through a male. Thus the mother's brother's son excludes the mother's sister's son.(w)

Rule 8. All other considerations being equal, a claimant between whom and the stem there intervenes only one female is to be preferred to that claimant who is separated from the stem by two such links.(x)

Illustrations.

Rule 1. Adit Narayan v. *Mahabir Prasad.*(y) Mother's father's father's daughter's son is to be excluded by mother's father's daughter's son's son because the former is a matru bandhu while the latter is an atma bandhu.

Muthuswami v. *Simambedu.*(z) Father's father's sister's son, being a pitru bandhu, is excluded by mother's brother, an atma bandhu.

Rule 2. See Note to Rule 2.

(t) 37 L.W. 772=60 I.A. 189=64 M.L.J. 660=37 C.W.N. 637=35 Bom. L.R. 595=1933 M.W.N. 557=14 P.L.T. 365 =1933 A.L.J. 774=1933 P.C. 141.

(u) *Kenchava* v. *Girimallappa,* 51 I.A. 368=48 B. 569=26 Bom. L.R. 779=20 L.W. 417=47 M.L.J. 401=22 A.L.J. 962=29 C.W.N. 271=1924 M.W.N. 719=1924 P.C. 209; *Venkata* v. *Surenani,* 31 M. 321=18 M.L.J. 409.

(v) 97 I.C. 314=1926 M. 1163.

(w) *Ram Charan* v. *Rahim Baksh,* 38 A. 416 34 I.C. 108=14 A.L.J. 538.

(x) *Tirumalacharlar* v. *Andal,* 30 M. 406=17 M.L.J. 285. But *see Vithal* v *Balu,* 60 B. 671 and *Rajeppa* v *Gangappa,* 47 B. 48 where the claimants are made to share equally.

(y) 48 I.A. 86=14 L.W. 20=19 A.L.J. 208=23 Bom. L.R. 692=25 C.W.N. 842=1921 M.W.N. 153=2 P.L.T. 97=40 M.L.J. 270=1921 P.C. 53.

(z) 23 I.A. 83=19 M. 405=6 M.L.J. 113 (P.C.)

Rule 3. Vedachela v. *Subramania.*[a] Maternal uncle being nearer in degree excludes the father's sister's son's son, both being atma bandhus.

Chengiah v. *Subbaraya.*[b] Mother's father's sister's son's son, a matru bandhu, being nearer in degree, excludes mother's father's brother's son's son's son, also a matru bandhu.

Balusami v. *Narayana.*[c] Father's daughter's son's son was preferred to the mother's father's daughter's son (both atma bandhus), the former being in a nearer line than the latter.

Rule 4. Jatindra v. *Nagendra.*[d] Father's half sister's son, an atma bandhu, excludes the mother's sister's son on the ground of spiritual efficacy.

Rule 6. Kenchava v. *Girimallappa.*[e] Father's sister's son excludes father's brother's daughter.

Avudai Ammal v. *Ramalinga.*[f] Brother's daughter's son is a preferential heir to a son's daughter, since female bandhus take only after all the male bandhus are exhausted.[g]

Rule 7. Ram Charan v. *Rahim Baksh.*[h] Mother's brother's son excludes a mother's sister's son because the latter is descended through a female, while the former is through a male.

Rule 8. Tirumalachariar v. *Andal.*[i] Daughter's son's son excludes a daughter's daughter's son because the latter is separated by two female links, while the former by only one.

Ram Charan v. *Rahim Baksh.*[h] Mother's brother's son excludes mother's sister's son because the latter is separated by two female links, while the former is separated by only one such link [in Bombay both the claimants are allowed to share equally.[j]] Formerly the Madras High Court in *Appandai* v. *Bagubali,*[k] preferred the mother's sister's son to the mother's brother's son on the ground that the latter was mentioned subsequent to the former in the textual enumeration of atma bandhus. But this view has been

(a) 48 I.A. 349—26 C.W.N. 159—24 Bom. L.R. 649—41 M.L.J. 676—14 L.W. 402=1921 M.W.N. 669=2 P.L.T. 707=1922 P.C. 33=44 M. 753.

(b) 31 L.W. 592=1930 M. 555=58 M.L.J. 562 1930 M.W.N. 537; See also *Duttatraya* v. *Gangabai,* 46 B. 541=1921 B. 321=24 Bom. L.R. 69.

(c) 20 M. 342=7 M.L.J. 207.

(d) 35 C.W.N. 1153—58 I.A. 372—1931 P.C 268—59 C. 578—61 M.L.J. 442—34 L.W 465—33 Bom. L.R. 1411—1931 M.W.N. 978 1931 A.L.J. 1009; See S. 461.

(e) 48 B. 569=51 I.A. 368=26 Bom. L.R. 779—20 L.W. 417=47 M.L.J. 401—22 A.L.J. 962—29 C.W.N. 271=1924 M.W.N. 719=1924 P.C. 269.

(f) 97 I.C. 314=1926 M. 1163.

(g) See also *Balkrishna Bhimaji* v. *Ramkrishna,* 45 B. 353=1921 B. 189=22 Bom. L.R. 1442; But see Act II of 1929.

(h) 38 A. 416—34 I.C. 108=14 A.L.J. 538.

(i) 30 M. 406=17 M.L.J. 285.

(j) *Rajappa* v. *Gangappa,* 47 B. 48=1922 B. 420—24 Bom. L.R. 789.

(k) 33 M. 439=5 I.C. 280=1910 M.W.N. 44—20 M.L.J. 275.

given up in a later case in *Rami Reddi* v. *Gangi Reddi*[l] on the ground that the test applicable to the case is the test of spiritual efficacy, and applying this test, it was held that the mother's brother's son excluded the mother's sister's son.

Female bandhus.—After the male bandhus come the following females in the Madras Presidency as heritable bandhus.

1. Half-sister.[m] 2. Brother's daughter.[n] 3. Sister's daughter.[o] 4. Father's sister.[p]

In addition to these, the sister,[q] son's daughter[r] and daughter's daughter[s] were also recognised as bandhus entitled to come in after the male bandhus, but these three, along with the sister's son, are now brought in among the sapindas as statutory heirs entitled to inherit in the order given in the Hindu Law of Inheritance (Amendment) Act of 1929 after the father's father and before the father's brother (*See* S. 446). The case of a step-sister is excluded.[t] But according to the Allahabad High Court women not expressly enumerated in the texts as heirs cannot inherit[u] and as these female bandhus are not enumerated in the texts, only the above statutory female bandhus are entitled to inherit.

452. Non-relations as heirs.—Certain non-relations such as the preceptor, the pupil and the fellow student have been conceded the right to inherit in the absence of the above agnatic and cognate relations under the texts of Apastamba and the Mitakshara.

Apastamba.—"If there be no male issue, the nearest kinsman inherits; or in default of kindred, the preceptor, or failing him, the disciple."[v]

Mitakshara.—"If there be no pupil the fellow student is the successor. He who received his investiture or instruction in reading or in the knowledge of the sense of scripture from the same preceptor is a fellow student."[w]

(l) 48 M. 722=21 L.W. 476=1925 M. 807 =1925 M.W.N. 335.

(m) *Kuppal* v. *Lakshmi*, 45 L.W. 688= 1937 M.W.N. 602=1937 M. 555; *Angamuthu* v. *Sinnapennammal*, 1938 M. 364= 47 L.W. 286; *Lakshmanammal* v. *Tiruvengada*, 5 M. 241.

(n) *Venkatasubramaniam* v. *Thayarammah*, 21 M. 263.

(o) *Sundrammal* v. *Rangasami*, 18 M. 193=4 M.L.J. 275.

(p) *Chinnammal* v. *Venkatachala*, 15 M. 421=2 M.L.J. 86.

(q) *Kutti* v. *Radakrishna*, 8 M.H.C.R. 86.

(r) *Nallanna* v. *Ponnal*, 14 M. 149=1 M. L.J. 46.

(s) *Ramappa* v. *Arumugath*, 17 M. 182 =4 M.L.J. 30.

(t) *Ram* v. *Mt. Sudesra*, 1933 A. 491= 1933 A.L.J. 680=55 A. 725.

(u) *Lallubhai* v. *Cassibai*, 7 I.A. 212=5 B. 110; *Nanhi* v. *Gauri*, 28 All. 187=2 A. L.J. 654; *Jagan Nath* v. *Champa*, 28 All. 307=3 A.L.J. 87; The same view is taken by the Lahore High Court, *Tirath* v. *Mt. Kahan*, 1 Lah. 588=1921 Lah. 149; *Mt. Gur* v. *Mt. Bhagan*, 134 I.C. 203; *Janga Bir* v. *Mt. Jamna*, 12 L. 534=1932 L. 37.

(v) Apastamba cited in Mit. II-vii-1.

(w) Mita. II—vii-3.

These texts are not obsolete,[x] and the preceptor, the pupil and the fellow student inherit in the order in which they are here mentioned. The imparting of purely religious instruction is the only test in determining the above heirs (Ibid) and if the same is duly proved, the Court will uphold the claim (Ibid).[y]

453. The Crown.—On failure of the above persons, the property escheats to the Crown as the *ultima haeres*,[z] and the text[a] that the wealth of a Brahmin must be given to a Brahmin and should never be taken by the King, was held incapable of enforcement by reason of the uncertainty of its object.[b] The Crown's right to take the property accrues on its showing that there is no one in existence who is in the line of the heirs under the Hindu Law. Mere blood relationship does not entitle a person to succeed in preference to the Crown.[c] Unless the Crown affirmatively establishes that there are no other heirs, the estate will not escheat to it.[d] When the Crown takes the property as the ultimate heir, it takes it as if it is an ordinary heir subject to any trust or charge validly created and free of it if the same is not justifiable and binding on the inheritance[e] and there is also upon it the duty of having the ceremonies to the deceased performed by some body competent to do them.[f]

454. Succession among reunited members.—According to the Viramitrodaya (Chapter iv), the following is the order of succession among those reuniting after a partition: (1 to 3) son, grandson and great-grandson, (4) reunited full brother, (5) reunited half brother and separated full brother sharing together,[g] (6) reunited mother. (7) reunited father, (8) other reunited coparceners. (Other persons are given in an order which is not based on any principle. The following persons in the order in which they are given may be allowed to succeed the above persons as this order accords with the general scheme of succession under the Mitakshara). (9) widow, (10) daughter, (11) daughter's son, (12) mother not reunited, (13) father not reunited, (14) half brother not reunited, (15) sister.

(x) *Sambasivam* v. *Secretary of State*, M. 704=13 L.W. 638=1921 M. 537=41 L.J. 109=1921 M.W.N. 481.

(y) *Parbhudayal* v. *Lalta Das*, 92 I.C. 14=1926 Oudh. 293.

(z) *Collector of Masulipatam* v. *Cavaly Venkata*, 8 M.I.A. 500 (P.C.).

(a) Mit. II—vii-5.

(b) *Collector of Masulipatam* v. *Cavaly Venkata*, 8 M.I.A. 500; *Sonnet Kooer* v. *immut*, 1 C. 391=3 I.A. 92.

(c) *Satish Chandra* v. *Haridas Mitra*, 38 C.W.N. 98—1934 C. 399.

(d) *Gridhari Lal* v. *Government of Bengal*, 12 M.I.A. 448; *Ganpat Rama* v. *Secretary of State*, 45 B. 1106=1921 B. 138=23 Bom. L.R. 462.

(e) *Cavaly Venkata* v. *Collector of Masulipatam*, 11 M.I.A. 619.

(f) *Bhyah Ram* v. *Bhyah Ugur*, 13 M.I.A 373.

(g) *Ramasami* v. *Venkatesam*, 16 M. 440=3 M.L.J. 107.

SUCCESSION TO MALES IN THE BOMBAY PRESIDENCY

455. Determination of heirs.—In the Bombay Presidency by reason of the term "sapinda" in Manu's text being construed as "sapinda male or female," a number of females have been let in as heirs either as gotraja sapindas, widows of such sapindas, or bandhus.

456. Female gotraja sapindas.—These are the females born in the gotra or family such as the daughter, sister,[h] including the half sister, and father's sister. They take the property absolutely,[i] and when two or more daughters or sisters or father's sisters[j] succeed to the estate, they take as tenants-in-common and not as joint tenants with rights of survivorship.[k]

457. Widows of gotraja sapindas.—These are the widows of sapindas and samanodakas of the deceased, such as, (1) son's widow, (2) brother's widow, (3) mother, (4) step-mother etc. A widow of a gotraja sapinda can succeed only (1) if she has not remarried,[l] (2) after the brother's son[m] with whom according to the Bombay High Court the compact series of heirs ends[m] and after the sister and half sister and (3) if there is no qualified male gotraja sapinda within 7 degrees from the common ancestor in the line to which her husband belonged.[n] When these conditions are fulfilled, she will succeed in the place occupied by her husband, that is, she will succeed only if there is no widow of a nearer gotraja sapinda, either in the same line or in a nearer line.[o] The nature of the estate that a widow of a gotraja sapinda takes depends upon whether she inherits to a male or to a female: if she inherits to a male she takes a limited estate, but if to a female, an absolute estate.[p]

458. Female bandhus.—These are the daughters of descendants,[q] ascendants and collaterals[r] upto the fifth degree and the

(h) *Dattatraya* v. *Matha Bala*, 58 B. 119 35 Bom. L.R. 1131=1934 B. 36, a case of an illegitimate daughter succeeding to the illegitimate son of the same mother: *Bhagwan* v. *Warubai*, 32 B. 300.

(i) *Bhagirthibai* v. *Khanujirao*, 11 B. 285 (F.B.); *Bhau* v. *Raghunath*, 30 B. 229=7 Bom. L.R. 936.

(j) *Ganesh* v. *Waghu*, 27 B. 610=5 Bom. L.R. 581; Father's sister succeeds after all other gotraja sapindas.

(k) *Vithappa* v. *Savitri*, 34 B. 510=7 I. C. 445=12 Bom. L.R. 487; *Rindabai* v. *Anacharya*, 15 B. 206.

(l) *Pranjivan* v. *Bai Bhiki*, 45 B. 1247=1921 B. 57 -23 Bom. L.R. 553.

(m) *Appaji* v. *Mohanlal*, 54 B. 584=1930 B. 273=32 Bom. L.R. 709.

(n) *Rachava* v. *Kalingapa*, 16 B. 716; *Lallubhai* v. *Cassibai*, 7 I.A. 22–5 B. 110; *Nahalchand* v. *Hemchand*, 9 B. 31 at 34.

(o) *Basangavda* v. *Basangavda*, 39 B. 87=27 I.C. 167—16 Bom. L.R. 699; *Raghunath* v. *Lakshmibai*, 59 B. 417=37 Bom L.R. 150=1935 B. 298

(p) *Bhau* v *Raghunath*, 30 B. 229–7 Bom. L.R 936; *Gandhi* v. *Bai Jadab*, 24 B. 192=1 Bom. L.R. 574.

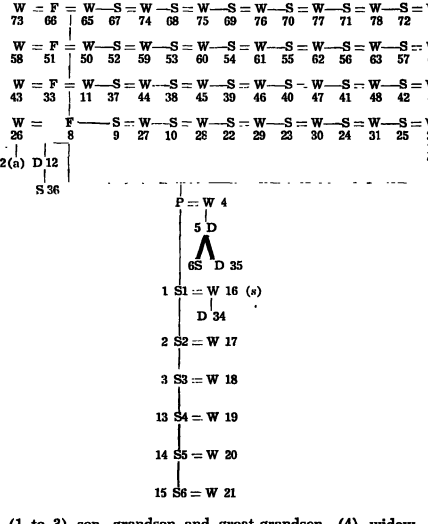
(q) *Gangaram* v. *Balia*, (1876) Bom. P.G. 31.

(r) *Vijli* v. *Prabhalakshmi*, 9 Bom. L.R. 1129; *Kenchava* v. *Girimallappa*, 48 B. 569=51 I.A. 368=26 Bom. L.R. 779=20 L. W. 417—47 M.L.J. 401=22 A.L.J. 962—29 C.W.N. 271=1924 M.W.N. 719—1924 P.C. 209 (Paternal uncle's daughter); *Bal-*

test to be applied in ascertaining their order of succession is the test of nearness of blood.

459. The order of succession to males according to the Mitakshara in the Bombay Presidency.

The following table gives the order of succession of heirs according to the Mitakshara in the Bombay School as indicated by the decisions, especially *Rachava* v. *Kalingappa*. 16 B. 716 ; *Kashibai* v. *Moreshwar*, 35 B. 389 ; *Shidramappa* v. *Neelawa*, 57 B. 377 ; and *Appaji* v. *Mohanlal*, 54 B. 564.



(1 to 3) son, grandson and great-grandson, (4) widow, (5) daughter, (6) daughter's son, (7) mother, (8) father, (9) brother, (10) brother's son, (11) father's mother, (12) sister—full sister succeeding before half sister, (13) S4, (14) S5, (15) S6, (16) son's

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krishna v. *Ramkrishna*, 45 B. 353 (Brother's daughter); *Dattatraya* v. *Gangabhai*, 46 B. 541 ; *Shidramappa* v. *Neelawa*, 57 B. 377.

(a) *Appaji* v. *Mohanlal*, 54 B. 564=1930 B. 273=32 Bom. L.R. 709.

widow, (17) S2's widow, (18) S3's widow, (19) S4's widow, (20) S5's widow, (21) S6's widow, (22) brother's son's son, (23) brother's son's son's son, (24) brother's son's son's son's son, (25) brother's son's son's son's son's son, (26 to 32) step-mother and widows of brother and his five male descendants, (33) father's father, (34 to 36) son's daughter, daughter's daughter and sister's son who are statutory heirs under the Hindu Law of Inheritance (Amendment) Act of 1929, (37 to 42) father's father's six male descendants in the male line, (43 to 49) father's step-mother and widows of Nos. 37 to 42, (50) father's father's mother, (51) father's father's father, (52 to 57) his six male descendants, (58) father's father's step-mother, (59 to 64) widows of 52 to 57 etc. etc.

460. Order of succession to males under the Mayukha. (Mayukha 1-V-8).

(1 to 3) son, son's son and son's son's son, (4) widow, (5) daughter, (6) daughter's son, (7) father, (8) mother, (9) full brothers and sons of predeceased full brothers, (10) full brother's son, (11) father's mother, (12) full sister, (13) half brother and father's father sharing equally, (14) son's daughter, (15) daughter's daughter, (16) sister's son, (17) half sister.

As the Mayukha does not contain any logical indication of the order of the other heirs, the order given according to the Mitakshara in the Bombay Presidency may be adopted for its determination.

PRINCIPLES OF SUCCESSION UNDER THE DAYABHAGA.

461. Classes of heirs.—There are three classes of heirs under the Dayabhaga: (1) Sapindas, (2) Sakulyas, and (3) Samanodakas.

Note: Under the Dayabhaga, the right to inherit is determined by the capacity for conferring spiritual benefit on the deceased,[t] though where the theory of spiritual benefit cannot apply, the principle of propinquity enunciated by the Mitakshara is to be resorted to.[u] "In most cases, propinquity, spiritual efficacy, and natural love and affection run in the same lines and no difficulty arises, but wherever they run in different lines, Jimutavahana was compelled to ignore spiritual efficacy and have recourse to other principles or express texts:" per Mitra, J. in *Akshay Chandra* v. *Hari Das.*[v] The classification of heirs as above given into three groups is based upon the significance of certain offerings to the ancestors at the ceremony called the Parvana Shradh. This is the

(t) *Sambhu Chandra* v. *Kartick Chandra*, 54 C. 171=1927 C. 11.

(u) *Nalinaksha* v. *Rajanikanta*, 35 C.W N. 726=58 C. 1392=1931 C. 741.

(v) 35 C. 721=12 C.W.N. 511.

Shradh performed during each conjunction of the sun and the moon when certain oblations are presented to the deceased ancestors in the shape of pindas, pinda lepas, udaka or water. *Pindas* are the entire balls of food addressed to the father, father's father and father's father's father, their respective wives, and mother's father, her father's father and her father's father's father. *Pinda lepas* are the remnants of those balls or pindas, which are offered to the paternal ancestors from the fourth to the sixth degree, that is, father's father's father's father, father's father's father's father's father and father's father's father's father's father's father. *Udaka* or *water* is then offered to the agnatic ascendants from the 7th to the 13th degree, that is, seven ancestors above the remotest ancestor to whom pinda lepa, also known as divided oblation as distinguished from pinda or undivided oblation, is offered. The sapinda relationship arises out of the capacity to benefit by the offering of pinda, the sakulya relationship out of the capacity to benefit by offering of the pinda lepa and the samanodaka relationship out of the capacity to benefit by offering the udaka or libations of water. Any one of these relationships may arise in one of three ways, (1) by offer, (2) by acceptance and (3) by participation. A Hindu is said to participate in the benefit of oblations tendered to those ancestors to whom he himself is bound to offer them Thus he who is bound to offer pinda to the deceased, he to whom the deceased was bound to offer pinda during his life-time and he who is bound to offer pinda to one to whom the deceased himself was bound to offer it, if alive, are all sapindas of the deceased.[w] In the same way the sakulya relationship and the samanodaka relationship arise.

Objections to the oblation theory.—Golabchandra Sarkar Sastri in his treatise on Hindu Law offers some objections against the above exposition of the sapinda relationship based on the oblation theory, and chief among them are: (1) that the oblations are offered only for the benefit of the offerer, and not for the benefit of the offeree; (2) that the doctrine of spiritual benefit contravenes the fundamental doctrine of Hindu religion, namely, the doctrine of karma under which every man is the architect of his own happiness or misery and cannot be aided by what another may do to him; and (3) that according to the text of Manu[x] there is no such thing as oblations being offered to any ancestor beyond the third degree.

Guru Gobind v. Anand Lal, L.R. 15 at 36 to 41=13 W.R. 49 (F.B.)

"Now, it is beyond all dispute that the whole of this portion of the Dayabhaga is nothing but a mere elaboration of the doctrine of spiritual benefit. Every point for which a discussion is thought necessary is ultimately deter-

(w) *Guru Gobind* v. *Anand Lal*, 5 Beng. L.R. 15. The test is the duty to perform and not the fact of performance; *Jatindra* v. *Nagendra*, 59 C. 576=58 I.A. 372=1931 P.C. 268.

(x) Manu, ix-180-187.

mined by that doctrine; and it is by that doctrine that every difficulty is ultimately removed. The texts of Manu and various other Hindu sages are frequently cited, it is true, as the highest authorities on Hindu Law, but it is by the light of the doctrine of spiritual benefit that every one of those texts is interpreted, and it is by that light that every discrepancy existing between them is reconciled.

If examples are necessary, we have only to go through the 11th Chapter of the Dayabhaga, which contains the whole law of inheritance relating to the estate of one who has left neither sons, nor grandsons, nor great-grandsons. It will be seen, that the first and most prominent characteristic of the order of succession laid down in this Chapter, is the studious exclusion of female relatives generally. It is to be borne in mind that these relatives are as a class disqualified by their sex to perform the religious ceremonies prescribed by the Hindu Shastras for the promotion of the spiritual welfare of a deceased individual; and hence it is that the author of the Dayabhaga has generally excluded them from the category of heirs. The few that are allowed to come in are allowed to do so on the authority of special texts, but even in their case the doctrine of spiritual benefit is expressly put forward as the ultimate reason for the selection. Thus, for instance, the widow is no more competent than other relatives of her sex to perform the ceremony of the Parbana Shradh to which we shall have to refer more specifically hereafter; but she is, nevertheless, according to the author of the Dayabhaga, "half the body of her deceased husband," and the consequences of all her acts, whether virtuous or vicious, must be necessarily borne by his soul. It is for this reason that she is recognized as an heir, and it is by the light of that reason that the numerous conflicting texts bearing upon her case are reconciled with one another. "Since by these and other texts," he says (Colebrooke's Dayabhaga, verse 44, Section I, Chapter XI.), "it is declared that the wife rescues her husband from hell, and since a woman doing improper acts through indigence causes her husband to fall into a region of horror, for they share alike the fruits of virtue and vice, therefore the wealth devolving on her is *for the benefit of the former proprietor, and the wife's succession is consequently proper.*" The discussion on the question of precedence between the widow on the one side, and the son, the grandson and the great-grandson on the other, is significant. If the widow is really half the body of her husband, how is it that sons, grandsons, and great-grandsons are allowed to supersede her? The author of the Dayabhaga answers the objection by stating that the power of the widow to confer spiritual benefit commences from the date of her husband's death, whereas, sons, grandsons, and great-grandsons confer such benefit from the moment of their birth—see verse 43, Section I, Chapter XI.

The next exception made is in the case of the daughter, and she is allowed to come in because she can confer great spiritual benefit on her father, by giving birth to a son who will deliver him and his ancestors from hell, and hence it is that those daughters who are barren or childless widows are carefully excluded from the line of inheritance. The maiden daughter is allowed to come in first, because her marriage might be delayed on account of indigence beyond the age of puberty, and the salvation of her father's soul and of those of his ancestors might be thereby jeopardized; so that even here the spiritual welfare of the deceased proprietor is distinctly recognised as the ultimate ground of the decision. The same remarks are also applicable to the mother, the grandmother, &c., for it will be seen that in each of these cases, some peculiar spiritual benefit or other is invariably put forward as the basis of the discussion.

that of inheritance.

› preceding observations that the principle of spiri-
inded

onfer any such benefit on the deceased proprietor. We are of opinion
he is, and we may add that this point was not even contested before
the pleader of the respondent.

That the paternal uncle's daughter's son of a Hindu is one of his *sapindas*, is a proposition beyond all controversy. The whole doctrine for *sapinda* is contained in the following passage of the Dayabhaga:

"Since the father and certain other ancestors partake of three funeral oblations as participating in the offering at obsequies, and since the son and other descendants to the number of three present oblations to the deceased (or to be shared by his *manes*) ; and he who while living presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person ; therefore, such being the case, the middle-most of seven who, while living, offered food to the *manes* of ancestors, and when dead partook of offering made to them, became the object to which the oblations of his descendants were addressed in their life-time and shares with them, when they are deceased, the food which must be offered by the daughter's son and other descendants beyond the third degree. Hence, those ancestors to whom he presented oblations, and those descendants who present oblations to him, partake of an undivided offering in the form of (*pinda*) food at obsequies. Persons who partake of such offerings are *sapindas*."—Colebrooke's Dayabhaga, Chapter XI, Section 1, verse 38.

It is clear from the above passage, that if two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors ; and hence it is that the person who offers those oblations, the person to whom they are offered, and the person who participates in them, are recognized as *sapindas* of each other. That this definition of *sapinda* is good for all purposes of inheritance is conclusively shown by the very next verse, which says :

"This relation of *sapindas* (extending no further than the fourth degree) as well as that of *sakulyas*, has been propounded relatively to inheritance."—Colebrooke's Dayabhaga, Chapter XI, Section 1, verse 39.

In order to apply this definition to the particular case under our consideration, we think it necessary to make a few preliminary observations on the ceremony of the Parbana Shradh, which has been already referred to in an earlier part of this judgment. This ceremony consists in the presentation of a certain number of oblations, namely, one to each of the first three ancestors in the paternal and maternal lines respectively ; or, in other words, to the father, the grandfather and the great-grandfather in the one line, and the maternal grandfather, the maternal great-grandfather, and the maternal great-great-grandfather in the other. It is for this reason that this ceremony is frequently referred to in the Dayabhaga under the name of the *Troipurosik Pind*, or Pind relating to three ancestors : and it is through the oblations presented at this ceremony, that the relation of *sapinda* propounded in that treatise admittedly arises. Every Hindu is bound by his religion to perform this ceremony, for, his own salvation, which is intimately connected with that of his ancestors, is absolutely dependent on such performance; and of all the ceremonies prescribed by that religion, it is, therefore the most important.

Such then being the nature of the Parbana Shradh, and of the obligation to perform it, it is clear that the deceased proprietor was just as much bound to fulfil that obligation as his paternal uncle's daughter's son, who is now claiming his estate by right of inheritance. Now, it is obvious, from the very position of the parties, that the maternal great-grandfather and the maternal great-great-grandfather of the latter are no other persons than the paternal grandfather and the paternal great-grandfather respectively of the former ; and the conclusion is, therefore, inevitable that they are *sapindas* of each other according to the strictest interpretation of the Dayabhaga. The deceased pro-

prietor was bound to offer funeral cakes to his own paternal grandfather and paternal great-grandfather, during his lifetime; and he is, therefore, entitled, after his death, to participate in the cakes that are now offered to those very persons by the son of his paternal uncle's daughter."

462. Rules for determining the order of succession under the Dayabhaga.

1. The sapindas come before the sakulyas(y) and the Sakulyas come before the Samanodakas.

2. *Among the sapindas*:

(a) He who is bound to offer pinda to the deceased excludes one to whom the deceased would be bound to offer it if alive.(z)

(b) He who is bound to offer pinda to the deceased is preferred to one who is bound to offer it to any of his ancestors.(a)

(c) He who is competent to offer pindas to both the paternal and maternal ancestors of the deceased is to be preferred to one who is competent to offer pinda only to the paternal or maternal ancestors.(b)

(d) He who is competent to offer pinda to a paternal ancestor is to be preferred to one who is competent to offer it only to the maternal ancestor.(c)

(e) He who is competent to offer pinda to a nearer ancestor is to be preferred to one who can offer it only to a remoter ancestor, irrespective of the number of cakes offerable by each.(d)

(f) He who offers a larger number of pindas of a particular description is to be preferred to one who is competent to offer only a less number of pindas of the same description.(e)

(g) He who is an agnatic sapinda in a given line is to be preferred to one who is a cognate sapinda in the same line.(f)

(h) Where these rules are inapplicable, the rule of propinquity or nearness of blood is to be applied.(g)

(i) Sapindas *ex parte paterna* exclude sapindas *ex parte materna*.

(y) *Digumber* v. *Moti*, 9 C. 563.

(z) *Gobind* v. *Mohesh*, 23 W.R. 117.

(a) *Guru Gobind* v. *Anand Lal*, 13 W.R. 49—5 Beng. L.R. 15 (F.B.)

(b) *Huri Das* v. *Bama Churn*, 15 C. 780.

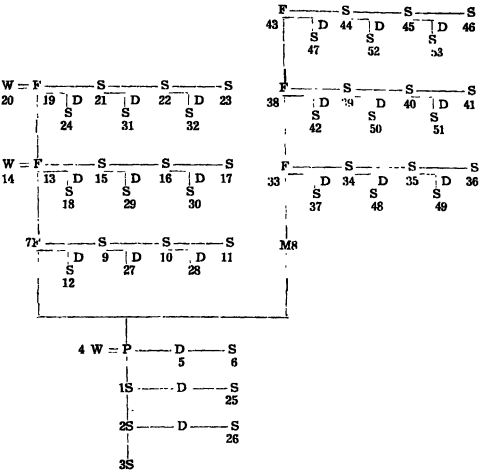
(c) *Sheo Soondary* v. *Pirthee Singh*, 4 I.A. 147.

(d) *Pran Nath* v. *Surrat* 8 C. 460.

(e) *Guru Gobind* v. *Anand Lal*, 13 W.R. 49.

(f) *Rajkishore* v. *Gobind*, 1 C. 27 (F.B.).

(g) *Akshoy Chandra* v. *Hari Das*, 35 C. 721—12 C.W.N. 511; *Nalinaksha* v. *Rajanikanta*, 35 C.W.N. 726—1931 C. 741—58 C. 1392.



This table indicating the order of succession among the sapindas under the Dayabhaga yields, when analysed, the following rules for determining precedence amongst them.

1. Those who offer to the propositus or to his paternal ancestors, and such paternal ancestors exclude his maternal ancestors and those who offer only to the maternal ancestors

2. An ancestor takes before his descendants in the collateral line.

3. Those who offer paternal offerings or first maternal offering to the propositus exclude those who offer them to ancestors.

4. Those who make paternal offerings and first maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.

5. Those who make paternal offerings exclude those who make maternal offerings.

6. Those who make 2nd and 3rd maternal offerings to the propositus exclude those who make them to ancestors.

7. Those who make such 2nd and 3rd maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.

8. Those who make nearer paternal offerings to the same ancestor exclude those who make remoter paternal offerings.

Note :—(a) Paternal offering means an offering made to a paternal ancestor of the offerer and, in the same way, a maternal offering means an offering made to a maternal ancestor of the offerer.

(b) First maternal offering means an offering made to offerer's first maternal ancestor. So also in the case of a paternal offering. Nearer offering, paternal or maternal, means an offering made by one who is nearer the ancestor to whom the offering is made.

Female heirs under the Dayabhaga :—The only females that can inherit to a male under the Dayabhaga are those expressly mentioned in the texts, namely, (1) widow, (2) daughter, (3) mother, (4) father's mother and (5) father's father's mother. All these come under the class of sapindas.

463. Order of succession among sapindas under the Dayabhaga.

1 to 3, son, son of a deceased son, and great grandson whose father and grandfather are dead. These succeed together.

4 widow who is chaste (*Moniram* v. *Keri*, 5 C. 776=7 I.A. 115).

5 daughter.

Note :—A daughter who is unchaste,(h) or is barren or widowed without male issue,(i) is excluded from inheritance. An unmarried daughter excludes a married daughter. A daughter takes only a limited estate and when there are two or more daughters they take as joint tenants with rights of survivorship.

6. Daughter's son, 7. Father, 8. Mother, 9. Brother (step-brother comes after brother),(j) 10. Brother's son, 11. Brother's son's son, 12. Sister's son, 13. Father's father, 14. Father's mother, 15. Father's father's son, 16. Father's father's son's son, 17. Father's father's son's son's son, 18. Father's sister's son, 19. Father's father's father, 20. Father's father's mother, 21. Father's father's father's son, 22. Father's father's father's son's son, 23. Father's father's father's son's son's son, 24. Father's father's father's daughter's son, 25. Son's daughter's son, 26. Son's son's daughter's son, 27. Brother's daughter's son, 28. Brother's son's daughter's son, 29. Father's father's son's daughter's son. 30. Father's father's son's son's daughter's son. 31. Father's father's father's son's daughter's son, 32. Father's father's father's son's son's daughter's son, 33. Mother's father, 34. Mother's father's son. 35. Mother's father's son's son, 36. Mother's father's son's son's son, 37. Mother's sister's son, 38. Mother's father's father, 39. Mother's father's father's son, 40. Mother's father's father's son's son, 41. Mother's father's father's son's son's son, 42. Mother's father's father's daughter's son, 43. Mother's father's father's father, 44. Mother's father's father's father's son, 45. Mother's father's father's father's son's son, 46. Mother's father's father's father's son's son's son, 47. Mother's father's father's

(h) *Sundari* v. *Pitambari*, 32 C. 871=9 C.W.N. 1003 ; *Bhaba Kanta* v. *Kerpai*, 38 C.W.N. 1095=1935 C. 144.

(i) *Binodini* v. *Susthee*, 48 C. 300=1921 C. 295=26 C.W.N. 29.

(j) *Susheelasundari* v. *Bishnupada*, 37 C.W.N. 329=60 Cal. 636=1933 C. 622.

father's daughter's son, 48. Mother's father's son's daughter's son, 49. Mother's father's son's son's daughter's son, 50. Mother's father's father's son's daughter's son, 51. Mother's father's father's son's son's daughter's son, 52 Mother's father's father's father's son's daughter's son, 53. Mother's father's father's father's son's son's daughter's son.

464. Order of succession among sakulyas and samanodakas:—This is to be ascertained by the application (so far as they are applicable) of the principles given for ascertaining the order among the sapindas.

465. Ultimate heirs.—As in the Mitakshara, so in the Dayabhaga, the preceptor, the pupil and the fellow student succeed, in the order given, to the estate of a deceased Hindu on failure of the sapindas, sakulyas and Samanodakas. On failure of these, the Crown takes the estate as the *ultima haeres.*

466. Order of Succession on reunion.—Even under the Dayabhaga Law the reason for inheritance by a reunited coparcener is not spiritual benefit, but a *quasi* contractual relation and affection for each other.(k) The order of succession given for a Mitakshara reunited family may be adopted also under the Dayabhaga.(l)

(k) *Akshoy Chandra* v. *Hari Das*, 35 C. 721=12 C.W.N. 511.

(l) See *Abhai Churn* v. *Mangal*, 19 C 634.

CHAPTER XIII.

STRIDHANA.

467. Origin and history of Stridhana.—The settled property of a married woman, incapable of alienation by her husband, is well known to the Hindus under the name of Stridhana, and it is certainly a remarkable fact that the institution seems to have been developed among them at a period relatively much earlier than among the Romans.[a] Even in the dim twilight of the early Vedic period, it is possible to discern some indications of a theory of perfect equality once subsisting between the parties to a marriage.[b] Instead of being matured and improved as it was in the Western Society, under various influences which may partly be traced, in the East it has been gradually reduced to dimensions and importance far inferior to those which at one time belonged to it.[c] Thus when the Code of Manu was drawn up, the female sex had fallen to a distinctly lower position. A woman was never to seek independence, no religious rite was allowed to her apart from her husband: she must revere him as a God.[b] According to both Manu and Katyayana, a woman's earnings were absolutely at the disposal of the man to whom she belonged.[d] Still certain kinds of property were recognised as belonging to the wife: "(1) what was given before the nuptial fire (Adhyagni), (2) what was given on the bridal procession (Adhyavahanika), (3) what was given in token of love (Dattam pritikarmani), and what was received from (4) a brother, (5) mother, or (6) father, are considered as the six-fold property of a married woman."[e] Under the class (3) "what was given in token of love", Katyayana brings gifts through affection by mother-in-law and father-in-daw (Pritidatta) and also those made by the elders at the time of obeisance at their feet (Padavandanika).[f] To this list Vishnu adds "what she received on supersession or on her husband's marriage to another (Adhivedanika),[g] what has been given to her by her relations (Anwadheyaka) subsequent to marriage. and *Sulka*." Yagnyavalkya, in giving a list of the above mentioned kinds of Stridhana, terminates it with "adya" or "etc." This term "adya" was expanded by

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(a) Sir Henry Maine's Early Institutions.

(b) *Vijiarangam* v. *Lakshuman*, 8 Bom. H.C. 244.

(c) Maine's Early Institutions.

(d) Manu, viii.; S. 416; Dayabhaga, iv-1-19.

(e) Manu, ix-194, 195.

(f) Mitak., II-xi-5 where Katyayana is cited.

Vignaneswara into " and also property which she may have acquired by inheritance, purchase, partition, seizure and finding ".(h)

468. Definition of Stridhana.—During the voluminous discussions, ancient and modern, which have arisen with regard to the separate property of women under Hindu law, its qualities, its kinds and its line of descent, the question has constantly been found in the forefront, what is Stridhana? Vignaneswara's expanded definition of Stridhana in the Mitakshara, was accepted by the Benares (Viramitrodaya V-1-2) and Mayukha Schools (iv-10-2 and 26) and generally by the Madras High Court,(i) but was not adopted by the Mithila(j) and the Dayabhaga Schools. The Bengal School of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively, to the kinds of women's property enumerated in the primitive sacred texts, the Smritis. The author of the Mitakshara and some other authors apply the term broadly to every kind of property which a woman can possess from whatever source it may be derived.(k) The Privy Council in *Sheo Shankar* v. *Debi Sahai*(k) confined the Stridhana proper to property classified as such by Manu and Katyayana and disapproved of the extension given by Yagnyavalkya. Stridhana must be confined to such property of a woman over which she possesses an unfettered power of disposal. This power depends upon the School to which she belongs, her status at the time of acquisition and the source of such acquisition.

469. Sources of acquisition.—The sources of acquisition of property in a woman's possession are the following:

1. Gifts before marriage.
2. Wedding gifts.
3. Gifts subsequent to marriage.
4. Self-acquisitions.
5. Inheritance.
6. Purchase.
7. Partition.
8. Adverse possession.
9. Maintenance claim.
10. Other sources.

470. Gifts to a maiden.—Property gifted or bequeathed to a female in her maiden state is her absolute property whether the

(h) Mitak., II-xi-2

(i) *Salemma* v. *Lutchmana*, 21 M. 100 =8 M.L.J. 14; see also *Subramanian* v. *Arunachelam*, 28 M.1. (F.B.).

(j) *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487.

(k) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468=30 I.A. 202=13 M.L.J. 330=5 Bom. L.R. 528=7 C.W.N. 831 (P.C.).

gift be from relations or strangers,[l] and her relations, whether father, mother, or brothers, have no right over it.

471. Wedding gifts.—Properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhyagnic or Adhyavahanic, are the bride's Stridhana.

472. Gifts subsequent to marriage.—Properties given to a woman subsequent to her marriage might have been given to her either by her husband or by others. When a husband gives properties to his wife, either under a gift *inter vivos* or by will, it is a question of construction of the deed of gift or will, whether the husband intended her to take the property absolutely as her stridhana property or only for a qualified interest. The later judicial view seems to be that in the absence of words in the deed indicating the contrary intention, the presumption is that the donee takes the property as an absolute owner and this view seems to be more in consonance with the present day sentiment of the Hindus which, owing to the influence of western civilisation and culture, abhors any distinction being created in the legal rights of parties, merely because of sex.[m] Properties given or bequeathed to a woman by her relations or strangers during coverture[n] or widowhood,[o] are her Stridhana, except that under the Dayabhaga and the Mithila Schools, property given by a stranger during coverture is subject to her husband's dominion and becomes her absolute property only after his death.[p]

473. Self-acquisition.

Katyayana.—"The wealth which is earned by mechanical arts or which is received through affection from strangers is always subject to her husband's dominion".[q]

This text is construed to refer only to property acquired by self-exertion during coverture,[r] and hence property acquired by mechanical arts or by her own individual skill and industry during her maidenhood or widowhood is held to constitute her Stridhana[s] according to all the Schools. Property acquired by such means even during coverture is Stridhana[t] except under the Dayabhaga where it becomes her absolute property only after her husband's death. Where acquisitions are made in a joint trade conducted by

(l) Mitakshara, ii-2-30; *Venkata* v. *Venkata*, 1 M. 281; *Judoonath* v. *Bussunt*, 11 Beng. L.R. 286; Dayabhaga, iv-1-20.

(m) See S. 404. *Hilaising* v. *Udesing*, 39 Bom. L.R. 1217—1938 B 125.

(n) *Salemma* v. *Lutchmana*, 21 M. 100 8 M.L.J. 14.

(o) *Brij Indar* v. *Ranee Janki*, 1 C.L.R. 318—5 I.A. 1; *Salemma* v. *Lutchmana*, 21 M. 100—8 M.L.J. 14; *Ram Gopal* v. *Narain*, 33 C. 315; *Basanta Kumari* v. *Kamikshya*, 32 I.A 181 33 C. 23; *Bai Narmada* v. *Bhagwantrai*, 12 B. 505.

(p) Dayabhaga, iv-1-20.

(q) Cited in the Dayabhaga, iv-1-19; See also *Ram Gopal* v. *Narain*, 33 C. 315

(r) Dayabhaga, iv-1-20.

(s) *Subramanian* v. *Arunachelam*, 28 M.I. (F.B.).

(t) *Muthu Ramakrishna* v. *Marimuthu*,

both the husband and wife, her interest passes after her death to her own Stridhana heir and not to the husband or his heirs.(t)

474. Inheritance.—Except in the cases mentioned in Ss. 456 and 457 where women in the Bombay Presidency succeeding to the estate of other women,(u) or succeeding to the estate of males as gotraja sapindas,(v) take absolute estate, any property inherited by a female is taken by her only as a qualified owner, whether the inheritance is to a male,(w) or to a female,(x) though in places governed by the Mithila and Mayukha law moveable property inherited by a female from whomsoever it may be is taken by her as her own absolute property or Stridhana.(y)

475. Purchase.—Where a woman purchases property with her Stridhana or its income, the property becomes her absolute property as an accretion to her Stridhana.(z) The following observations of the Privy Council on the question are pertinent: "It is clearly the law that from the time the funds were given to the widow by the husband, they became her Stridhan and that she had full power of disposition over them. Years after the death of the husband, she chooses to invest them in land. Can it be contended with any plausibility that that was land which was derived from the husband? Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindu female over her Stridhana."(a) See also Ss. 519 and 520.

38 M 1036–26 M.L.J. 532–24 I.C. 363; *Mummama* v *Krishna*, 1933 R. 347.

(u) *Bhau* v. *Raghunath*, 30 B 229 7 Bom L.R. 936; *Gandi* v. *Bai Jadab*, 24 B 192 1 Bom L.R 574; *Narayan* v *Waman*, 46 B. 17 1922 B. 134; *Kesserbai* v. *Hunsraj*, 30 B 431; *Parshotham* v. *Keshavlal*, 56 B. 1.

(v) *Gandhi* v. *Bai Jadab*, 24 B. 192 1 Bom. L.R. 574; *Balvant Rao* v. *Baji Rao*, 42 C. 30–47 I.A. 213; *Kisan* v. *Bapu*, 1925 B 424 27 Bom. L.R 670; *Vithappa* v. *Savitri*, 34 B. 510; *Rindabai* v. *Acharya*, 15 B. 206; *Tuljaram* v. *Mathuradas*, 5 B. 662; *Madhavram* v. *Dave*, 21 B. 739.

(w) *Bhupwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Sheo Shankar* v. *Debi Sahai*, 25 A. 468–30 I.A. 202–5 Bom. L.R. 828=7 C.W.N. 831–13 M.L.J. 330; *Janakisetty* v. *Miriyala*, 31 M. 521–5 I.C. 281 19 M.L.J. 381

(x) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468–30 I.A. 202–13 M. L.J. 330–5 Bom. L.R. 828–7 C.W.N. 831; *Ram Kali* v. *Gopal Dei*, 48 A 646–1926 A. 557–24 A.L.J. 742; *Dhanna Mal* v. *Parmeshari*, 111 I.C. 251–1928 L. 9; *Sheo Parlab* v. *Allahabad Bank*, 30 I.A. 209–25 A. 476–5 Bom. L.R. 833–13 M.L.J. 336–7 C.W.N 810 (P.C.); *Janakisetti* v. *Miriyala*, 32 M 521 3 I.C 281–19 M.L.J. 384; *Javiri* v *Gendan*, 49 A 729–25 A.L.J. 500–1927 A 767. *Raghavalu* v. *Kamaraju*, 1937 M 607–45 L.W. 598 *Kaliyanatha* v *Parvakthi*, 58 M. 183= 69 M.L.J. 142–41 L.W. 356–1935 M.W.N. 210. 1935 M. 740 (holding that income of the inheriter) property is the stridhana of the inheriter); *Sisir* v. *Jogneswar*, 42 C.W.N. 359; *Hukum Chand* v. *Sital*, 50 A. 232 1928 A. 52; *Shah Behari* v. *Ram Kali*, 45 A. 715–21 A.L.J. 656–1924 A. 15; *Mahendra Narayan* v. *Dakshina*. 1936 C. 34–61 C.L.J. 537.

(y) *Jagarnath* v. *Surajdeo*, 1937 Pat. 193; *Latur Rai* v. *Bhagwan*, 1936 P. 80, *Bhagirthi Bai* v. *Kahnujirav*, 11 B. 285; See *Chaman Lal* v. *Bai Parrathi*, 159 I.C. 854.

(z) *Luchmunchunder* v. *Kalichurn*, 19 W.R. 292 (P.C.); *Venkata* v. *Venkata*, 2 M 333 (P.C.); *Sri Ram* v. *Jagadamba*, 43 A. 371–1921 A. 11–19 A.L.J. 129 (P.B.).

(a) *Venkata* v. *Venkata*, 2 M. 333 (P.C.).

476. Partition.—A share allotted to a mother or the father's mother on partition, unless it has been transferred to her by way of absolute gift as Stridhana[b] does not stand on a footing different from that on which property coming to her by way of inheritance has been placed and hence is taken by her only as a qualified owner.[c]

477. Adverse possession.—The title acquired by adverse possession is independent of Hindu Law and has no reference to the sex of the acquirer. Hence property acquired by adverse possession by a Hindu female, whether during coverture, widowhood[d] or maidenhood, becomes her Stridhana and should descend to her Stridhana heirs,[e] except where from the circumstances of any particular case it is perfectly clear that she intended to hold adversely in her character as the heir of the last male-holder and not in her own individual capacity.[f] See also S. 526.

478. Maintenance Claim.

Devala.—"Her sustenance, her ornaments, her perquisite, and her gains, are the separate property of a woman."[g]

Maintenance awarded to a woman, whether by agreement or decree of Court, whether during coverture[h] or widowhood, whether in the shape of money[i] or by way of absolute transfer of immovable property,[j] is her Stridhana property. Any property purchased by her out of her maintenance allowance is also her

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(b) *Saheb Rai* v. *Shafiq*, 101 I.C. 426=26 L.W. 82=53 M.L.J. 507=31 C.W.N. 972 1927 M.W.N. 480=1927 P.C. 101; *Bolye Chund* v. *Khetterpal*, 11 Beng. L.R. 459; See also the observations in *Mangal Prasad* v. *Mahadeo Prasad*, 39 I.A. 121=34 A. 234=16 C.W.N 409—9 A.L.J. 263—1 C. Bom. L.R. 220—22 M.L.J. 462=1912 M.W.N. 324=14 I.C. 1000.

(c) *Mangal Prasad* v. *Mahadeo Prasad*, 34 A. 234—9 A.L.J. 263=16 C.W.N. 409=1912 M.W.N. 324—14 Bom. L.R. 220—22 M.L.J. 462—39 I.A. 121=14 I.C. 1000; *Krishna Lal* v *Nandeshwar*, 4 Pat. L.J. 38; *Bhagwantrao* v. *Punjaram*, 1938 N. 1; *Hridoy* v. *Behari*, 11 C.W.N. 89; *Hemangini* v. *Kedarnath*, 16 I.A. 115=16 C. 758; *Nunni* v. *Phula*, 50 A. 22—1927 A. 679; *Sashi Bhushan* v *Hari Narain*, 48 C. 1059—25 C.W.N. 990—1921 C. 202.

(d) *Hubraji* v. *Chandrabali*, 1931 Oudh 89=130 I.C. 849—6 Luck 519; *Mukh Ram* v. *Mt. Sundar*, 1934 Lah. 270; *Mohim Chunder* v. *Kashi Kant*, 2 C.W.N. 161; *Kanhai Ram* v. *Amri*, 32 A. 189=7 A.L.J. 153—5 I.C. 207; *Adya* v. *Mt. Chandravati*, 1934 Oudh 265; *Satgur* v. *Kishore*, 46 I.A. 197—42 A. 152; *Sham* v. *Dah*, 29 I.A. 132—29 C. 664; *Varada Pillai* v. *Jeevarathnammal*, 46 I.A. 285—43 M 244; Rikhdeo v. Sukhdeo, 49 A. 713=1928 A. 45; *Suraj* v. *Tilakdhari* 7 Pat. 163=1928 P. 220.

(e) *Rampal* v. *Bajrang*, 1 Luck. 50=92 I.C. 126—1926 Oudh 211.

(f) See also S. 526; *Lajwanti* v. *Safachand*, 5 Lah. 192—51 I.A. 171; *Parbati* v. *Ram*, 7 Luck. 320=1933 Oudh. 92; *Dhurjati* v *Ram*, 52 A. 222.

(g) Cited in the Dayabhaga, iv-1-15.

(h) *Mantlal* v. *Bai Rewa*, 17 B. 758.

(i) *Subramanian* v. *Arunachelam*, 28 M. 1; *Nellaikumari* v. *Marakathammal*, 1 M. 166.

(j) *Mangal Prasad* v. *Mahadeo Prasad*, 34 A. 234=9 A.L.J. 263=16 C.W.N. 409=1912 M.W.N. 324—14 Bom. L.R. 220=22 M.L.J. 462=39 I.A. 121=14 I.C. 1000 P.C.; *Ramachandra* v. *Vijiaraghavalu*, 31 M. 349; *Sri Rajah Venkata* v. *Raja Rao*, 17 M. 150; See also *Dhup Nath* v. *Ram*, 54 A. 366=1932 A. 662 where the transfer is not an absolute one.

absolute property,[k] as also savings out of the maintenance given to her [l] and arrears of maintenance.[m]

479. Other sources.—Under the heading other sources may be brought property acquired by a woman under a compromise and the gains of prostitution. If a limited female holder enters into a *bona fide* compromise of disputes with the reversioners and obtains certain properties thereunder, the question whether she takes them as Stridhana or only as a qualified owner depends upon the intentions of the parties[n] and the nature of the claim put forward by the woman. If she had put forward the claim as the absolute owner of certain properties and obtains some of them in her own personal character and not as the representative of the last holder, she takes them as absolute owner. If on the other hand both the claim and the compromise proceeded on the footing of her being only the representative of the estate of the last holder, she takes the property only as a qualified owner.[o] This test, however, is applicable only where the language of the deed of compromise under which she obtains the property is not clear as to the quantum of the interest given to her in the property, and hence, if on that language it is clear that what is given to her is an absolute estate she is entitled to it.[p] Where a daughter who is not an heir owing to her exclusion by custom gets property under a compromise with the reversioner who is entitled to such property, the property so obtained by her is her Stridhanam to which her daughters are entitled to inherit to the exclusion of her sons.[q] The earnings of a woman, married or unmarried, from prostitution constitute her Stridhana.[r]

480. Sulka.—"Among the Aryan communities as a whole we find the earliest traces of the separated property of a woman in the widely diffused ancient institution, known as the bride-price. Part of this price, which was paid by the bridegroom either at the wedding or the day after it, went to the bride's father as compensation

(k) *Pethasari* v. *Sendamarai*, 8 M.L.T. 284=8 I.C. 385.

(l) *Bankim Behary* v. *Prabodh Chandra*, 1934 C. 284; *Ram Das* v. *Ram Sewak*, 1935 Oudh W.N. 596=1935 O. 365.

(m) Dayabhaga, iv-1-15.

(n) *Nathu* v. *Babu*, 43 M.L.W. 464=1936 P.C. 103=63 I.A. 155=40 C.W.N. 481=38 Bom. L.R. 462=1936 A.L.J. 686=1936 M.W.N. 499=17 P.L.T. 321.

(o) *Karimuddin* v. *Gobind*, 31 A. 497=36 I.A. 138=6 A.L.J. 807=11 Bom. L.R. 911=13 C.W.N. 1117=19 M.L.J. 687=3 I.C. 795 (P.C.); *Sambasiva* v. *Venkateswara*, 31 M. 179; *Rabutty* v. *Sibchunder*, 6 M.I.A. 1; *Adya* v. *Mt. Chandrawat*, 1934 Oudh 265=10 Luck. 35; *Rani Mewa* v. *Rani Hulas*, 1 I.A. 157; *Saodamini* v. *Administrator-General, Bengal*, 20 C. 433 =20 I.A. 12 (P.C.); *Khunni Lal* v. *Gobind*, 33 A. 356=38 I.A. 87=8 A.L.J. 552=13 Bom. L.R. 427=15 C.W.N. 545=1911 (1) M.W.N. 432=21 M.L.J. 645=10 I.C. 477.

(p) *Nathu* v. *Babu*, 63 I.A. 155=1936 P.C. 103=40 C.W.N. 481=38 Bom. L.R. 462=43 L.W. 464=1936 A.L.J. 686.

(q) *Rajeshar* v. *Har Kishen*, 1933 Oudh 170.

(r) *Hiralal* v. *Tripura*, 40 C. 650=19 C. 129=17 C.W.N. 679 (F.B.); *Jagannath* v. *Narayan*, 34 B. 553=7 I.C. 459 =12 Bom. L.R. 545; *Mandaram* v. *Mandaram*, 24 M.L.J. 223=18 I.C. 601.

for the patriarchal or family authority which was transferred to the husband, but another part went to the bride herself, and was very generally enjoyed by her separately and kept apart from her husband's property."[s] *Sulka* differently defined as the present to induce the bride to go with her husband[t] or as the amount paid as equivalent of the price of household utensils, ornaments etc.,[u] went absolutely to the wife over which the husband had no control[v] and may also be immovable property.[w]

481. Ornaments.—Ornaments presented to the bride by her husband or father constitute her Stridhana property.[x] But ornaments made over to a girl's father for the girl at the time of the betrothal do not become the Stridhana of the girl if the marriage does not take place.[y]

482. Adyavedanica.—Yagnyavalkya lays down. "To a woman whose husband marries a second wife, let him give an equal sum as compensation for the supersession, provided no separate property has been bestowed on her, but if any had been assigned, *let him allot half.*"[z] The words *italicised* were interpreted by the Mitakshara to mean "half the sum expended on the second marriage".[a] It is not unusual for a husband upon his being about to marry a second wife to make a present to his first wife and if he does so, the property so presented becomes her Stridhana.[b]

483. Income from property held by a female as a limited owner.—The income from an estate held by a female as a qualified owner and which she can be treated as having held separately as her own absolute property is her Stridhana and does not belong to the estate which she holds as a limited owner.[c]

484. Acquisition under compromise.—Property given to a woman in consideration of her giving up her rights in respect of her Stridhana constitutes her Stridhana.[d] See S. 479.

(s) Maine's Early Institutions.

(t) Dayabhaga, iv—3-21. Viramitrodaya, v—1-3; See also *Bhola Ram* v. *Dhani Ram*, 26 A.L.J. 1203=1929 A. 25 =111 I.C. 165.

(u) Vyav. Mayukha IV-x-3; Viramit. v-1-3.

(v) Viramitrodaya. v-1-3.

(w) *Bhola Ram* v. *Dhani Ram*, 111 I.C. 165=26 A.L.J. 1203=1929 A. 25.

(x) *Harkishan Das* v. *Sundro Bibi*, 89 I.C. 424=1925 Oudh 43.

(y) *Chedi Lal* v. *Jawahir Lal*, 49 A. 186=1927 A. 160.

(z) Yagnyalvalkya, ii-143.

(a) Mitakshara, ii-xi-35.

(b) *Thakro* v. *Ganga Prasad*, 10 A. 197.

(c) *Saodamini Dasi* v. *Administrator-General of Bengal*, 20 C. 433=20 I.A. 12 (P.C.); *Isri Dutt* v. *Hansbutti*, 10 C. 324=10 I.A. 150(P.C.); *Ayiswaryanandaji* v. *Sivaji*, 49 M. 116=1926 M. 84=49 M.L.J. 568; *Kallasanatha* v. *Parasakthi*, 58 M. 488=1935 M.W.N. 240=41 M.L.W. 336=69 M.L.J. 142=1935 M. 740; *Balasubramanya* v. *Subbiah*, 65 I.A. 95=42 C.W.N. 449.

(d) *Saodamini Dasi* v. *Administrator-General of Bengal*, 20 C. 433=20 I.A. 12 (P.C.).

485. Property in woman's possession is presumed to be her absolute property.—There is no presumption that property standing in the name of a female member of the family is the common property of the family and not her Stridhana and if it is in the possession of a widow no presumption arises that it was a part of her deceased husband's estate;[e] on the other hand the presumption seems to be the other way. The provisions of S. 110 of the Evidence Act raise a presumption that a "woman" who must be included in the word "person" in the section has absolute title in respect of the property in her possession unless and until the contrary is established, and until this presumption is rebutted by proper evidence which the Court accepts, her powers of disposal in respect of that property remain unfettered.[f]

486. Powers over Stridhana.—A maiden and a widow, provided they are not minors,[g] have absolute powers of disposition over their Stridhana property and can dispose of them by gift or will.[h] But the rights of a married woman during coverture vary according as the Stridhana property is *Saudayika* (gifts from relations) or not.

487. Powers during Coverture.—Saudayika, meaning the gift of affectionate kindred,[i] includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will,[j] she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure[k] by gift or will without reference to her husband[l] and property acquired by it is

(e) *Diwan Ran Bijai* v. *Indarpal*, 26 C. 871=26 I.A. 226=4 C.W.N. 1=2 Bom L.R. 1; *Narayana* v. *Krishna*, 8 M. 214; *Baikunthnath* v. *Jai Kissen*, 51 A. 341=1929 A. 449; *Sadayappa* v. *Raghava*, 27 M.L.T. 325=62 I.C. 220.

(f) *Raj Bachan Singh* v. *Shri Thakurjee*, 4 O.W.N. 1179=1927 O. 618; *Baikunth Nath* v. *Jai Kissen*, 51 A. 341=1929 A. 449; *Narayana* v. *Krishna*, 8 M. 214; *Diwan Ran Bijai* v. *Indarpal*, 26 C. 871=4 C.W.N. 1=2 Bom. L.R. 1=26 I.A. 228 (P.C.); *Ganpat* v. *Secretary of State*, 45 B. 1106=23 Bom. L.R. 462=1921 B. 138.

(g) *Brij Indar* v. *Janki Koer*, 5 I.A. 15.

(h) *Venkata* v. *Venkata*, 2 M. 333 (P.C.).

(i) *Venkareddi* v. *Hanmant Gowda*, 57 B. 85=34 Bom. L.R. 1144=1932 B. 559.

(j) *Damodar* v. *Parmanandas*, 7 B. 155; *Hitendra* v. *Rameswar*, 4 Pat. 510=1925 Pat. 625 (gift by husband after marriage); *Venkareddi* v. *Hanmant Gowda*, 57 B. 85=34 Bom. L.R 1144=1932 B. 559.

(k) *Muthukaruppa* v. *Sellathammal*, 39 M. 298=2 L.W. 38=26 I.C. 785=1915 M.W.N 48; *Basanta Kumari* v. *Kamakshya*, 33 C. 23=15 M.L.J. 326=7 Bom L.R. 904=10 C.W.N. 1=2 A.L.J. 810=32 I.A. 181; *Sham Shivendar* v. *Janki Koer*, 36 C. 311=36 I.A. 1=19 M.L.J. 289=11 Bom. L.R. 759=1 I.C. 126; *Venkareddi* v. *Hanmant Gowda* 57 B. 85=34 Bom. L.R. 1144=1932 B. 559 (case of gift from maternal grandfather); *Atul Krishna* v. *Sanyasi Churn*, 32 C. 1051.

(l) *Emperor* v. *Sat Narain*, 53 A. 437=1931 A.L.J. 201=1931 A. 265; *Venkareddi* v. *Hanmant Gowda*, 57 B. 85=34 Bom. L.R. 1144=1932 B. 559; *Sham Shivendar* v. *Janki Koer*, 36 I.A. 1=36 C. 311=1 I.C. 126. The same rule applies to such properties as a woman has acquired by way of maintenance (Vritti), ornaments, perquisites (Sulka), gains (labha); Smriti Chandrika, ix-ii-15; Viramit., v-i-7.

equally subject to such rights.[m] Ordinarily the husband has no manner of right or interest in it. But in times of extreme distress, as in famine, illness or imprisonment, or for the performance of indispensable duty, the husband can take and utilise it for his personal purposes, though even then he is morally bound to restore it or its value when able to do so. But this right is purely personal to him and cannot be availed of by a holder of a decree against the husband,[n] and if the husband dies without utilising the property for the liquidation of his debts, his creditors cannot claim to proceed against it in the place of her husband.[o] But the position is different in the case of non-Saudayika property. According to Katyayana "the wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to the husband's control" and according to the Dayabhaga he has a right to take it even in the absence of distress.[p] Hence in the case of property which is Non-Saudayika, the husband's consent is a condition precedent to her power of disposal,[q] and he is entitled to use it for his own purposes even in the absence of any compelling necessity. But after his death, her power of disposition becomes unfettered. Even during the lifetime of the husband, the wife does not cease to be its owner, though the husband has the rights above referred to. Hence if she dies during the husband's life-time, the property is taken by her Stridhana heirs and not by the heirs of her husband.[r]

488. Principles of succession to Stridhana.—The order of succession to Stridhana varies according to the School to which its owner belongs, her status at the time of acquisition and the source from which it came. Besides, the principles regulating its devolution are essentialy different from those applicable in the case of succession to the property of males.

489. Succession to Stridhana—Its distinctive features.—The following are the general principles governing succession to Stridhana.

1. The religious element is not a factor that enters into the question of preference among the claimants. Thus neither un-

(m) *Venkata* v. *Venkata*, 2 M. 333 (P.C.).

(n) *Tukaram* v. *Gunaji*, 8 Bom. H.C.R. (A.C.J.) 129.

(o) *Nammalvar* v. *Thayarammal*, 50 M. 941=26 L.W. 602—1927 M. 1031=53 M.L.J. 802—1927 M.W.N. 846; *Tukaram* v. *Gunaji*, 8 Bom. H.C.R. (A.C.J.) 129.

(p) Dayabhaga, iv-1-19 and 20.

(q) *Salemma* v. *Lutchmana*, 21 M. 100 =8 M.L.J. 14; *Bhau* v. *Raghunath*, 30 B. 229—7 Bom. L.R. 936; *Fakirgauda* v. *Dyamawa*, 57 B. 488; This rule cannot reasonably apply if the wife is living away from the husband.

(r) *Salemma* v. *Lutchmana*, 21 M. 100 =8 M.L.J. 14; *Muthu Ramakrishna* v. *Marimuthu*, 38 M. 1036.

chastity,[s] nor illegitimacy[t] operates as a barrier against inheritance. This however does not mean that when a woman leaves both legitimate and illegitimate issue, they are entitled to succeed together. In such a case, the legitimate issue exclude the illegitimate issue, whatever be the sex of the rival claimants.[u] There is no preference in favour of an aurasa son as against an adopted son of her husband when both of them claim to succeed to the Stridhana property of their step-mother.[v] Propinquity being the only ground of preference, it is but natural that the sons' sons are excluded by the sons unlike in the case of succession to the property of males.

2. Female issue are preferred to male issue. Thus a son is excluded by a daughter and the daughter's son is excluded by the daughter's daughter.[w]

3. Stridhana heirs take as tenants-in-common[x] and not as joint tenants with rights of survivorship, even though the heirs are the sons of the deceased woman.[y]

4. Heirs like daughters' daughters, daughters' sons and sons' sons take per stirpes.[z]

5. Female Stridhana heirs take limited estates except female heirs governed by the Bombay School,[a] but male heirs take absolutely.[b]

6. Though illegitimacy of the sons or daughters of a woman is not in itself a disqualification for inheriting her Stridhana,[c] yet when there are also legitimate children to the woman, these exclude the illegitimate ones. Thus a legitimate son excludes an illegitimate daughter.[d]

ORDER OF SUCCESSION TO STRIDHANA

Except in the case of maiden's property, the order of succession varies according as it is under the Mitakshara, the Mayukha or the Dayabhaga.

(s) *Nogendra* v. *Benoy*, 30 C. 521=7 C.W.N. 121; *Angammai* v. *Venkata*, 26 M. 509.

(t) *Mayna Bai* v. *Uttaram*, 2 M.H.C.R. 196; *Hiralal* v. *Tripura*, 40 C. 650=17 C. W.N. 679=19 I.C. 129; *Ganga* v. *Ghasita*, 1 A. 46 (F.B.). But see *Meenakshi* v. *Ramaswami* (1937) 1 M.L. J. 28; *Dundappa* v. *Bhimava*, 45 B. 557 =1921 B. 137=22 Bom. L.R. 1306.

(u) *Meenakshi* v. *Muniandi*, 38 M. 1144 =1 L.W. 704=1914 M.W.N. 672=27 M. L.J. 343=25 I.C. 957.

(v) *Gangadhar* v. *Hira*, 43 C. 944=34 I.C. 10=20 C.W.N. 489.

(w) *Amarjit* v. *Algu*, 51 A. 478=1929 A. 71=1929 A.L.J. 150.

(x) *Bai Parson* v. *Bai Somli*, 36 B. 424; *Karuppai* v. *Sankaranarayana*, 27 M. 300.

(y) *Jamnadas* v. *Kunwar*, 1925 A. 447.

(z) Mitak. ii-2-16; Mayukha, iv-10-21.

(a) *Sham Biheri* v. *Ram Kali*, 45 A. 715=1924 A. 15=21 A.L.J. 656; See Sa. 474, 456 and 457.

(b) *Manibhai* v. *Shankar*, 32 Bom. L. R. 183=1930 B. 296.

(c) *Dundappa* v. *Bhimava*, 45 B. 557= 1921 B. 137=22 Bom. L.R. 1306.

(d) *Meenakshi* v. *Muniandi*, 38 M. 1144 =1 L.W. 704=1914 M.W.N. 672=27 M. L.J. 353=25 I.C. 957.

490. Order of Succession to maiden's property.—

1. Uterine brother. 2. Mother. 3. Father—*Dayabhaga, iv-3-7;* Mitak. II-xi-36.

4. Father's sapindas,[e] if they are legitimate,[f] in order of propinquity,[g] ascertained according to the rules of the particular School to which the maiden belonged.

5. Mother's kinsmen in order of propinquity.[g]

Note:—Thus the father's daughter or father's daughter's son excludes father's brother's son.[h] So also a step-mother, being the father's wife, excludes mother's sister,[i] and the paternal uncle's son excludes the father's sister.[j]

SUCCESSION TO STRIDHANA OF A MARRIED WOMAN

491. Sulka.—Sulka passes first to (1) uterine brothers, then (2) to the mother, then (3) to the father[k] and in default of all these, it goes to (4) father's heirs[l] except in the Dayabhaga, where the rule of succession applicable is that governing succession to Anvadheya mentioned in S. 505.[m]

492. Succession to other Stridhana under the Mitakshara.— The Mitakshara classifies Stridhana as sulka and non-sulka and prescribes the following order of succession in respect of the latter.[n]

(1) Unmarried daughters.[o]

(*e*) Viramit. v-ii-9; *Tukaram* v. *Narayan*, 36 B. 339=14 Bom. L.R. 89=14 I.C. 438 (F.B.); *Sundaram* v. *Ramasamia*, 43 M. 32=10 L.W. 664=52 I.C. 821=37 M.L.J. 209=1919 M.W.N. 615; *Kamala* v. *Bhagirathi*, 38 M. 45=16 I.C. 939=23 M.L.J. 518=1912 M.W.N. 1166; *Gandi Maganlal* v. *Bai Jadab*, 24 B. 192; *Janglubai* v. *Jetha*, 32 B. 409—10 Bom L.R. 522 (father's mother's sister preferred to maternal grandmother).

(*f*) *Subramanian* v. *Rathnavelu*, 41 M. 44—6 L.W. 149=33 M.L J. 224=1917 M. W.N. 668=42 I.C. 556; *Ayiswaryanandaji* v. *Sivaji*, 49 M. 116=49 M.L.J. 568=1926 M. 84.

(*g*) *Dwarka Nath* v. *Sarat Chandra*, 39 C. 319—15 C.W.N. 1036=11 I.C. 872; *Janglubai* v. *Jetha*, 32 B. 409=10 Bom. L.R. 522; *Tukaram* v. *Narayan*, 36 B 339—14 I.C. 438; *Vithal* v. *Bala*, 60 B. 671.

(*h*) *Dwarka Nath* v. *Sarat Chandra*, 39 C. 319 =11 I.C. 872—15 C.W.N. 1036.

(*i*) *Kamala* v. *Bhagirathi*, 38 M. 45=16 I.C. 939 =23 M.L.J. 518=1912 M.W N. 166.

(*j*) *Sundaram* v. *Ramaswamia*, 43 M. 32=10 L.W. 664=52 I.C. 821=37 M.L.J. 209=1919 M.W.N. 615; *Tukaram* v. *Narayan*, 36 B. 339=14 I.C. 438=14 Bom. L.R. 89.

(*k*) Viramit. v-ii-12.

(*l*) *Bhola Ram* v. *Dhani*, 26 A.L.J. 1203=1929 A. 25.

(*m*) Dayabhaga, iv-iii-22 to 29. *Ram Gopal* v. *Narain*, 33 C. 315; Dayakrama Sangraha, II-iii-15 to 18.

(*n*) *Nanja* v. *Sivabagyathachi*, 36 M. 116; *Muthappudayan* v. *Ammani*, 21 M. 58; *Raju* v. *Ammani*, 29 M. 385; *Subramanian* v. *Arunachalam*, 28 M. 1; *Salemma* v. *Lutchmana*, 21 M. 100; Mitak. II-xi-9 to 24.

(*o*) Gautama xxviii-21; Mit. ii-11-13; *Ram Kali* v. *Gopal Dei*, 48 A. 648=1926 A. 557=24 A.L.J. 742; *Salemma* v. *Lutchmana*, 21 M. 100; *Mt. Jaiwanti* v. *Mt. Anandi*, 1938 A. 62; *Basanta* v. *Kamikshya*, 32 I.A. 181=33 C. 23=2 A. L.J. 810=7 Bom L.R. 904=10 C.W.N. 1=15 M.L.J. 320 (Daughter excluding husband); Manu ix-192, 195.

(2) Married daughter unprovided for.[p] In the case of daughters who are poor in different degrees, no hard and fast rule can be laid down, but a Court of justice should take into account the circumstances of each case and order the distribution accordingly.[q]

(3) Married daughter provided for.[r]

(4) Daughter's daughters.[s]

Note:—The distinction between a married and unmarried[t] daughter, or provided for or unprovided for daughter, does not apply in the case of daughter's daughters. Daughters' daughters inherit *per stirpes* and not *per capita*.[u]

(5) Daughter's son[v] though the adopted son of a daughter, may be entitled to inherit in the absence of an aurasa son. The existence of an aurasa son, it is submitted, excludes the adopted son's right to inherit to the Stridhana of his adoptive maternal grandmother.

(6) Sons.[w]

Note:—The sons take as tenants-in-common and not as joint tenants.[w] The son here means her own son, aurasa or adopted, and not the aurasa son by another wife or a son adopted by her husband in conjunction with another wife. But in the presence of an aurasa son, the adopted son cannot come in to share in the Stridhana, as he can in the case of the father's estate, the reason being that succession to Stridhana is guided by natural love and affection and not by considerations applicable to the succession to the estate of males. Sons by the co-wives of the woman would inherit her Stridhana only as her husband's sapindas[x] and not as her sons, and when they do claim to inherit, there will not be any distinction between an aurasa and an adopted son. Besides, a son here means a son born in lawful wedlock and not in adulterous intercourse.[y] In the case of remarriage, her sons by both the husbands inherit to the woman's Stri-

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(p) Gautama xxviii-21; *Wooma Daee* v. *Gokoolanund*, 3 C. 587=5 I.A. 40 (P.C.); Mitak ii-11-13; *Jagannath* v. *Runjit*, 25 C. 354.

(q) Gurudas Banerjee's Marriage and Stridhan, 4th Edition 367. See also *Totawa* v. *Basawa*, 23 B. 229.

(r) *Brij Indar Bahadur* v. *Janki Koer*, 5 I.A. 1 (daughter excluding husband's heirs).

(s) *Subramanian* v. *Arunachelam*, 28 M. 1; *Amarjit* v. *Alagu*, 51 A. 478=1929 A. 71=1929 A.L.J. 150; *Sham Beharilal* v. *Ram Kali*, 45 A. 715=1924 A. 15; *Ram Kali* v. *Gopal Dei*, 48 A. 648=24 A. L.J. 742=1926 A. 557.

(t) *Ram Kali* v. *Gopal Dei*, 48 A. 648 =1926 A. 557=24 A.L.J. 742.

(u) Mitak ii-2-16, Mayukha iv-10-21.

(v) *Amarjit* v. *Alagu*, 51 A. 478=1929 A.L.J. 150=1929 A. 71, holding that daughter's son is postponed to daughter's daughter; *Dhanna Mal* v. *Parmeshri*, 1928 L. 9, preferring daughter's son to son; See also *Hanmant* v. *Secretary of State*, 54 B. 125=32 Bom. L.R. 155=1930 B. 254, regarding the position of daughters' sons; *Subramania* v. *Arunachelam*, 28 M. 1.

(w) *Karuppai* v. *Sankaranarayana*, 27 M. 300=13 M.L.J. 398; *Parson* v. *Somli*, 36 B. 424=15 I.C. 774=14 Bom. L.R. 400; *Jumna* v. *Kunwar*, 1925 A. 447.

(x) *Gangadhar* v. *Hira*, 43 C. 944=35 I.C. 10=20 C.W.N. 489.

(y) *Jagannath* v. *Narayan*, 34 B. 553= 7 I.C. 459=12 Bom. L.R. 545.

dhana.[z] Nor does the word "son" as used here include the illegitimate son of the deceased woman's husband.[a]

(7) Son's sons.[b]

Note:—Sons' sons take per stirpes, and aurasa and adopted sons' sons share equally.[c] Sons and grandsons do not inherit together as in the case of inheritance to their father and a son always excludes sons of predeceased sons.[d]

(8) Husband (If the marriage is in the approved form).[e]

Note:—Husband is a nearer heir than his son by another wife.[e]

(9) Husband's sapindas (if her marriage is in the approved form.[f]) In *Kamla Prasad* v. *Murli*,[g] after an examination of all the texts and authorities in detail by Dhavle J., it was held that a sister's son of the deceased lady is not entitled, being only a blood relation, to succeed in preference to her husband's sapindas. The husband's sapindas do not include his illegitimate son[a] or the new heirs of the husband either under Act II of 1929 or under Act XVIII of 1937. A co-widow is entitled to succeed in preference to her husband's brother or brother's son.[h]

(10) Blood relations[i] like mother, father and their nearest

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(z) *Bapu* v. *Kashinath*, 1934 Bom. 113 —36 Bom. L.R. 140.

(a) *Ayiswaryanandaji* v. *Sivaji*, 49 M. 116=1926 M. 84—49 M.L.J. 568.

(b) *Hukum Chand* v. *Sital Prasad*, 50 A. 232—1928 A. 52=25 A.L.J. 922; *Ram Kali* v. *Gopal Dei*, 48 A. 648=1926 A. 557

(c) *Nagindas* v. *Bachoo*, 40 B. 270=43 I.A. 56=1915 P.C. 41=14 A.L.J. 185=18 Bom. L.R. 172=20 C.W.N. 702=30 M.L.J. 193=3 L.W. 259—(1916) 1 M.W.N. 258.

(d) *Karuppai* v. *Sankaranarayana*, 27 M. 300; *Dowlatt* v. *Narain*, 60 I.C. 929; *Bai Raman* v. *Jagjiwandas*, 41 B. 618=19 Bom. L.R. 629=41 I.C. 277.

(e) *Bhimacharya* v. *Ramacharya*, 33 B. 452—2 I.C. 750=11 Bom. L.R. 654; See *Palaniappa* v. *Chockalingam*, 57 M. L.J. 817=1930 M. 109 (custom amongst Nattukottai Chettles by which parents inherit in preference to the husband and his relations).

(f) *Kesserbai* v. *Hunsraj*, 30 B. 431=33 I.A. 176=3 A.L.J. 484=16 M.L.J. 446=10 C.W.N. 802=8 Bom. L.R. 446 (P.C.); *Rajee Gramany* v. *Ammani*, 29 M. 358; *Musumat Thakoor Deyhee* v. *Baluk Ram*, 11 M.I.A. 139 (Presumption of marriage in the approved form); *Nanja Pillai* v. *Sivabagyathachi*, 36 M. 116 (Step-daughter preferred to father's brother's son); *Ganeshi Lal* v. *Ajudhia*, 28 A. 345 (Husband's sister's son preferred to sister's son); *Mt. Rukka* v. *Chhiddu*, 1924 A. 464 (a case of second marriage of a woman to whose Stridhana the claim of the heirs of her first husband was upheld; *Raj Bachan* v. *Bhanwar*, 4 Luck. 690 -1929 Oudh 296; *Surajdeo* v. *Ramdewan*, 1927 Pat. 392; *Motichand* v. *Kunwar*, 48 A. 663=24 A.L.J. 753=1926 A. 663; *Sital* v. *Harpal*, 1929 Oudh 11; *Rampal* v. *Bajrang*, 1 Luck. 50=1926 Oudh 211; *Javitri* v. *Gendan*, 49 A. 779=1927 A. 769; *Jodha* v. Darbari, 2 Luck. 612=1927 Oudh 339; *Mathsori* v. *Rama Bai*, 12 M.L.W. 171—59 I.C. 265.

(g) 1934 P. 398—13 P. 550.

(h) *Kesserbai* v. *Hunsraj*, 30 B. 431=33 I.A. 176—3 A.L.J. 484—16 M.L.J. 446=10 C.W.N. 802—8 Bom. L.R. 446; *Dulhin Parbati* v. *Baijnath*, 14 Pat. 518=1936 P. 200; Kamla Prasad v. Murli, 1934 Pat. 398=13 Pat. 550.

(i) *Ganpat* v. *Secretary of State*, 23 Bom. L.R. 462=45 B. 1106=1921 B. 138; *Kamla Prasad* v. *Murli*, 1934 P. 398=13 P. 550; *Sombhai* v. *Jagjivan*, 30 Bom. L.R. 987=1928 B. 380; *Surajdeo* v. *Ramdewan*, 1927 pat. 392; *Motichand* v. *Kunwar*, 48 A. 663=24 A.L.J. 753=1926 A. 663.

kinsmen.[j] Full brother always excludes half-sister[k] but an uterine brother and an uterine sister succeed equally to the stridhana property.[l] There is a custom amongst the Nattukottai Chetties having the force of law that if a daughter dies issueless, her stridhana will revert to her parents.[m]

Note:—If the marriage is in an unapproved form like the Asura form, then the order of succession after sons' sons is different and is as follows: (8) Mother, (9) Father, (10) Father's heirs.[n] The reason why a woman married in the unapproved form does not leave her Stridhana to be inherited by her husband or his heirs is that the law treats her for this purpose as still continuing in her father's family owing to the absence of the proper giving away of the bride in the approved form.[o] Hence her sister will take before her sister's son[p] or her paternal uncle.[q] In the absence of any heir of the father, it is proper to hold that the husband and his heirs should be let in before the property is taken by the King as the *ultima haeres*.[q-1]

(11) The Crown.

The above order has been adopted by the Madras High Court[r] and by the Benares School.[s] The same is the order to be followed in parts of the Bombay Presidency where the authority of the Mitakshara prevails over that of the Mayukha.

SUCCESSION TO STRIDHANA UNDER MITHILA SCHOOL

493. Order of succession under the Mithila School.—Under the Mithila School, in which Vivada Chintamani is the principal authority on this question, Stridhana is divided into (1) Sulka, (2) Yautaka and (3) other Stridhana.

494. Sulka which is the amount received by a woman during the marriage when performed in the unapproved form, follows the order of descent governing Sulka in other provinces.

(j) *Kanakammal* v. *Ananthamathi*, 37 M. 293=25 I.C. 901; *Motichand* v. *Kunwar*, 48 A. 663=24 A.L.J. 753=1926 A. 663 (Brother's sons); *Ganaham Das* v. *Saraswati*, 21 L.W. 415=1925 M.W.N. 285=1925 M. 861 (sister excluding sister's son); *Vithal Tukaram* v. *Balu*, 60 B. 671=38 Bom. L.R. 520 :1936 B. 283; holding that brother and sister succeed together and take equal shares; *Parbati* v. *Baijnath*, 1936 P. 200=14 P. 518.

(k) *Ganshamdoss* v. *Saravathi Bai*, 57 I.C. 821=1925 M.W.N. 285=1925 Mad. 861=21 L.W. 415.

(l) *Vithal Tukaram* v. *Balu*, 1936 B. 283=38 Bom. L.R. 520=60 B. 671.

(m) *Palaniappa* v. *Chockalingam*, 30 L.W. 1040=1930 M. 109=57 M.L.J. 817.

(n) *Raju* v. *Ammani*, 29 M. 358; *Govind* v. *Savitri*, 43 B 173=47 I.C. 883 =20 Bom. L.R. 911; *Parbati* v. *Baijnath*, 14 Pat. 518=1936 Pat. 200.

(o) *Janglubai* v. *Jetha*, 32 B. 408; *Tukaram* v. *Narayan*, 36 B. 339=14 Bom. L.R. 89 (F.B.).

(p) *Raju* v. *Ammani*, 29 M. 385.

(q) *Govind* v. *Savitri*, 43 B. 173=47 I. C. 883=20 Bom. L.R. 911.

(q-1) *Chandulal* v. *Bai Kashi*, 1939 B. 59=40 Bom. L.R. 1262.

(r) *Bhujanga Rao* v. *Ramayamma*, 7 M. 387; *Muthappudayan* v. *Ammani*, 21 M. 58=8 M.L.J 9; *Nanja* v. *Sivabagyathachi*, 36 M. 116=(1911) 2 M.W.N. 168=21 M.L.J. 850=12 I.C. 128; *Salemma* v. *Lutchmana*, 21 M. 106=8 M.L.J. 14; *Subramanian* v. *Arunachelam*, 28 M. 1.

(s) *Jagannath* v. *Runjit*, 25 C. 354.

495. Yautaka or property gifted to the woman during marriage when she was seated with her husband is taken first by the unmarried daughters, then the married daughters and after them by the persons in the order mentioned by the Mitakshara.(t)

496. Other kinds of Stridhana pass to sons and unmarried daughters together in equal shares. The other heirs, it is submitted, are those mentioned in the Mitakshara and come in the order prescribed therein. It must be noted here that the Mithila School does not accept the extended definition given by Yagnyavalkya and confines Stridhana to the property mentioned by the Smritikars like Manu, Katyayana and Devala. In *Kamla Prasad* v. *Murli*,(u) after an exhaustive examination of all the texts and authorities, it was held that there being no definite rule laid down in the Mithila books departing from the Mitakshara, succession to Stridhana property of a lady dying leaving no son, daughter or daughter's daughter or daughter's son was governed by the rule in the Mitakshara and that a sister's son of a deceased lady was not entitled to succeed in preference to her husband's sapindas.

SUCCESSION TO STRIDHANA UNDER THE MAYUKHA

497. Order of succession under the Mayukha.—Stridhana is divided by Mayukha into (1) technical or Paribhasika Stridhana and (2) non-technical or Aparibhasika Stridhana. Technical Stridhana which comprises gifts from relations at any time and gifts from strangers at the time of the marriage is sub-divided into (i) *Sulka*, (ii) *Yautaka*, (iii) *Bhartridatta and Anwadheyaka* and (iv) other technical Stridhana. Non-technical Stridhana refers to every property of a woman not expressly mentioned as Stridhana by the Smriti writers.

498. Sulka, defined as the property received by a woman as the value of household utensils, of beasts of burden, cattle, dress and ornaments,(v) follows the line of devolution mentioned in the Mitakshara.

499. Yautaka or property received by a woman during the marriage while seated along with her husband goes first to the unmarried daughters, then to married daughters and then to other heirs as under the Mitakshara according as the marriage was in the approved or in the unapproved form—Banerjee's Hindu Law of Marriage and Stridhana, 3rd Edn. 388.

(t) *Bacha* v. *Jugmohun*, 12 C. 348; but see *Mohun Pershad* v. *Kishen*, 21 C. 344; See also *Kesserbai* v. *Humeraj*, 30 B. 431 ...33 I.A. 176.

(u) 1934 P. 398=13 P. 550.

(v) Mayukha, 10-3.

500. Bhartridatta and Anwadheyaka represent property given after marriage by her husband or her relations both in the family of her birth and in the husband's family and devolve in the following order:

(1) Unmarried daughters and sons[w] taking together equally.

(2) Married daughters and sons in equal shares.[x]

(3) Daughters' daughters and daughters' sons taking together in equal shares.[y]

(4) Sons' sons.

(5) Failing the above the succession is to the persons ascertained according to the order mentioned in the Mitakshara.

Note:—The heirs in the second generation like the daughters' daughters and sons' sons take per stirpes and not per capita. When there are no daughters alive at the time of the woman's death, but only her sons and daughter's daughters, the question whether the daughter's daughters should be allowed to share along with the sons had not been answered in any judicial decision. It is submitted that the general intention of the ancient texts being to benefit the female sex in preference to the male sex in matters of Stridhana succession and the scheme of Stridhana succession for other technical Stridhana being to exclude the sons so long as there is any issue of a daughter alive, it is but reasonable that the daughter's daughters should be allowed to share with the sons. In the same way, if there are only daughters and son's sons, the latter should be allowed to inherit along with their aunts, taking the share to which their father would be entitled, if alive.

501. Other technical Stridhana devolves in the following order:

(1) Unmarried daughters. (2) Unprovided for married daughters. (3) Daughters provided for. (4) Daughters' daughters and daughters' sons. (5) Sons. (6) Sons' sons. (7) Other persons ascertained according to the Mitakshara order of Stridhana succession.

502. Order of succession to non-technical Stridhana.—Non-technical Stridhana, which does not include any of the properties coming under "technical Stridhana", comprises the earnings of a woman, property obtained under gifts or bequests from strangers prior to or subsequent to marriage, property inherited so as to become Stridhana in her hand,[z] and property given to her absolutely *in lieu* of maintenance. This passes in the following order[a]: (1) Sons, (2) Sons' sons, (3) Sons' sons' sons, (4) Daughters, (5)

(w) *Dayaldas* v. *Savitribai*, 34 B. 385= 6 I.C. 530=12 Bom. L.R. 386; *Shriram* v. *Rajaram*, 1924 N. 83.

(x) *Dayaldas* v. *Savitribai*, 34 B. 385= 6 I.C. 530=12 Bom. L.R. 386; *Ashabai* v. *Hasi*, 9 B. 15.

(y) Vyav. Mayukha. IV-x-20. 21.

(z) *Vitharangam* v. *Lakshuman*, 8 Bom. H.C.R. 244.

(a) *Bai Narmada* v. *Bhagwantrai*, 12 B. 505.

Daughters' sons, (6) Daughters' daughters, (7) Other persons ascertained in the order given by the Mitakshara.[b]

Note:—Sons, sons' sons, and sons' sons' sons do not take together but successively in the order specified.[c]

SUCCESSION TO THE STRIDHANA UNDER THE DAYABHAGA SCHOOL

503. Order of succession under the Dayabhaga.—Apart from Sulka which devolves in the same order as under the Mitakshara,[d] Stridhana under the Dayabhaga, which means woman's property which she has power to give, sell, or use independently of her husband's control, is, for purposes of succession, classified under, (1) *Yautaka* or property obtained by gifts made by relations or strangers during the marriage ceremony ending with the obeisance by prostrating before the husband.[e] (2) *Anwadheyaka* made by the father and (3) *Ayautaka* excluding Anwadheyaka from the father mentioned in class (2).

504. Yautaka.—The order of succession to Yautaka is as follows[f]:

Dayabhaga.

(1) Unbetrothed daughters. (2) Betrothed daughters. (3) Married daughters having or likely to have male issue and widowed daughters having issue.[g] (4) Married daughters either barren or widowed without issue taking together equally. (5) Son including an adopted son.

Dayakrama Sangraha.

(6) Daughter's sons. (7) Sons' sons. (8) Sons' sons' sons.

(9) Sons of a co-wife or co-wives. (10) Sons' sons of such co-wives. (11) Sons' sons' sons of such co-wives. (12) Husband. (13) Brother. (14) Mother. (15) Father. (16) Husband's younger brothers. (17) Husband's brother's son. (18) Brother's son. (19) Daughter's husband. (20) Husband's heirs in the order of succession.[h] (21) Father's heirs.

Note.—The above is the order if the deceased was married in the approved form. If the marriage was in the unapproved form the heirs from 12 to 15 will be in the following order.

(b) See the observations of the Privy Council in *Kesserbai* v. *Hunsraj*, 30 B. 431=33 A. 176 regarding the applicability of the Mitakshara order of succession.

(c) *Bai Raman* v. *Jagjivandas*, 41 B. 618=41 I.C. 277=19 Bom. L.R. 629; *Doulati* v. *Narain*, 80 I.C. 929.

(d) *Judoo Nath* v. *Busunt Coomar*, 19 W.R. 264.

(e) *Bristo* v. *Radha*, 16 W.R. 115.

(f) Dayabhaga iv-2-13 to 26; *Raghunandana*, x-12 to 20; Dayakrama Sangraha, ii-3-8 to 21.

(g) *Charu Chunder* v. *Nabo Sundri*, 18 C. 327.

(h) Dayabhaga IV-iii-37.

(12) Mother.
(13) Father.
(14) Brother.
(15) Husband.

505. Anwadheyaka from father.—Anwadheyaka from father which means property given or bequeathed to the woman by her father subsequent to her marriage passes in the following order :—

(1) Maiden daughter. (2) Sons[i] (3) Married daughter having or likely to have male issue.[j] (4) Barren or widowed daughters. (5) Son's sons. (6) Daughter's sons. (7) Son's son's sons. (8) Sons of a co-wife. (9) Son's sons of a co-wife. (10) Son's son's sons of a co-wife. (11) Brothers.[k] (12) Mother.[l] (13) Father and (14) Husband and the husband's heirs.

506. Ayautaka represents property received by the woman under gifts or bequests from relations made prior or subsequent to marriage. Property obtained by a woman which does not come under Sulka, Anwadheyaka, Yautaka or Ayautaka as above defined does not form the Stridhana of the woman. Thus gifts from strangers except those made during the continuance of the marriage ceremonies do not become her Stridhana. Ayautaka thus defined under the Dayabhaga passes in the following order : [m]

(1) Sons and unbetrothed daughters jointly inheriting in equal shares, the sons taking in preference to married daughters in the absence of unmarried daughters.[n]

(2) Married daughters having or likely to have sons.
(3) Son's sons.
(4) Daughter's sons.
(5) Son's son's sons.
(6) Son of rival wife or his son or his son's son.
(7) Barren and widowed daughters without issue.[o]

Failing these the order given for the Anwadheyaka from father is applicable.[p] A brother's son is entitled to succeed to a woman's *Ayautaka* Stridhanam in preference to a step-daughter's son.[q]

(i) *Prosanna Kumar* v. *Sarat Shoshi*, 36 C. 86=1 I.C. 766=12 C.W.N. 924
(j) *Charu Chunder* v. *Nobo Sundri*, 18 C. 327.
(k) *Gopal Chunder* v. *Ram Chunder*, 28 C. 312.
(l) *Ram Gopal* v. *Narain*, 33 C. 315.
(m) Dayabhaga, iv-2-1 to 12 and iv-3-10, 29, 30 and 31.
(n) *Sreenath* v. *Surbo*, 10 W.R. 488 ; *Prosanna Kumar* v. *Sarat Shoshi*, 36 C. 86=1 I.C. 766=12 C.W.N. 924 ; *Delanney* v. *Pran Hari*, 22 C.W.N. 990 ; See also *Basanta* v. *Kamlkshya*, 33 C. 23=32 A. 181.
(o) Dayakrama Sangraha, II-iv-9.
(p) *Ram Gopal* v. *Narain*, 33 C. 315 ; *Juddo Nath* v. *Busunta*, 19 W.R. 264.
(q) *Krishna Bihari* v. *Sarojinee*, 60 C. 1061=37 C.W.N. 613=1933 C. 858.

Under the Dayabhaga, a sister's son is not an heir to the Stridhana property of a woman.[r]

507. Ultima haeres. All kinds of Stridhana under whichever school they may fall ultimately escheat to the Crown as the *ultima haeres* in the absence of the woman's blood relations. But if she leaves any blood relation of hers, he or she takes it in preference to the Crown.[s]

508. Gains of prostitution.—Prostitution may be practised either by married women or by women who belong to a class or community like the Dancing Girl community in which it is practised as an achara or customary rule. But when a family woman lapses into prostitution, she only becomes degraded; the tie of blood connecting her to her kindred does not become destroyed by unchastity and her Stridhana would pass according to the normal order of succession applicable as if she were chaste.[t] Thus her legitimate son will exclude her illegitimate daughter[u] and her husband will exclude her illegitimate son.[v] Though this view is undoubtedly the correct view, there are a line of cases taking the opposite view that with prostitutes the tie of kindred is broken and none of their undegraded relations, whether offspring or not, inherits to the exclusion of their issue after degradation. This latter view[w] no longer holds the field[x] and the claims of the step-son,[y] sister,[z] daughter,[a] etc., to succeed to the Stridhana of a married woman who has taken to prostitution have been upheld. But it will be more in conformity with the principles of equity if the illegitimate children are at least allowed to succeed to their mother's Stridhana in the absence of legitimate issue.[b]

But in the case of the Dancing Girls, the principles governing succession are entirely different. They are practising prostitution as a sort of *kulachara* or rule of life among them and they do not view immorality as entailing any degradation upon the person who has

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(r) *Satish Chandra* v. *Haridas*. 38 C.W.N. 98=1934 C. 399

(s) *Ganpat* v. *Secretary of State*. 45 B. 106=1921 B. 138=23 Bom. L.R. 462; *Kundan* v. *Secretary of State*. 7 Lah. 543 =1926 L. 673; *Kanakammal* v. *Anantha-mathi*. 37 M. 238=25 I.C. 901; *Sambhoi* v. *Jagiwan*. 114 I.C. 377=1928 B. 380=30 Bom. L.R. 987

(t) *Hiralal* v. *Tripura*. 40 C. 650=19 I.C. 129-17 C.W.N. 679 (F.B.).

(u) *Meenakshi* v. *Muniandi*. 38 M. 1144 =27 M.L.J. 353=1 L.W. 704=25 I.C 957 =1914 M.W.N 672.

(v) *Jagannath* v. *Narayan*. 34 B. 553= 7 I.C. 459=12 Bom. L.R. 545.

(w) *Sivasamy* v. *Mimal* 12 M. 277; *Tripura* v. *Harimati*. 38 C. 495.

(x) *Hiralal* v. *Tripura*. 40 C 650=19 I.C 129-17 C.W.N. 679 (F.B.); *Meenakshi* v. *Muniandi*. 38 M. 1144-27 M.L.J. 353= 1914 M.W.N. 672-1 L.W. 704 25 I.C. 957; *Jagannath* v. *Tripura*. 34 B. 553=7 I.C. 459 =12 Bom. L.R. 545; *Narayan* v. *Laxman*. 51 B. 784=1927 B. 456=29 Bom. L.R. 930; *Narain* v. *Trilok*. 29 A. 4=3 A.L.J. 537; *Taleb Ali* v. *Abdul*. 1925 C. 748; *Kothandarama* v. *Subbier*. 52 M.L.J. 514.

(y) *Subbaraya* v. *Ramasami*. 23 M. 171.

(z) *Narayan* v. *Laxman*. 51 B. 784=1927 B. 456=29 Bom. L.R. 930.

(a) *Tara* v. *Krishna*. 31 B. 495=9 Bom. L.R. 774.

(b) *Maharana* v. *Thakur Pershad*. 12 I.C. 778.

taken to it. In their case there is no such distinction between legitimate issue, and illegitimate issue, for, to them every child begotten upon the girl, whoever be its father, is legitimate. The women being the chief earning members, it is but natural that the women when they inherit take an absolute estate in the property inherited so that they may have the wherewithal to carry on the profession.[c] Hence it is that the daughters of Dancing women, whether natural or adopted, inherit in preference to their sons.[d] In a recent Madras case a custom by which a remoter female relation who continued to practise the profession excluded a nearer female relation who abandoned the life of prostitution and settled in married status was upheld.[e] The sons of a prostitute by different fathers are entitled to inherit to each other, and their sons whether legitimate or illegitimate, can succeed to one another.[d]

There is no coparcenary betweeen a mother and her daughter in the Devadasi or Dancing Girl community, and a daughter, whether natural or adopted (it may here be mentioned that a devadasi can have more than one adopted daughter at the same time), cannot, in the absence of a contract to that effect, claim a partition against the mother in respect of property either earned by the latter or acquired by her from her mother or other ascendants.[f]

(c) *Chandramma* v. *Naganna*, 45 M.L.J. 228=18 L.W. 309=1923 M.W.N. 567=1924 M. 94; *Subbaratna* v. *Balakrishnaswami*, 6 L.W. 184=41 I.C. 408=1917 M.W.N. 569=33 M.L.J. 207; But see *Balasundaram* v. *Kamakshi*, 44 M.L.W. 695=71 M.L.J. 785=1936 M.W.N. 1054=1936 M. 958, a case of daughter succeeding a dancing girl who had adopted family life and then relapsed to prostitution, where it was held that the inheritor was entitled only to a limited estate.

(d) *Viswanatha* v. *Doraiswami*, 48 M. 944=1926 M. 289; But see *Bera Chandramma* v. *Chandran*, 45 M.L.J. 228, for sons and daughters succeeding together.

(e) *Shanmugathammal* v. *Gomathi*, 67 M.L.J. 861=1935 M. 58.

(f) *Gangamma* v. *Kuppammal*, 1939 M. 139=I.L.R. 1938 M. 789=48 L.W. 919=1938 M.W.N. 1258=(1938) 2 M.L.J. 923.

CHAPTER XIV.

WOMAN'S ESTATE.

509. What is woman's estate.—The term woman's estate in its larger connotation means all property which has come to a woman by any means and from any source whatsoever, and includes both property in which she has absolute estate (Stridhana) and property in which she has only a limited interest. The term "woman's estate" in this chapter is used only in the latter sense of property in which she takes only a limited or qualified interest. Such property is either property inherited by a woman or property which has been allotted to her in a partition in her husband's family.[a] To the rule that property inherited by a woman either from a male[b] or a female[c] is taken by her as a qualified owner, there are two exceptions recognised in the Bombay School, namely, (i) property inherited by a woman born in the gotra of the deceased,[d] or the daughter of such woman[e] and (ii) property inherited by a female from a female.[f] Barring these two exceptions recognised in the Bombay Presidency as cases where the woman inheriting takes an absolute estate in the property inherited, every woman to whichever school she belongs takes on inheritance, in the absence of a custom to the contrary,[g] only a limited estate as distinguished from absolute estate or Stridhana.

510. Female heirs having limited estate.—According to the Dayabhaga, the Benares and the Mithila Schools, the only female heirs to the property of a male are those expressly mentioned as such by the texts, namely. (1) widow, (2) daughter, (3) mother, (4) father's mother and (5) father's father's mother. To this list the Madras School added 7 more persons as bandhus, namely, (6) sister, (7) half sister, (8) son's daughter, (9) daughter's daughter, (10) brother's daughter, (11) sister's daughter and (12) father's sister. The Bombay School has recognised in addition the widows of all gotraja sapindas.[h] By the Hindu Law of Inheritance

(a) *Debi Mangal Prasad* v. *Mahadeo Prasad*, 34 A. 234=9 A.L.J. 263=16 C.W.N. 409=1912 M.W.N. 324=14 Bom. L.R. 220=22 M.L.J. 462=39 I.A. 121=14 I.C. 1000 (P.C.).

(b) *Muttu Vaduganadha* v. *Dora Singha*, 3 M. 290=8 I.A. 99 at 109; *Bhagwandeen* v. *Myna Baee*, 11 M. I.A. 487.

(c) *Sheo Shankar* v. *Debi Sahai*, 25 A. 458=30 I.A. 202=13 M.L.J. 330=5 Bom. L.R. 828=7 C.W.N. 831.

(d) *Bhau* v. *Raghunath*, 30 B. 229; *Shidramappa* v. *Neelawa*, 57 B. 377.

(e) *Vinayak* v. *Laxmibai*, 9 M.I.A. 520.

(f) *Ghandi* v. *Bai Jadab*, 24 B. 192=1 Bom. L.R. 574 (F.B.); *Parshottam* v. *Keshavlal*, 56 B. 164; *Kisan* v. *Bapu*, 27 Bom. L.R. 670=1925 B. 424.

(g) *Tulsiram* v. *Chunnilal*, 1938 N. 391 (case of Jain widow); *Shimbhu* v. *Gayam*, 16 A. 379 (case of jain widow); *Harnabh* v. *Mandil*, 27 C. 379; See *Pankar* v. *Shamsher*, 29 A.L.J. 314 restricting this custom to self-acquired and not an ancestral property of the husband.

(h) *Lulloobhoy* v. *Cassibai*, 5 B. 110 =7 I.A. 212.

(Amendment) Act, 1929, the son's daughter, the daughter's daughter, and the sister have become heirs in all provinces where the Mitakshara rules; and the Hindu Women's Rights to Property Act of 1937 (printed and discussed at the end of the book) has added a few more female heirs. Thus with the exception of those females in the Bombay Presidency who take an absolute estate on inheritance, all the females inheriting another's property take only a limited estate. The following sections in this chapter are devoted to the consideration of the legal incidents of the limited estate taken by a Hindu widow since the same is typical, the most important, and the most discussed of the limited estates taken by the females.

511. Widow's estate.—It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power of alienation is imposed. A widow's disabilities under the Hindu Law depend in a great measure upon the notions which the Hindu legislators like Manu, Katyayana, Narada and others entertained of the infirmity and necessary dependence of her sex.[i] The estate which she takes is an anomalous one and cannot be aptly represented by any of the terms of English law applicable to what might seem analogous in circumstances.[j] Hindu Law knows nothing of estate for life or in tail or in fee. It measures estates not by duration but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder, but different in degree. The distinctive feature of the estate is that at her death it reverts to the heirs of the last male owner. Her estate is not a life-estate because under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her, the female holder has the most absolute powers of enjoyment.[k] What she takes is a qualified proprietorship and the whole estate is for the time vested in her, absolutely for certain purposes, though in some respects for a qualified interest; she may hold the estate without performing the necessary religious ceremonies for her husband, and she may give, sell, or transfer the estate to another for her own life, or in case of necessity, sell or mortgage the whole interest in it.[l] She is absolutely entitled to the fullest benefit of her life interest and is accountable to none in respect of its income.[m] In

(i) *Mt. Thakoor Deyhee v. Rai Baluk Ram*, 11 M.I.A. 139; *Collector of Masulipatam, v. Cavaly Venkata*, 8 M.I.A. 529 =2 W.R. 61.

(j) *Rangasami Goundan v. Nachiappa Gounden*, 42 M. 523=46 I.A. 72=17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262=1918 P.C. 196.

(k) *Vasonji Morarji v. Chanda Bibi*, 37 A. 369=29 I.C. 781=2 L.W. 676=17 Bom. L.R. 556=19 C.W.N. 873=29 M.L.J. 130=1915 M.W.N. 449=1915 P.C. 18.

(l) *Moniram Kolita v. Kerri Kolitani*, 5 C. 776=7 I.A. 115 (P.C.).

(m) *Renka v. Bhola Nath*, 37 A. 177=28 I.C. 896.

other words "her right is of the nature of a right of property, her position is that of owner; her powers in that character are however limited; but so long as she is alive, no one has any vested interest in the succession".[n] But the restrictions on her power are there, restrictions whose existence does not depend on that of heirs capable of taking on her death.[o] The reasons for these restrictions upon the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to lands, as the ancient texts importing these restrictions do not make any distinction between one kind of property and another.[p]

512. Divestment of the estate.—An estate inherited by the widow is liable to be divested upon the subsequent birth or adoption of a son or upon her remarriage;[q] but on the question whether such a divestment takes place on her remarriage after conversion to another religion or under the custom of the caste allowing remarriage, the decisions are not uniform. One view is that the expression "any widow" in S. 2 of the Hindu Widow's Remarriage Act of 1856 under which the remarriage of a widow entails her forfeiture of her former husband's estate means only a widow who continues to be a Hindu at the time of her remarriage and who besides marries under the above Act and not under her caste custom. This construction places an unnatural premium on apostacy of Hindu widows and introduces an anomalous differentiation between a widow marrying under the custom and a widow marrying under the Act. Besides, there is no warrant for these refinements on the phraseology of the statute, as the expression "any widow" in the Act is without any such qualification and plainly means in the context any woman who was a Hindu when she was widowed and who remarries whether under or outside the Act. Hence a woman who was a Hindu when she lost her Hindu husband and who has inherited his estate as his widow must be held to forfeit that estate on her remarriage, though the re-marriage is after conversion to another religion,[r] or under the custom of the caste allowing re-

(n) *Janaki Ammal* v. *Narayanasami*, 43 I A. 207 39 M. 634 P.C.=14 A.L.J. 997=18 Bom. L.R. 856=20 C.W.N. 1323—31 M.L.J. 225=4 L.W. 53=(1916) 2 M.W.N. 188=1916 P.C. 117.

(o) *Collector of Masulipatam* v. *Cavaly Venkata*, 8 M. I.A. 529.

(p) *Bhagwandeen* v. *Myna Baee*, 11 M.I.A. 481; But see *Mt. Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 139, regarding widow's power of disposing of movable property in Western India.

(q) *Matungini* v. *Ram Rutton*, 19 C. 289 (F.B.).

(r) Ibid—*Raghunath* v. *Lakshmibai*, 59 B. 417=37 Bom. L.R. 150=1935 B. 298; *Vitta* v. *Chatakondu*, 41 M. 1078=8 L.W. 480=48 I.C. 50=35 M.L.J. 317 =1918 M.W.N. 625 (F.B.); *Mt. Suraj* v. *Attar*, 1 P. 706=1922 P. 378; See contra in *Abdul Aziz* v. *Nirma*, 35 A. 466=20 I.C. 335=11 A.L.J. 678.

marriage.[s] But the mere fact that she has subsequently become unchaste does not divest the estate already vested in her,[t] because a woman does not by her misconduct cease to be her husband's widow as in the case of her re-marriage.[u]

513. Reversioners.—The persons who would be entitled, after the widow's death, to succeed to the estate as the heirs of the last male owner are called reversioners. Such reversioners may be either presumptive or contingent, the former being persons who at any given time are the persons entitled to succeed to the estate if the widow should die at that time, while the latter being those whose right does not arise so long as the presumptive reversioners are alive. The interest which a reversioner possesses in the estate so long as the widow is alive is a mere chance of succession, which cannot enlarge her estate into an absolute one by its being relinquished in her favour.[v] He has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or relinquish or even to transmit to his heirs. His right becomes concrete only on her demise and remains until then a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereof.[w] Every reversioner derives his title from the last full owner and not from another reversioner,[x] and there being no privity of estate between one reversioner and another, an act or omission by one reversioner cannot bind another reversioner who does not claim through him.[y]

514. Widow's powers.—The powers of a widow in respect of the property inherited by her from her husband may be classified

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(s) *Murugayi* v. *Viramakali*, 1 M. 226; *Vijaraghava* v. *Ponnammal*, 62 M. L.J. 131=1932 M. 120=1931 M.W.N. 1257 =34 L.W. 967; *Santala* v. *Badaswayi*, 50 C. 727 -1924 C. 98=27 C.W.N. 669; *Vithu* v. *Govinda*, 22 B. 321; *Mt. Suraj* v *Attar*, 1 P. 706=1922 P. 378; *Nawab* v. *Gauri*, 1935 P. 58; See contra in *Bhola Umar* v. *Mt. Kausilla*, 1932 A. 617 -55 A. 24 -1932 A.L.J. 941 (F.B.) 58 A. 1034=1937 A. 230; *Mangat* v. *Bharto*, 49 A. 203=1927 A. 523 -25 A. L.J. 151; *Gajadhar* v. *Mt. Sukhdei*, 5 Luck. 689=1931 Oudh 107; *Ganga Saran* v. *Mt. Sirtaji*, 1935 A.L.J. 1174= 1935 A. 924; *Narain* v. *Mohan*, 1937 A.L.J. 255=1937 A. 343.

(t) *Sellam* v. *Chinnammal*, 24 M. 441; *Gangadhar* v. *Yellu*, 36 B. 138=13 Bom. L.R. 1038=12 I.C. 714; *Monsram Kolita* v. *Kerri Kolitani*, 5 C 776 -7 I.A. 115 (P.C.).

(u) *Matangini* v *Ram Ratton*, 19 C. 289 (F.B.).

(v) *Hem Chunder* v *Sarnamoyi*, 22 C 354.

(w) *Amrit Narayan* v. *Gaya Singh*, 45 C. 590=45 I.A. 35.-1917 P.C. 95=16 A.L.J. 265=20 Bom. L.R. 546=22 C.W. N. 409=34 M.L.J. 298=7 L.W. 581=1918 M.W.N. 306.

(x) *Rangasami* v. *Nachiuppa*, 42 M. 523=46 I.A. 72—1918 P.C. 196.-17 A.L. J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493—10 L.W. 105—1919 M.W.N. 262.

(y) *Govinda* v. *Thayammal*, 28 M. 57 =14 M.L.J. 209; *Manokarni* v. *Hariapada*, 18 C.W.N. 718=24 I.C. 311=1914 P.C. 184 P.C.

as powers of (1) enjoyment, (2) management, (3) representation and (4) alienation.

515. Widow's powers of enjoyment.—Within the limits imposed upon her by law, she has the most absolute powers of enjoyment.[z] She is absolutely entitled to the fullest benefit of her limited estate and is accountable to none in respect of its income. She can sell, or mortgage or make a gift of her interest to whomsoever she likes. Except in the case of waste or spoliation, her powers of enjoyment are unfettered and she is not bound to economise or save from the income or pay out of it the debts of the husband or the expenses of the necessary religious ceremonies in the family or the maintenance of its members. If she happens to be one of two or more co-widows and if they cannot get on amicably together, she is entitled to a partition of the joint estate for purposes of separate enjoyment.[a] As a necessary corollary of her absolute powers of enjoyment, she is entitled to get possession of the whole estate[b] and enjoy it as any owner is entitled to do by letting the whole or any portion of it on lease for her life.[c] If the income from her estate is insufficient for her own maintenance, she is entitled to alienate the corpus by way of sale or mortgage.[d]

516. Right to income.—Though the corpus of the estate cannot be alienated by the widow except for purposes recognised by law as justifying an alienation, its income during her life forms no part of the husband's estate, and if she receives and spends it all, nobody can call her in question.[e] No doubt the Hindu writers prescribe that a widow ought to lead a chaste and retired life. Her strict duty may be to spend no more than is necessary for her support in a state of seclusion. But if, instead of living strictly, as she should, she lives freely and expensively, her disposition cannot be questioned. The fact that she wastes the income upon extravagance is no ground for restraining such waste, because the waste of the income which is her own absolute property is not the waste of the corpus.

(z) *Vasonji Morarji* v. *Chanda Bibi*. 37 A. 369=17 Bom L.R. 556=19 C.W.N. 873=29 M.L.J. 130=1915 M.W.N. 449=1915 P.C. 18=29 I.C. 781=2 L.W. 676 (P.C.).

(a) *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*, 55 I.A. 399=28 L.W. 378=1928 M.W.N. 758=55 M.L.J. 339=26 A.L.J. 1174=33 C.W.N. 39=31 Bom. L.R. 1=1928 P.C. 251.

(b) *Karimuddin* v. *Gobind*, 31 A. 497=36 I.A. 138=6 A.L.J. 807=11 Bom. L.R. 911=13 C.W.N. 1117=19 M.L.J. 687=3 I.C. 795 (P.C.).

(c) *Subba Reddi* v. *Chengalamma*, 22 M. 126=9 M.L.J. 19.

(d) *Ramsumran* v. *Shyam Kumari*, 49 I.A. 342=1 P. 741=1922 P.C. 356=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=16 L.W. 956=44 M.L.J. 751=25 Bom. L.R. 634.

(e) *Navaneethakrishna* v. *Collector of Tinnevelly*, 69 M.L.J. 632=42 M.L.W. 675 .1935 M.W.N. 1001=1935 M. 1017; *Krishan* v. *Muhammad*, 1938 A. 426 (F.B.); See *Phool Kunwar* v. *Rikhi*, 57 A. 714, holding that the income is liable to be proceeded against in execution of a decree against the husband.

She is in no sense a trustee for those who may come after her, and so long as she does not endanger the corpus or waste it, there is no law which can bind her to save the income or use it for paying off the husband's debts(f) or to invest the principal or manage the principal in any particular way.(g) But if considerable properties are inherited by a woman as a limited owner she has no business to charge the estate with debts contracted by her when those debts could have been very easily met from the income of the properties.(h) Though she is not bound to pay out of the income of the estate the principal of the debt due from the last male holder she is under a duty to pay the interest due thereon where she is in receipt of sufficient surplus income, and she is also bound to meet out of such income the revenue and other periodical charges such as the maintenance charges of dependent members of the last holder's family.(i) In the case of accumulated income of which she stands possessed and properties purchased out of it, her powers in respect thereof vary according as the accumulations accrued or had not accrued when she had possession of the estate. This question may be considered under four heads: (1) accumulations made during the husband's life-time, (2) accumulations made after his death, when the widow was not in possession of the estate, (3) accumulations made by herself while in possession of her husband's estate. (4) accretions.

517. Accumulations made during husband's lifetime.—Accumulations of income which had accrued during the lifetime of the husband are accretions to the estate which she has inherited and she possesses in them the same qualified interest which she has in the corpus of her husband's main estate.(j) Even when there is a special settlement under which the corpus of the estate has passed to a male and the accumulations have come to the widow by heirship, the accumulations are taken by her only as a qualified owner subject to all the restrictions applicable to an estate inherited by a female.(k)

518. Accumulations after husband's death while the widow was not in possession of her husband's estate.—Where the widow who had been kept out of possession of her husband's estate due to

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(f) *Jagannadham* v. *Vigneswarudu*, 55 M. 216=34 L.W. 551=1931 M.W.N. 965 =61 M.L.J. 507=1932 M. 177.

(g) *Hurryidoss* v. *Uppoornah*, 6 M.I.A. 433.

(h) *Rajagopala Chariar* v. *Semi*, 1926 M. 517=50 M.L.J. 221=1926 M.W.N. 266.

(i) *Gade Subbayya* v. *Raja Kundakuri*, 35 L.W. 93=1932 M. 257; *Jagannadham*, v. *Vigneswarudu*, 55 M. 216=34 L.W. 551; *Boddu Jogayya* v. *Goli*, 1913 M.W.N. 275; *Debi Dayal* v. *Bhau*, 31 C. 433; *Thiruvengadam* v. *Gnana*, 1932 M. 97.

(j) *Soorjeemoney* v. *Denobundoo*, 9 M.I.A. 123; *Chandrabalee* v. *Brody*, 2 Suth. 584.

(k) *Soorjeemoney* v. *Denobundu*, 6 M.I.A. 526.

litigation or other causes, ultimately received the accumulations of its income which had accrued from the date of her husband's death, in the absence of anything done by a widow to indicate that she treated the accumulations as part of the husband's estate, she takes the accumulations as her absolute property so as to be entitled to dispose of them to whomsoever she likes by deed or will, and they pass, on her dying intestate, to her own heirs.[l] There is no room for any presumption that the savings of a Hindu widow have been made for the benefit of her husband's estate in a case where the corpus of the estate never came to the widow, but was taken by another under her husband's will, and the income to which the widow succeeded was separated from it and became and was dealt with as an entirely separate fund. In such a case there is no estate of her husband's in the widow's hands for her to augment[l] and the circumstance that she placed the fund in an investment of a permanent nature would not alone justify the inference that she wished it to revert to her husband's heirs or add the fund to the estate devolving on such heirs.[l] In another case where the estate was under the management of the Court of Wards, but the widow entitled to it disposed of its accumulations by will, the reasoning in *Saodamini's case*[l] was followed in upholding the validity of the will on the ground that there was no evidence to suggest that she ever added any part of the income as an accretion to the estate.[m] In the same way, where under a deed or will of her husband the widow gets the income of the husband's estate for her life, the corpus itself having been given to another, the corpus not being in her hands, the savings of the income and property purchased therewith become her absolute properties and not accretions to her husband's estate.[n]

519. Accumulations made by widow while in possession of her husband's estate.—Where a widow comes into possession of the property of the husband and receives the income but does not dispose of the savings in her lifetime, there is no dispute that they follow the estate from which they arose.[o] Though it is true that when the income had been received by the widow it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in the absence of sufficient evidence of that having been done, the savings

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(l) *Saodamini Dasi* v. *Administrator-General of Bengal*, 20 C. 433=20 I.A. 12 (P.C.); *Kallasanatha* v. *Vadivanni*, 58 M. 488.

(m) *Venkatadri Appa Rao* v. *Parthasarathy*, 48 M. 312=52 I.A. 214=23 A.L.J. 261=48 M.L.J. 627=27 Bom. L.R. 823=1925 M.W.N. 441=29 C.W.N. 989 =1925 P.C. 105 affirming *Rajah Parthasarathy* v. *Rajah Venkatadri*, 46 M. 100.

(n) *Krishna* v. *Rajendra*, 2 Luck. 43= 104 I.C. 155; *Bhugbutti* v. *Bhulanath*, 2 I.A. 256=1 C. 104.

(o) *Isri Dutt* v. *Hansbutti*, 10 C. 324= 10 I.A. 150 (P.C.).

from the income must follow the main estate.(p) But the cases in which the above propositions were laid down have been distinguished as inapplicable to questions arising under the Mitakshara by the Madras High Court, and the contrary presumption was held applicable to such cases.(q) The same view was taken by the Bombay High Court in *Keshav* v. *Maruti*.(r) In *Akkanna* v. *Venkayya*,(s) the Madras High Court observed: "The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which though derived from her husband's property was at her absolute disposal. Her absolute power of disposition over the income derived from limited estate being now fully recognised, it is only reasonable that in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction along with properties inherited from her husband, can in no way affect this presumption." This is good sense and good logic and when this case was referred to the Privy Council, they did not disapprove of its ruling.(t) As Ainstie, J. said "if a distinction is to be drawn between current income and accumulations, where is the line to be drawn? When does the surplus cease to be part of the current income? There is no rule requiring a widow to make up the accounts at stated intervals and carry the unexpended balance to the credit of the husband's estate."(u) The enunciation of the above principle was endorsed by the Privy Council in *Isri Dutt* v. *Hansbutti*.(v) The question seems to be essentially one of intention on the part of the widow, and though the outside presumption may be as was indicated by the Madras High Court in *Akkanna's case*, it is a question of fact to be determined in each case whether the widow has so acted as to make the accumulation a part of the husband's estate.(w) The later decision of the Privy

(p) *Nabakishore* v. *Upendra Kishore*, 1922 P.C. 39=15 L.W. 417=20 A.L.J. 22=42 M.L.J. 253=1922 M.W.N. 95=26 C.W.N. 322=3 Pat L.T. 311=24 Bom. L.R. 346.

(q) *Akkanna* v. *Venkayya*, 25 M. 351=12 M.L.J. 5; *Subramanian* v. *Arunachelam*, 28 M. 1; *Piramanayakam* v. *Krishnaswami*, 121 I.C. 492; *Zemindar of Badrachalam* v. *Raja Venkatadri*, 46 M. 190=16 L.W. 369=1922 M.W.N. 532=43 M.L.J. 486=1922 M. 457 (F.B.); *Ayiswaryanandaji* v. *Sivaji*, 49 M. 116=1926 M. 84=49 M.L.J. 568.

(r) 46 B. 37=1922 B. 144=23 Bom. L.R. 803.

(s) 25 M. 351=12 M.L.J. 5.

(t) *Rajah of Ramnad* v. *Sundara Pandiyasami*, 42 M. 581=46 I.A. 64=1918 P.C. 156=17 A.L.J. 153=21 Bom. L.R. 885=23 C.W.N. 549=36 M.L.J. 164=10 L.W. 322=1919 M.W.N. 511; To the same effect is the recent decision of the Privy Council in *Balasubramanya* v. *Subbayya*, 42 C.W.N. 449=65 I.A. 93 affirming *Navaneethakrishna* v. *Collector of Tinnevelly*, 69 M.L.J. 632.

(u) *Hunsbutti* v. *Ishri Dutt*, 5 C. 572.

(v) 10 I.A. 150=10 C. 324 (P.C.).

(w) *Rajah of Ramnad* v. *Sundara Pandiyasami*, 42 M. 581 P.C.=46 I.A. 64=10 L.W. 322=17 A.L.J. 153=21 Bom. L.R. 885=23 C.W.N. 549=36 M.L.J. 164=1919 M.W.N. 511=1918 P.C. 156; *Suraj Prasad* v. *Gulab*, 1937 A. 197.

Council in *Nabakishore* v. *Upendrakishore*[x] appearing to lay down the converse presumption, cannot be said to nullify the effect of the previous decisions of the same tribunal to the contrary.[y]

The following extract contains a useful discussion of this question :—

Ayiswaryanandaji v. Sivaji, 49 M. 116 at 149 to 151.

"So far as this Presidency is concerned, the authorities are to the effect that there is no presumption that property acquired by a Hindu widow out of funds which were at her absolute disposal would form part of her husband's estate. I have dealt with this question in *Rajah Parthasarathy Appa Rao* v *Rajah Venkatadri Appa Rao.*[z] In *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar,*[a] their Lordships of the Privy Council observe:

"Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property."

The case referred to seems to be *Akkanna* v. *Venkayya,*[b] which was referred to in the course of the argument by Mr. De Gruyther.

It is argued by Mr. Krishnaswami Ayyar that the decision of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal,*[c] has settled the question which was left in doubt in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar.*[w] There is an observation of their Lordships at page 256 to the following effect: —

"Now there can, their Lordships think, be no doubt that whatever stridhan she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done."

It is argued that the effect of this observation is that the onus is on the other side to show that she did something which would indicate an intention of treating the accretions as her own and not as part of her husband's estate. The previous decisions of the Privy Council are not referred to by their Lordships and I do not think this case can be said to overrule all the previous decisions of their Lordships on the subject.

I am of opinion that the decision in *Saodammi Dam* v. *The Administrator-General of Bengal,*[d] is clear authority for the view that where a

(x) 15 L.W. 417 1922 P C. 39=20 A.L.J. 22—42 M.L.J. 253 1922 M.W.N. 95=26 C.W.N. 322—3 Pat. L.T. 311—24 Bom. L.R. 346.

(y) *Ayiswaryanandaji* v. *Sivaji,* 49 M. 116=1926 M. 84—49 M.L.J. 568 ; *Bankim Behary* v. *Prabodh,* 1934 C. 284.

(z) 46 M. 190 at p. 220=16 L.W. 369= 1922 M.W.N 532—43 M.L.J. 486=1922 M. 457 (F.B.).

(a) 42 M. 581—46 I A. 64—1918 P.C. 156 —17 A.L.J. 153—21 Bom. L.R. 885—23 C.W.N. 549—36 M.L.J. 164—10 L.W. 322= 1919 M.W.N. 511 (P.C.).

(b) 25 M. 351=12 M.L.J. 5.

(c) 15 L.W. 417=1922 P.C. 39=20 A.L.J. 22=42 M.L.J. 253=1922 M.W.N. 95=26 C.W.N. 322—3 Pat. L.T. 311=24 Bom. L.R. 346.

(w) See foot-note (w) on page 519.

(d) 20 C. 433=20 I.A. 12 (P.C.).

widow is not in possession of her husband's estate, there can be no question of any purchase made by her being an accretion to her husband's estate. Their Lordships of the Privy Council observe: "The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow, but was taken by Shamcharan Mullick under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund."

I think the result of the authorities may be summed up as follows:— A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as govern the devolution of her husband's estate and should be treated as accretions to the estate. Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations. Where the question is one of intention to be deduced or interred from her conduct, the presumption is she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate nor can an intention be inferred that she wants to treat them as part of her husband's estate. On her death such properties would follow the same course of succession as her *stridhanam* properties."—*Per* KUMARASWAMI SASTRI, J.

520. Accretions.—The presumption in the case of properties acquired by Hindu widows and other qualified owners is that they are self-acquisitions, and the onus is on those who assert the contrary.(e) This presumption holds good even when the widow purchases property out of the savings from her limited estate.(f) But a widow by her act may show that she intended the property newly acquired by her to become an accretion to her husband's estate. The whole question, apart from presumption as above laid down, is one of intention gatherable from the circumstances of the case and the acts and conduct of the widow in respect of the new property.(g) Thus when a widow builds upon the land belonging to the husband's estate,(h) or instructs her husband's bankers to consolidate the principal and interest at the end of each year and treat

(e) *Ramayya* v. *Mahalakshmi*, 14 L.W. 33=64 I.C. 481=1921 M.W.N. 434=1922 M. 357.

(f) *Akkanna* v. *Venkayya*, 25 M. 351= 12 M.L.J. 5; *Jamuna Prasad* v. *Ram Padarath*, 1937 Pat. 619=18 Pat. L.T. 765; *Bhaross* v. *Manbasi*, 54 A. 1014; *Keshav* v. *Maruti*, 46 B. 37; *Parbati* v. *Baijnath*, 1936 P. 200=14 P. 518; *Sriram* v. *Jagdamba*, 43 A. 374=1921 A. 11=19 A.L.J. 129 (F.B.); *Nirmala* v. *Deva*, 55 C. 269= 1927 C. 868; *Dulhin* v. *Baijnath*, 14 Pat. 518=16 Pat. L.T. 713=1936 Pat. 200.

(g) *Suraj Prasad* v. *Gulab*, 1937 A. 197.

(h) *Venkata* v. *Surenani*, 31 M. 331= 18 M.L.J. 409.

the aggregate amount as a fresh deposit, [i] or purchases fresh shares in property wherein her husband had already acquired some shares,[j] or makes a single gift of both the original estate and the after acquisition[k] or in any other way treats them in the same manner,[l] her conduct would point to an accretion to the original estate. If, on the other hand, the circumstances do not warrant the inference of an intention on the part of the widow to hold the after-acquired property as a part of her husband's estate, the plea of accretion has no foundation.[m] Thus, where a widow acquires with the aid of borrowed money, but without detriment to the husband's estate, a property, by exercising a right of pre-emption vested in her as her husband's heir,[n] the property acquired is not an accretion to her husband's estate, even though but for her being her husband's widow, she could not have made the acquisition.[o] Again, where a widow purchases land with her own savings and soon after deals with it as her own absolute property by mortgaging it or making a gift of it,[p] the after-acquisition of the widow, even though with the savings from the original estate, cannot be held to be its accretion. But if the estate gets enlarged either by action of the Government[q] or by the act of the widow not in her own independent right but as representing her husband's estate, as for instance, by purchasing the rights of others in the estate[r] or by a compromise with the superior holder,[s] the widow takes the interest representing the enlargement only as a qualified owner.[t] These principles apply even in the case of properties acquired by other limited female holders like the daughter, the mother etc., and hence if a daughter succeeding to her father's property purchases fresh property in her husband's name out of the income of that property, as this is a clear intention to treat the newly acquired

(i) *Narayanan* v. *Suppiah*, 43 M. 629=11 L.W. 418=1920 M.W.N. 248=58 I.C. 639—38 M.L.J. 437.

(j) *Kula Chandra* v. *Bama Sundari*, 41 C. 870—22 I.C. 701; See also *Jagarnath* v *Suraj*, 1937 Pat. 483.

(k) *Isri Dutt* v. *Hansbutti*, 10 C. 324=10 I.A. 150 (P.C.).

(l) *Kula Chandra* v. *Bama Sundari*, 41 C. 870—22 I.C. 701; *Gonda Kooer* v. *Kooer Oodey*, 14 Beng. L.R. 159=2 Suth. 975; *Sheolochun* v. *Saheb*, 14 I.A. 63=14 C. 387 (P.C.).

(m) *Wahid* v. *Tori*, 35 A. 551=21 I.C. 91=11 A.L.J. 856; *Parbati* v. *Baijnath*, 1936 P. 200=14 P. 518.

(n) *Sri Ram Janklji* v. *Jagadamba*, 43 A. 374=1921 A. 11=19 A.L.J. 129 (F.B.); But see *Bhardsa* v. *Manbasi*, 54 A. 1014=1932 A.L.J. 875—1932 A. 690.

(o) *Mahna Singh* v. *Thaman Singh*, 11 Lah 393=1930 L. 1010.

(p) *Keshav* v. *Maruti*, 46 B. 37=1922 B. 144—23 Bom. L.R. 803; *Akkanna* v. *Venkayya*, 25 M. 351=12 M.L.J. 5; *Wahid* v. *Tori*, 35 A. 551=21 I.C. 91=11 A.L.J. 856.

(q) *Subbaroya* v. *Aiyaswami*, 32 M. 86=1 I.C. 749; *Kashi Prasad* v. *Inda Kunwar*, 30 A. 490—5 A.L.J. 590; *Narayan* v. *Chengalamma*, 10 M. 1; *Vangala* v. *Vangala*, 28 M. 13; but see *Palaniyandi* v. *Velayudham*, 52 M. 6.

(r) *Nabakishore* v. *Upendrakishore*, 1922 P.C. 39=15 L.W. 417—20 A.L.J. 22=42 M.L.J. 253—1922 M.W.N. 95=26 C.W.N. 322=3 Pat. L.T. 311=24 Bom. L.R. 346.

(s) *Ram Shankar* v. *Lal Bahadur*, 1 Luck. 98=1926 O. 277.

(t) See however *Palaniyandi* v. *Velayudam*, 52 M. 6=28 L.W. 530=55 M.L.J. 579=1928 M.W.N. 723=1929 M. 93, a case of an enfranchisement of a Karnam service inam in favour of a widow.

property as her own, the same cannot be held to be an accretion to the parent's estate.[u] Where a widow shows no inclination to realise the past profits awarded to her by a decree of Court, she must be taken to have intended to leave these mesne profits with her husband's estate, so that the heir succeeding to that estate after her, is entitled to execute the decree in respect of the mesne profits as well as the other property deal with by the decree.[v] See also S. 475.

521. Widow's power of management.—Being the owner of the estate vested in her by inheritance, she is entitled to manage it as any prudent owner of property, and, like a manager of a family, must be allowed reasonable latitude in the exercise of her powers, provided she acts fairly to the expectant heirs.[w] Her powers are similar to those of the manager of an infant's estate as defined in *Hunoomanpersaud's case.*[x] If her acts of management do not constitute a waste of the corpus or a danger to the reversion, she cannot be restrained therefrom. She is not a trustee for any body and is not bound to apply the income for the discharge of the husband's debts, because the income is entirely hers.[y] She fully represents the estate for the time being. This being so, she must in the nature of the circumstances from time to time enter into transactions for the proper management of the estate. If she incurred a debt for lawful purposes or entered into transactions giving rise to pecuniary liabilities in respect of which she could validly create a charge upon the estate, the debts are binding on the estate even in the hands of the reversioners[z] whether they were ordinary debts[z] or trade debts.[a] She can keep a debt alive by making payments under S. 20 of the Limitation Act[b] or making an acknowledgement under S. 19 thereof (Indian Limitation Amendment Act, 1927, S. 3). A compromise entered into *bona fide* for the benefit of the estate and not for her own personal benefit is binding upon the reversion if prudent and reasonable under the circumstances of the case.[c] An alienation which is the result of a compromise, or the mode by

(u) *Suraj Prasad* v. *Gulab*, 1937 A. 197.

(v) *Raghunath* v. *Lakshmibai*, 59 Bom. 417=37 Bom. L.R. 150=1935 B. 298; see also *Phool Kunwar* v. *Nikhi*, 57 A. 714=1935 A. 261.

(w) *Venkaji* v. *Vishnu*, 18 B. 534; *Punjab Sugar Mills* v. *Lakshman*, 1937 A.L.J. 501=1937 A. 321.

(x) 6 M.I.A. 393; *Kameswar* v. *Run Bahadur*, 6 C. 843=8 I.A. 8 (P.C.).

(y) *Debi Dayal* v. *Bhan Pertap*, 31 C. 433=8 C.W.N. 408.

(z) *Bisheshar Bakhsh* v. *Jang Bahadur*, 122 I.C. 614=1930 Oudh 225; *Ramcoomar* v. *Ichamoyi*, 6 C. 36; See contra *Ramasami* v. *Sellattammal*, 4 M. 375; *Bhagwantrao* v. *Ramanath*, 52 B. 542=30 Bom. L.R. 881=1928 B. 310; *Dhiraj Singh* v. *Manga Ram*, 19 A. 300.

(a) *Pahalwan Singh* v. *Jiwan Das*, 42 A 109=59 I.C. 162=18 A.L.J. 41; *Sakrabai* v. *Magamlal*, 26 B 206=3 Bom. L.R. 738

(b) *Chegamull* v. *Govindaswamy*, 112 I.C. 491=1928 M. 972.

(c) *Mata Prasad* v. *Nageshar Sahai*, 47 A. 883=52 I.A. 398=24 A.L.J. 1=50 M.L.J. 18=1926 M.W.N. 53=28 Bom. L.R. 1110=30 C.W.N. 626=1925 P.C 272; *Ramsumran Prasad* v. *Shyam Kumari*, 1 P. 741=49 I.A. 342=27 C.W.N. 269=3 P.L.T. 749=21 A L.J. 18=16 L.W. 956=44 M.L.J. 751=25 Bom. L.R. 634=1922 P.C. 356.

which a compromise is carried into effect, will, if it be reasonable and prudent, and for the interest of the estate, fall within the power of the holder of a Hindu woman's estate, either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity.[d] As regards moneys belonging to the estate, she may invest them in such securities as she may think proper and profitable, not necessarily in Government securities. She can grant leases in the exercise of her power of management, but not a permanent lease or one for an excessively long term unless it be for the benefit of the estate or warranted by legal necessity.[e] The mere fact that the rent reserved was a fair market rent, or the price obtained was a fair market price, cannot in itself be regarded as sufficient to validate a permanent lease.[f]

522. Widow's power to represent the estate.—Being the owner of the property, she is entitled to represent it in all transactions necessary for the management, realisation or improvement of the estate.[g] She can sue to recover possession from trespassers, defend suits against the estate, incur debts in its management and enter into valid compromises on its behalf.

523. Decree against widow and res judicata.—A Hindu widow represents the estate in suits brought by or against her, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit, where the suit was fought out according to law and was not collusive or fraudulent.[h] Even an *ex parte* decree against a Hindu widow will be binding on the reversioners if the decree has not been obtained unfairly or improperly;[i] and so also is a decree fairly and properly obtained against her on an admission of fact[j] or on a *bona fide* compromise on behalf of the estate[c] or on an award.[k] It is true that the rule of *res judicata* enacted in S. 11 of the Civil Procedure Code of 1908 is not strictly applicable in such a case, as the reversionary heir was

(d) *Ramasumran Prasad* v. *Shyam Kumari*, 1 P. 741=49 I.A. 342=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=16 L.W. 956=44 M.L.J. 751=25 Bom. L.R. 634=1922 P.C. 356.

(e) *Bijoy Gopal* v. *Girindra Nath*, 41 C. 793=1914 P.C. 128=12 A.L.J. 711=16 Bom. L.R. 425=18 C.W.N. 673=27 M.L.J 123=1914 M.W.N. 430=1 L.W. 533 (P.C.).

(f) *Nabakishore* v. *Upendrakishore*, 15 L.W. 417=1922 P.C. 39=20 A.L.J. 22=42 M.L.J. 253=1922 M.W.N. 95=26 C.W.N. 322=3 P.L.T. 311=24 Bom. L.R. 346.

(g) *Radharani* v. *Brindarani*, 63 C.L.J. 263=1936 C. 392.

(h) *Vaithilinga* v. *Srirangath Anni*, 48 M. 883=52 I.A. 322 49 M.L.J. 769=1926 M.W.N. 11=28 Bom. L.R. 173=30 C.W.N. 313 1925 P.C. 249; *Sarju* v. *Mangal*, 47 A. 490=1925 A. 339=23 A.L.J. 251; *Katama Natchier* v. *Rajah of Shivagunga*, 9 M.I.A 539; *Bhupendra* v. *Bhusan*, 41 C.W.N. 392.

(i) *Debendranath* v. *Nagendranath*, 60 C. 1158=1933 C. 900=37 C.W.N. 1001; *Gur Nanak* v. *Jai Narain*, 34 A. 385=14 I.C. 814=9 A.L.J. 375; *Sarju* v. *Mangal*, 47 A. 490.

(j) *Bhuneshwari* v. *Secretary of State*, 1937 Pat. 374.

(c) See p. 523 footnote (c).

(k) *Shib Deo* v. *Ram*, 46 A. 637.

not a party to the suit and does not claim under a party to the suit, but the principle of *res judicata* has been applied rightly by the Courts in India so as to bind reversioners by decisions in litigation, fairly and honestly conducted, given for or against Hindu females who represented the estate of the last male owners,(l) and a reversioner is not entitled to have a decree obtained against the widow as representing her husband's estate declared void merely by showing that it was based on wrong principles. Such a decree can be corrected by a Court of appeal, but once the opportunity for the appeal is past and the decree has become final, it is as binding as a decree which is passed on the most clear and correct principles of law and the reversioner is not entitled to challenge it on the ground, for instance, that the contract of the husband on which the decree was given was not binding on the estate because it was void for a particular reason.(m) Where a decree founded upon the law of limitation is obtained against the widow in her life-time, the reversionary heir is barred and does not get the benefit of Art. 141 of the Limitation Act; but where there has been no decree against the widow or other act in the law in the widow's life-time depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art. 141 for the purposes of the determination of the question whether his title is barred by lapse of time. "The case of 52 I.A. 322(n) illustrates the application of the rule in the *Shivagunga case*,(o) where a decree founded upon adverse possession has been obtained against a Hindu widow in her life-time. The decision is not, in their Lordships' judgment, in conflict with that in *Ranchordas Vandravandas* v. *Parvatibai*,(p) in which no decree had been obtained against the widow, nor had there been any other act in the law in the life-time of the widow destroying the heir's interest".(q) But the rule of *res judicata* can be applied only if the widow did as a matter of fact represent the estate in the prior litigation.(r) The question in each case will be, whether the estate was properly represented in the prior proceedings. If, for instance, she had litigated in assertion of an absolute right, inconsistent with her representative cha-

(l) *Rissl Singh* v. *Balwant Singh*, 40 A. 593=45 I.A. 168=21 Bom. L.R. 511=23 C.W.N. 326=36 M.L.J. 597=1919 M.W.N 155=1918 P.C. 87=48 I.C. 553=9 L.W. 52; *Munni Bibi* v. *Tirloki*, 58 I.A. 158=53 A. 103=1931 A.L.J. 453=33 Bom. L.R. 979=35 C.W.N. 661=61 M.L.J. 196=34 L.W. 459 =1931 P.C. 114; *Dinanath* v. *Sabuj*, 1934 Pat. 606; *Parbati* v. *Baijnath*, 14 Pat. 518 =16 Pat. L.T. 713=1936 Pat. 200.

(m) *Madivalappa* v. *Subbappa*, 1937 B. 458=39 Bom. L.R. 895.

(n) *Vaithilinga* v. *Srirangath Anni*, 52 I.A. 322=48 M. 883=49 M.L.J. 769=1926 M.W.N. 11=28 Bom. L.R 173=30 C.W.N. 313=1925 P.C. 249.

(o) 9 M.I.A. 539.

(p) 26 I.A. 71=23 B. 725=3 C.W.N. 621 =1 Bom. L.R. 607.

(q) *Mt. Jaggo Bai* v. *Utsava Lal*, 56 I.A. 267=51 A. 439=1929 P.C. 166=30 L.W. 60 =1929 A.L.J. 716=33 C.W.N. 809=31 Bom. L.R. 891=57 M.L.J. 160=10 P.L.T. 527= 1929 M.W.N. 762; See also *Ram Bharose* v. *Rameshwar*, 1938 Oudh 27.

(r) *Rajlakshmi* v. *Bholanath*, 48 L.W. 423=1938 P.C. 254.

racter, she could not in any sense of the word, be said to have represented the estate, and a decision given therein upholding such contention of hers would not obviously bind the reversion.[s] Thus if she was not sued as representing the estate and the decree and the sale proceedings were against the widow only personally, the sale does not pass to the auction-purchaser any thing more than the limited interest possessed by the female holder, even though the debt for which the decree was obtained was binding on the estate. "It is possible that although no charge was created, the original debt having been for lawful purposes, the creditor might have recovered his debt from the estate left by Bharat, if he had chosen to do so. But in order to make the estate liable he ought to have framed his suit in a proper manner."[t] Where in execution of a decree obtained against a Hindu widow, her right, title and interest in her husband's estate is sold, the question whether the sale passes to the purchaser only the widow's interest or the whole interest in the property depends upon the nature of the suit in which the execution issues. If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it.[u] If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, the whole estate passes.[v] When a question arises as to what was sold under the decree, the Court is at liberty to look to the judgment in which the decree was passed.[v]

524. Widow's power to incur unsecured debts for the estate.— On the question whether simple debts incurred by a widow for legal necessity are binding upon the estate after the widow's death, the decisions are not uniform. If the debts were incurred by the widow for carrying on the business inherited by her from her hus-

(s) *Viraswami* v. *Nayudamma*, 91 I.C. 497 :=22 L.W. 178=49 M.L.J. 430 :=1925 Mad. 1270 ; *Katama Natchier* v. *Rajah of Shivagunga*, 9 M.I.A. 539 ; *Tirupatiraju* v. *Venkayya*, 45 M. 504 :=15 L.W. 395 :=1922 M. 131=1922 M.W.N. 207 :=42 M.L.J. 392 (F.B.) ; *Kishan Lal* v. *Muhammad* (1938) A. 426.

(t) *Lalit Mohan* v. *Srimati Dayamoyi*, 25 L.W. 709 :=105 I.C. 469 =1927 M.W.N. 95 :=52 M.L.J. 426 :=29 Bom. L.R. 759=1927 P.C. 41 ; *Ghasit* v. *Panchanan*, 15 P. 798 =1937 P. 58 ; *Jugal Kishore* v. *Jotendro*, 10 C. 985 :=11 I.A. 66 ; *Mt. Raj Kunwari* v. *Mt. Kunwar*, 1 Oudh W.N. 710=82 I.C. 832; *Rameshar Bux* v. *Pairaj*, 1938 Oudh 35 := 1937 Oudh W.N. 1181 ; *Kameshwar* v. *Beni*, 11 Pat. 430=1931 Pat. 422=12 Pat. L.T. 701 ; *Parbati* v. *Baijnath*, 14 Pat. 518 :=16 Pat. L.T. 713 =1936 Pat. 200 ; *Narayan* v. *Rajkumari*, 22 C.L.J. 400 :=32 I.C. 580 ; *Vasant* v. *Behari*, I.L.R 1938 N. 382 :-- 1938 N. 225.

(u) *Baijun Doobey* v. *Brij Bhookun*, 1 C. 133 :-2 I.A. 275 ; *Jugal Kishore* v. *Jotendro Mohun*, 10 C. 985 :11 I.A. 66 ; *Vasant* v. *Behari*, 1938 N. 225 ; *Amrit Narayan* v. *Gaya*, 45 C. 590 :=45 I.A. 35 ; *Risal* v. *Balwant*, 40 A. 593 :=45 I A. 168 ; *Krishan* v. *Muhammad*, 1938 A. 426 (F.B.) ; *Kumar* v. *Gobinda*, 1937 C. 280.

(v) *Jugul Kishore* v. *Jotendro Mohun*, 10 C. 985 :=11 I.A. 66 ; *Nagendrabala* v. *Panchanan*, 60 C. 1236 :=1934 C. 162 ; See also *Veerabadra* v. *Marudaga*, 34 M. 188 :=1910 M.W.N. 799=21 M.L.J. 320 ; *Parathnath* v. *Rameshwar*, 1938 A. 491 ; *Marudanayakam* v. *Subramanian*, 1935 M.W.N. 601=68 M.L.J. 643=41 L.W. 783=1935 M. 425 ; *Mallaya* v. *Bapi Reddi*, 35 M.L.W. 134=62 M.L.J. 39=1932 M. 29.

band, the debts are binding upon the reversioners to the extent of the business assets and there is no conflict on this question.[w] But if the debts are not trade debts, the High Courts of Allahabad,[x] Madras,[y] and Patna,[z] take the view that the debt though for legal necessity, not having been secured by a charge on the property, must be taken to have been incurred solely with reference to the personal liability of the widow and the creditor who has accepted that liability cannot proceed against the estate after the widow's death. But the Calcutta High Court, however, holds and holds, it is submitted, rightly, that such debts are binding upon the reversioner though not charged upon the estate during the widow's life-time[a] and this view has now been taken by a Full Bench of the Bombay High Court,[b] and is followed by the Nagpur High Court as well.[c] It cannot be gainsaid that a widow fully represents her husband's estate and she must from the nature of the circumstances from time to time for the proper management of the estate incur debts for lawful purposes or enter into transactions giving rise to pecuniary liabilities in respect of which she could validly create a charge upon her husband's property. If this is conceded, there is no reason why a debt incurred for a lawful purpose and accredited necessity should cease to be binding upon the estate after her death simply because the creditor had not chosen to take a mortgage or charge in respect of that debt during the widow's life-time.[d] If as was held by the Privy Council in *Lalit Mohan* v. *Srimati Dayamoyi*,[e] a creditor can enforce an unsecured debt of a widow against the whole estate during the widow's life-time, it is difficult to see how her death can affect his right against the property simply because he was liberal enough to allow the widow sometime before taking steps to enforce the debt.[f] The proper

(w) *Pahalwan Singh* v. *Jiwan Das*, 42 A. 109=59 I.C. 162=18 A.L.J. 41 ; *Barada Prosad* v. *Krishna Chandra*, 38 C.W.N. 33 .1934 C. 414 ; *Sakrabai* v. *Maganlal*, 26 B. 206=3 Bom. L.R. 738 (F.B.) ; *Popat* v. *Damodar*, 36 Bom. L.R. 844=1934 B. 390 ; *Subramania* v. *Ramakrishnamma*, 20 L.W. 627=1925 M. 403.

(x) *Mt. Kishandevi* v. *Chand Mal*, 1934 A. 423 ; *Dhiraj Singh* v. *Manga Ram*, 19 A. 300 ; *Kallu* v. *Faiyaz*. 30 A. 394=5 A.L.J. 367.

(y) *Ramasami* v. *Sellattammal*, 4 M. 375.

(z) *Baramdeo* v. *Lal Bahadur*, 1934 P. 216=15 P.L.T. 583 ; *Babu Ramsewak* v. *Jamuna*, 1937 Pat. 667 ; See also *Sheikh* v. *Thakur*, 15 Pat. 798.

(a) *Ramcoomar* v. *Ichamoyi*, 6 C. 36 ; *Hurry Mohun* v. *Ganesh*, 10 C. 823 (F.B.).

(b) *Dhondo Yeshwant* v. *Mishrilal*, 1936 B. 58=60 B. 311=38 Bom. L.R. 6 (F.B.) overruling *Bhagwantrao* v. *Ramanath*, 52 B. 542=1928 B. 310=30 Bom L.R. 881.

(c) *Raghvappa* v. *Balappa*, 1938 N. 77.

(d) *Bisheshar Singh* v. *Jang Bahadur*, 122 I.C. 614=1930 Oudh. 225 ; See also the observations of Sir Lawrence Jenkins in *Sakrabhai* v. *Mangan Lal*, 26 B. 206=3 Bom. L.R. 738 (F.B.); *Regella* v. *Nimishakavi*, 33 M. 482=1910 M.W.N. 142=20 M.L.J. 412=5 I.C. 271 ; *Venkayya* v. *Bangarayya*, 82 I.C. 464=1925 M. 401 (2); *Parathnath* v. *Rameshwar*. 1938 A. 491 ; *Veerabadra* v. *Marudaga*, 34 M. 188=21 M.L.J. 320=8 I.C. 1072 ; *Maharaja of Bobbili* v. *Zamindar of Chundi*, 35 M. 108 =21 M.L.J. 593=(1911) 1 M.W.N. 101.

(e) 25 L.W. 709=105 I.C. 469=1927 P.C. 41=1927 M.W.N. 95=52 M.L.J. 426=29 Bom. L.R. 759 (P.C).

(f) See *Karimuddin* v. *Gobind*, 31 A. 497=36 I.A. 138=6 A.L.J. 807=11 Bom. L.R. 911=13 C.W.N. 1117=19 M.L.J. 687= 3 I.C. 795 (P.C.).

view, therefore, is where the widow incurs a necessary liability in her character as representing the husband's estate, the intention of binding the estate as opposed to binding herself alone is to be implied, because the reversioner's obligation depends upon the purpose of the debt rather than upon the intentions of the parties contracting it, and in the absence of definite evidence to prove an agreement confining the liability to widow's personal capacity, it must be held that the estate in the reversioner's hands is also bound by a simple debt incurred by a widow for the necessity or benefit of the estate.(g)

525. Compromises and family arrangements by widow.—A compromise not vitiated by fraud or collusion, but made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner, is binding on the heirs in reversion, and in this respect a compromise stands on the same footing as a decree on contest,(h) whether the compromise is out of Court or one concluded in a suit.(i) An alienation which is the result of such a compromise, or the mode by which the compromise is carried into effect, if the compromise be reasonable and prudent, and for the interest of the estate, is within the widow's competence, either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to such an alienation.(j) In rejecting the argument that a widow has no authority to compromise in any case, their Lordships of the Privy Council in *Ramsumram Prasad* v. *Shyam Kumari*(k) observed as follows: "A Hindu woman might be a party to a litigation concerning considerable immovable property, might be successful in the first Court and be threatened with an appeal, and have then a suggestion from the adversary that if she would part with a single item of property or a few bighas, he would let the judgment stand. She would have, if the argument were sound, to refuse the suggested compromise, and be prepared to fight the case upto the Privy Council: or it might be put in another way: her opponent could never suggest a compromise, because he would know that any compromise would be upset. It would be very undesirable in the interests of property owners that this extreme doctrine should be upheld, and their

(g) *Dhondo Yeshvant* v. *Mishrilal*, 38 Bom. L.R. 6 1936 B. 59=60 Bom. 311 (F.B.); *Dan Parmanand* v. *Gopalrao*, 1937 N. 302.

(h) *Venkataraman* v. *Sivagurunatha*, 1933 M. 639; *Shanmuga Mudaliar* v. *Koveri Ammal*, 109 I.C. 539=1928 M. 706; *Rama Aiyar* v. *Narayanasami*, 23 L.W. 496=96 I.C. 483=1926 M. 600=51 M.L.J. 313=1926 M.W.N. 958.

(i) *Mohendra Nath* v. *Shamsunnessa*, 27 I.C. 954=19 C.W.N. 1280.

(j) *Ramsumran Prasad* v. *Shyam Kumari*, 1 P. 741=49 I.A. 342=1922 P.C. 356=16 L.W. 956=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=44 M.L.J. 751=25 Bom. L.R. 634; *Ravji* v. *Rama*, 106 I.C. 206=29 Bom. L. R. 1346=1928 B. 14.

(k) 1 P. 741=49 I.A. 342=1922 P.C. 356 16 L.W. 956=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=44 M.L.J. 751=25 Bom. L.R. 634.

Lordships, after consideration of the authorities that have been cited to them, are glad to find that they are not driven to any such extreme position."

A family arrangement stands on a similar footing as a compromise. It is an arrangement come to between relations or members of a family, who have their own unadmitted rights to be pressed against one another, in order to avoid litigation and for the benefit, peace, security or preservation of the property in dispute,[l] and to such an arrangement great importance is attached by the Courts.[m] In the absence of proof of mistake, inequality of position, undue influence, coercion or like ground, a family arrangement made in settlement of the disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from: and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose act in this respect will bind the reversioners.[n] But a family arrangement to be valid and operative must be one concluded with the object of settling a *bona fide* dispute arising out of conflicting claims to property which was existing at the time or likely to arise in future. *Bona fides* is the essence of its validity. There must be either a dispute, or at least an apprehension of a dispute, a situation of contest which is avoided by a policy of giving and taking, or else all transfers and surrenders will pass under a cloak of family arrangement.[o] But it is not essential to the validity of a family settlement that there must be disputes existing at the time the settlement is arrived at. The members of the family may anticipate disputes likely to arise thereafter, and in order to prevent them and with a view to maintain amity and peace in the family, they may arrive at a settlement among themselves which can be held to be valid.[p] But there must be always some consideration for a family settlement to be valid, in the sense of a doubtful right to be compromised, a dispute to be set at right or a threat to the honour of the family which is to be averted.[q] The mere existence of a dispute, however, does not raise a presumption that it is a *bona fide* dispute, but if a person putting forward a claim to the estate believed in good faith that he had some right in the property, whether that claim

(l) *Sidh Gopal* v. *Bihari Lal*, 50 A. 284 =1928 A. 65=25 A.L.J. 978.

(m) *Binda Kuer* v. *Lalita*, 44 M.L.W. 546=41 C.W.N. 161=38 Bom. L.R. 1256=1936 P.C. 304; *Mst. Hardei* v. *Bhagwan*, 24 C.W.N. 105=1919 P.C. 27=13 L.W. 436; *Bishambar* v. *Amarnath*, 41 C.W.N. 651=1937 P.C. 105=46 L.W. 94.

(n) *Dangal Ram* v. *Jaimangal*, 5 P. 480 =1926 P. 364.

(o) *Basantakumar Basu* v. *Ramshankar*, 55 C.L.J. 205=59 C. 859=1932 C. 600: *Joges Chandra* v. *Prasanna Kumar*, 139 I.C. 250=1932 C. 664.

(p) *Bajrang* v. *Rameshar*, 12 Luck. 684 =1937 O. 189; *Jang Bahadur* v. *Uma*, 1937 O. 99=12 Luck. 639.

(q) *Williams* v. *Williams*, (1867) 2 Ch. A. 294; *Dattatraya* v. *Narayan*, 1936 N. 186.

was valid in law or not,[r] and the dispute between him and the widow was compromised with the aid of mediators, that compromise is binding on the reversioners. So also where the transaction is the result of a *bona fide* compromise of genuine dispute between the widow on the one hand and the reversioner on the other, the arrangement cannot be subsequently impeached by the actual reversioners[s] unless it was a device to divide the estate between them[t] and in considering the validity of it, the mode by which it is carried into effect is immaterial.[u] If the arrangement is a *bona fide* settlement of disputes in respect of the estate the fact that the reversioners were[v] or were not[w] parties thereto is immaterial and the actual reversioners would be bound by it.[x] But if there is no such *bona fide* dispute at all, and both the party putting forward a claim and the widow know that there is no foundation for the claim advanced, an apparent compromise entered into between them cannot be binding upon the reversioners.[y] The test to find out whether a transaction impeached by the reversioners is an alienation by the widow and not a *bona fide* compromise of a disputed claim is to see whether the alienee derives his title from the widow or not. If he does, the transaction is an alienation and is not binding on the reversioners except under circumstances under which an alienation by her will bind them.[z] If, however, the transaction has been effected on the footing that there was already an antecedent title of some kind in the parties which was only to be acknowledged and defined by the transaction in question, the transaction is to be upheld as a compromise and not rejected as an alienation by the widow[a] or as a relinquishment of

(r) *Jamna Prasad* v. *Mt. Durga*, 1933 A. 138.

(s) *Mata Prasad* v. *Nageshar*, 47 A 883 =52 I A. 396=24 A.L.J. 1=1926 M.W.N. 83 =28 Bom. L.R. 1110=30 C.W.N 626=1925 P.C. 272; *Sureshwar* v. *Maheshrani*, 48 C 100=47 I.A. 223=16 A.L.J. 1069=39 M.L.J. 161 1920 M.W.N. 472=25 C.W.N. 194 1921 P.C. 107; *Madan Lal* v. *Diwan*, 1938 Lah. 163; *Angamuthu* v. *Sinnapennammal*, 47 L.W. 286=1938 M. 364; *Sabitri* v. *Mrs F. A. Savi*, 12 Pat. 359= 1933 Pat. 306.

(t) *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352 1931 Pat. 442; *Angamuthu* v. *Sinnapennamal*, 47 L.W. 286=1938 M. 364; *Manmatha* v. *Gobindalall*, 1939 C. 135.

(u) *Ramsumran Prasad* v. *Shyam Kumari*, 1 Pat. 741=16 L.W. 956; *Angamuthu* v. *Sinnapennamal*, 47 L.W. 286= 1938 M. 364.

(v) *Ramgowda* v. *Bhausaheb*, 52 B. 1= 1927 P.C. 227=54 I.A. 396=29 Bom. L.R. 1380=32 C.W.N. 88=27 L.W. 140=1927 M.W.N. 736=53 M.L.J. 350.

(w) *Khunni Lal* v. *Gobind Krishna*, 33 A. 356 38 I.A. 87=10 I.C. 477=8 A.L.J. 552=13 Bom. L.R. 427=15 C.W.N. 545= (1911) 1 M.W.N. 432=21 M.L.J. 645 (P.C.); *Hiran Bibi* v. *Sohan Bibi*, 24 I.C. 309=1 L.W. 648 1914 P.C. 44=18 C.W.N. 929= 27 M I.J. 149 (P.C.).

(x) *Kanhai Lal* v. *Brij Lal*, 40 A. 487 P C. 45 I.A 118=47 I.C. 207=8 L.W. 212 1918 P.C. 70=16 A.L.J. 825=20 Bom. L.R. 1048 22 C.W.N. 914=35 M.L.J. 459=1918 M.W.N. 709; *Chhatarpal* v. *Sant*, 1938 Oudh 190.

(y) *Gunjeshwar* v. *Durga Prashad*, 45 C. 17=44 I.A. 229=7 L.W. 94=16 A.L.J. 1 =20 Bom. L.R. 38=22 C.W.N. 74=34 M.L.J. 1=1918 M.W.N. 16=1917 P.C. 146 =42 I.C. 849.

(z) *Mt. Rajpali* v. *Surju*, 1936 A. 507= 1936 A.L.J. 659=58 A. 1041 (F.B.).

(a) *Khunni Lal* v. *Gobind Krishna*, 33 A. 356=38 I.A. 87=10 I.C. 477=8 A.L.J. 552=13 Bom. L.R. 427=15 C.W.N. 545= (1911) 1 M.W.N. 432=21 M.L.J. 645.

spes successionis by the reversioners who are parties to the transaction.[b]

The power of a Hindu widow to compromise a litigation is discussed by the Privy Council in the following case :—

Ramsumran Prasad v. Shyam Kumari, 16 L.W. 956 : 1 Pat. 711 (P.C.).

"The question raised on this appeal is whether the reversionary heirs of one Brij Mohan Lal can recover possession of certain property which is said to have been alienated by his widow as one of the terms of a compromise of litigation originally brought by Brij Mohan Lal and continued by his widow after his death. He had begun the suit on the 18th July, 1895, and died on the 22nd December. The suit was brought to enforce two mortgage bonds. There was a claim by a prior mortgagee which eventually came up before this Board, and resulted in a decree which was generally favourable to the widow, but required her to pay into Court a considerable sum to the credit of this first mortgagee. She paid this, and then proceeded to execute the decree for recovery of what was due to her on the mortgage bonds, which was ascertained by the decree to be the sum of Rs. 141,959. Six of the properties were then put up for auction on the 20th June, 1912, the widow having leave to bid, and she bought them for the sum of Rs. 65,075. Thereupon the judgment-debtors filed a petition in objection to the sale and the widow came to the compromise which is now impeached.

By this compromise she agreed that the sale of the six properties should be set aside, and that the judgment-debtors should be allowed to sell them again to certain proposed purchasers for a sum total of Rs. 66,000 to be paid over to her. It was further provided that the two other properties should be hers to sell and make what she could of them, it being estimated that she would probably obtain Rs. 5,000. The rest of the debt, Rs. 70,259 was remitted.

The reversioners, hearing of this transaction, applied for leave to intervene in the suit and oppose, but were refused, all their rights being reserved. Thereupon the present suit was instituted by them, praying that the order entering satisfaction of the judgment debts should be vacated, for a declaration of their rights and for an injunction and further or other relief. They said that the sale was fraudulent, collusive and illegal.

The widow, the judgment debtors and the purchasers from the judgment-debtors all appeared and defended. One of the points set up on behalf of the defendants was that the widow's husband's family was governed by the Mithila School of Hindu Law, which gives larger powers to a Hindu woman when an estate is vested in her than she gets under the Mitakshara. This was negatived by both Courts—and need not now be considered.

On the other hand, both Courts have found that there was no fraud or collusion, and have taken the view that the compromise should stand, and have dismissed the suit. The principal ground on which the supposed fraud rested was that the properties released being worth considerably more than Rs. 66,000, the purchasers from the judgment-debtors had obtained very advantageous bargains, and that one of these purchasers was the widow's brother. Both Courts, however, having negatived fraud, it would

[b] 40 L.W. 241.

require an exceptionally strong case to induce this Board to take a contrary view, and indeed the appellants have not ventured to question this part of the decision.

The points further to be decided are, first of all, whether the widow or any one holding what is known as a Hindu woman's estate, especially perhaps if that estate consists of immovable property, can compromise in any circumstances, and secondly, whether this compromise is sufficiently reasonable for the Courts to allow it to stand.

Their Lordships have been invited in an elaborate argument which has reviewed all the authorities to hold either that there is no such power of compromise at all or that a compromise which results in the surrender of land must be treated on the footing that such an alienation is on the same footing with other alienations of land which the holder of a Hindu woman's estate can make, namely, that they are justifiable by necessity and necessity only.

It should be observed *in limine* that the word necessity, when used in this connection, has a somewhat special, almost technical, meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to secure the repose of the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immovable property to pay the last owner's debts or (if there is no other available source of supply) for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient.

Bearing this in mind their Lordships will proceed to consider whether an alienation, which is the result of a compromise or the mode by which a compromise is carried into effect, should, if the compromise be reasonable and prudent, and for the interest of the estate, fall within the power of the holder of a Hindu Woman's estate, either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity. It may be observed at once that the argument which would refuse authority to compromise in any case would have very extreme consequences. A Hindu woman might be a party to a litigation concerning considerable immovable property, might be successful in the first Court and be threatened with an appeal, and have then a suggestion from the adversary that if she would part with a single item of property or a few bighas he would let the judgment stand. She would have, if the argument were sound, to refuse the suggested compromise, and be prepared to fight the case upto the Privy Council, or it might be put in another way. Her opponent could never suggest a compromise, because he would know that any compromise would be upset. It would be very undesirable in the interests of property owners that this extreme doctrine should be upheld, and their Lordships, after a consideration of the authorities that have been cited to them, are glad to find that they are not driven to any such extreme position.

The case of *Katama Natchier* v. *The Rajah of Shivagunga*(c) decided in 1864, which has been brought to their Lordships' notice, has no direct bearing upon the point now to be discussed, but it is perhaps useful as an introductory statement. Their Lordships there held that a decree fairly and properly obtained against a widow binds the succeeding heirs because the whole estate is for the time vested in her, absolutely for some purposes, though

(c) 9 M.I.A. 539.

in some respect for a qualified interest, and because until her death it could not be ascertained who would be entitled to succeed (p. 604).

In *Tarinee Churn Gangooly* v. *Watson & Co.*[d] decided in 1859, the High Court at Calcutta had to deal with the case of a widow who was under age, and had a minor son, and the judges held that if she was properly represented in the suit they must treat the matter as standing precisely as if she had been of age, and had acted on her own behalf, that it was erroneous to look upon the transaction simply as an alienation by her, and that she had full power to compromise a suit or even to have entered into a compromise before the suit was brought.

In *Khunni Lal* v. *Gobind Krishna Narain*[e] decided in 1911, an agreement of compromise was made between the daughters of the pre-deceased son of a convert from Hinduism to Mahommedanism, and his heir-at-law, by which the property was divided into certain shares between the daughters and the alleged heir-at-law. After the death of the daughters, the heirs in reversion claimed the estate against the derivative purchasers from the heir-at-law, putting their case in this way, that the heir-at-law's title came under an alienation made by the daughters without justifying necessity, and that therefore neither he nor his derivative purchasers could hold the property. This Board held that the compromise on its true construction did not mean an alienation, and that it was not right to say that the heir-at-law or the derivative purchasers derived a title from the daughters. It is obvious that to put it as the respondents in that case did, that purchasers derived title from the daughters, was begging the question. The property belonged to one or other, or possibly both, of the parties to the dispute and the compromise proceeded upon the footing that it was uncertain in which of them the title was. As their Lordships put it, it was based on the asssumption that there was an antecedent title of some kind in the parties, and the agreement acknowledged and defined what that title was.

It was contended in the present appeal that this Board had laid down in the case of *Imrit Konwur* v. *Roop Narain Singh*[f] decided in 1880, "that it is clear that daughters could not be bound by a compromise made by the widow under any circumstances", but it must be remembered what that case really was. In a dispute between a person claiming to be an adopted son of the previous owner and the widow and her daughters who would have titles after her, the widow gave up her daughters' rights in consideration of her own remaining practically unimpaired. Such a compromise obviously could not stand; indeed it is not a compromise at all. If the language in the sentence quoted is rather wide, no one referring to the case in full could be misled by it.

Their Lordships are of opinion that the true doctrine is laid down in *Mohendra Nath Biswas* v. *Shamsunnessa Khatun*[g] decided in 1914. A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest.

This being so, their Lordships proceed to enquire whether this compromise is one that can be supported on these principles. At the outset it is a startling one. Assuming, as upon the whole appears to be the case, that the two reserved properties were worth the Rs. 5,000 for which they were to stand,

(d) 12 W.R. (Civ. Rul.) 413.
(e) 38 I.A. 87=33 All. 356=8 A.L.J. 552 =13 Bom. L.R. 427=15 C.W.N. 545=1 (1911) M.W.N. 432=21 M.L.J. 645=10 I.C. 477.
(f) 6 C.L.R. 76.
(g) 21 Cal. L.J. 157.

the widow took for the estate Rs. 66,000, plus Rs. 5,000 or Rs. 71,000 in all, and gave up all but as much, Rs. 70,959. Moreover, her petition to the Court presented in pursuance of the compromise in order to effect the necessary entries on the Court register, states, and the widow herself has stated in evidence, that one of her motives was the fact that the judgment-debtors were related to her and belonged to a respectable family, which she did not wish absolutely to impoverish, and that she gave up her rights after an entreaty by one of the judgment-debtors, who said that he had no property left. On the other hand, it does not appear that the judgment-debtor or debtors had any available property; one was said to have nothing but the house he lived in, which was itself encumbered.

Then comes the question, what was the value of the property released? It would have been easy for either party to have produced evidence nearly conclusive upon this point, but they have failed to do so, and Courts have been left to a series of inferences. The sub-sales were for Rs. 69,000, and if we are to take it that there was no fraud, it is reasonable to suppose that this would be the full value, not perhaps as between willing purchasers and willing sellers if an undisputed title were conveyed, but very likely as much as the widow would have realized if she had re-sold; and if this be the case, all that she has given up is Rs. 3,000. While, therefore, giving all weight as against the validity of the compromise to the point that the widow was partially actuated by motives which, however laudable in themselves, did not entitle her to give up property in which she had only a partial interest, their Lordships do not see that a concession of Rs. 3,000 out of Rs. 69,000 to buy off the opposition of the judgment-debtors which had crystallized into a petition of objection was otherwise than reasonable.

Litigation in respect of this very subject-matter had already once taken the widow to the Privy Council, and though the objections of the judgment-debtors were of the stock kind and not likely to prevail, still with judgment-debtors who had little or nothing to lose it was likely that their objections would have been carried as far as the High Court.

Their Lordships do not find it necessary to consider whether the judgment of the High Court, in so far as it places the burden of proof upon the present appellants, is absolutely and without qualification sound; but upon the facts found by both Courts in India they agree in the conclusion to which those Courts came.

One further observation should be made. It was suggested in argument for the appellants that there was a greater sanctity in immovable than in movable property forming the estate of a deceased Hindu. If this be the case, as to which their Lordships do not find it necessary to pronounce, it would be carrying technicality to an excess to consider this property as immovable property. In the hands of the deceased and in the hands of the widow till the sale it was money secured by a mortgage on immovable property. For a very brief period it might be said that the widow had converted the property by her purchase at the sale; but even this can hardly be said. The sale had not been confirmed and the compromise was upon the very point whether it should be confirmed, that is whether the property should be converted. In these circumstances there is no substance in the suggestion that the compromise is more difficult to uphold because it resulted in an alienation of immovable rather than of moveable property.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed with one set of costs."

526. Widow and adverse possession.—Where a decree founded upon adverse possession is obtained against the widow as representing her husband's estate the reversionary heir is barred and does not get the benefit of Art. 141 of the Limitation Act. But "where there has been no decree against the widow or any other act in the law in the widow's life-time depriving the reversionary heir of the right to possession on the widow's death" the heir is entitled to rely upon Art. 141 and bring a suit for possession of immovable property within 12 years from the date of the death of the widow and within 6 years from that date in the case of movable property under Art. 120 of the Limitation Act. "The case of *Vaithilinga Mudaliar* v. *Srirangath Achi*[h] illustrates the application of the rule in the *Shivagunga case* where a decree founded upon adverse possession has been obtained against a Hindu widow in her life-time. The decision is not, in their Lordships' judgment, in conflict with that in *Ranchordas Vandravandas* v. *Parvatibai*[i] in which no decree had been obtained against the widow, nor had there been any other act in the law in the life-time of the widow destroying the heir's interest."[j] Hence if no decree after a fair trial of the suit had been passed against a widow during her life-time on the basis of adverse possession, a suit by the reversioner to recover the estate from third parties is not barred if brought within 12 years of the widow's death.[k] What exactly their Lordships mean "by any other act in the law" is not quite clear. It is surmised that the words refer to a *bona fide* compromise by the widow or any other act which would amount to an estoppel against the reversioner's claim to recover the estate. The question as to when a decree against the widow based on adverse possession would operate as *res judicata* against the reversioners after the widow's death was considered by their Lordships of the Privy Council in a recent case[l] where the facts were as follows:—

A Hindu widow, as representing her husband's estate, obtained a decree on title for recovery of possession thereof from certain persons. In an appeal against the decree preferred by such per-

(h) 48 M. 883: 52 I.A. 322=49 M.L.J. 769=1926 M.W.N. 11=28 Bom. L.R. 173=30 C.W.N. 313=1925 P.C. 249.

(i) 23 B. 725=26 I.A. 71=1 Bom L.R. 607=3 C.W.N. 621 (P.C.).

(j) *Mt. Jaggo Bai* v. *Utsava Lal*, 51 A. 439=56 I.A. 267=1929 A.L.J. 716=33 C.W.N. 809=30 L.W. 60=31 Bom. L.R. 891 =57 M.L.J. 160=10 P.L.T. 527=1929 M.W.N. 762=1929 P.C. 166; *Bai Manchha* v. *Tribhovan*, 139 I.C. 28=34 Bom. L.R. 385.

(k) *Ayyaswami* v. *Mahadeva Iyer*, 29 L.W. 590=1929 M. 421=56 M.L.J. 441= 1929 M.W.N. 314; *Bankey Lal* v. *Raghunath Sahai*, 51 A. 188=1929 A. 561 (F.B.); *Siva Prosad* v. *Sreemati Bhadramoni*, 48 C.L.J. 368=1929 C. 93; *Madivalappa* v. *Subbappa*, 1937 Bom. 458=39 Bom. L.R. 895; See also *Ramayya* v. *Subba Rao*, 1935 M. 664 on the question of adverse possession subsequent to surrender by, or remarriage of the widow.

(l) *Rajlakshmi* v. *Bholanath*, 48 L.W. 423=1938 P.C. 254.

sons, the widow entered into a compromise with them and a consent decree was passed and a partition of the properties effected between them and the widow on the footing of the compromise. Thereupon the nearest reversioner to the estate filed a suit and obtained a decree therein declaring that the compromise and the consent decree were void and inoperative against the reversioner and that the widow was "in no way bound by the partition proceedings that have taken place in execution of that decree." On the faith of this decree, the widow filed a suit for recovery of the properties allotted to the persons in possession under the compromise, but this suit was dismissed on the ground that the widow had been out of possession of the properties for more than 12 years and hence could not recover possession. After the death of the widow the reversioner brought the present suit for recovery of possession of the properties in the possession of those to whom they were allotted under the widow's compromise above-mentioned. The question was whether the decree against the widow in her second suit operated as *res judicata* against the reversioner and excluded his claim in the present suit. Their Lordships held that the decree against the defendants obtained by the widow in her first suit in the trial Court which had become final and binding on them by reason of the decree in the reversioner's earlier suit for declaration declared the widow's title to the whole estate as representing the entire interest in that estate and hence formed *res judicata* on the question with the defendants. The title to the estate having been finally decided against the defendants in that suit the widow had no right to submit it to fresh adjudication by the Courts as against them so far as the rights of the reversionary heirs were concerned or to affect their right by any such action. It was further held that the widow in her second suit was only suing in her own interest and not as representing the reversionary heirs and hence the decision against her in that suit based on adverse possession against her could not be regarded as affecting the right of the reversionary heir to possession. For a decree against the female holder of the estate to be binding on the reversioner, the decree must involve a decision of the question of the title of the widow as representing the entire estate and not the mere question of possession as in this case.

A Hindu widow can also acquire property by adverse possession. Whether the property so acquired becomes an accretion to her husband's estate or remains her own absolute property depends upon the question whether she was in possession of it as her husband's heir or in her own independent right.[m] In the former

(m) *Dungar Singh* v. *Mt. Maid Kunwar*, 1933 A. 822.

case it becomes an accretion to the husband's estate[n] while in the latter case, the property becomes her own absolute property or Stridhana.[o] Thus where a Hindu widow who has no right to a widow's estate remains in possession of the property acquired by her father-in-law for more than 12 years in her own right and not under any maintenance arrangement, the property becomes hers absolutely.[p] Her adverse possession may also be of property of the joint family of which her deceased husband was an undivided member. Thus where a widow of a deceased member takes and remains in adverse possession of an item of joint family property in her own absolute right for the statutory period of 12 years, the property becomes her Stridhana descendible to her own heirs on her death.[q] But where a widow entitled only to maintenance possesses adversely a portion of the family property in her right as a widow of her husband, she does not acquire the portion as Stridhana, but she attaches it as an accretion to the husband's estate with the result that after her death, the property so acquired will go to her husband's heirs as his property.[r] Where the question was whether a Hindu widow, who, on her husband's death, took possession of his estate and held it adversely, acquired by reason of such adverse possession an absolute title or only the qualified interest of a limited owner, her statement that she took possession to the exclusion of her son who had the title thereto was held incompatible with the position that she took the property only as a widow.[s] In another case where on the death of a member of an undivided family governed by the Mitakshara law, his widow took adverse possession of a portion of the undivided property, it was held that the rights of the other members of the family would be barred after 12 years from the date of the widow's taking possession.[t] The possession by a widow of her first husband's estate becomes adverse when she remarries, and she becomes its

(n) *Suraj Balli Singh* v. *Tilakdhari*, 107 I.C. 151—7 P. 163=1928 P 220; *Lajwanti* v. *Safa Chand*, 5 Lah. 192—51 I.A. 171—22 A.L.J. 304—28 C.W.N. 960 =1924 M.W.N. 442. 26 Bom. L.R. 1117=47 M.L.J. 935—6 P.L.T. 1. 1924 P.C. 121—20 L.W. 10; *Shankar* v. *Damodar*, 1931 A. 450.

(o) *Varada Pillai* v. *Jeevarathnammal*, 43 M. 244=46 I.A. 285—18 A.L.J. 274—22 Bom. L.R. 444—24 C.W.N. 346—38 M.L.J. 313=10 L.W. 679=1919 M.W.N. 724=1919 P.C. 44; *Lachhan Kunwar* v. *Manorath*, 22 C. 445=22 I.A. 25—5 M.L.J. 1 (P.C.); *Rikhdeo* v. *Sukhdeo*, 49 A. 713; *Suraj Balli Singh* v. *Tilakdhar*, 7 P. 163=107 I.C. 151=1928 P. 220.

(p) *Mukh Ram* v. *Mt. Sundar*, 1934 Lah. 270; *Sham Koer* v. *Dah Koer*, 29 I.A. 132 =29 C. 664=6 C.W.N. 657=4 Bom. L.R. 547.

(q) *Satgur Prasad* v. *Raj Kishore Lal*, 42 A. 152=46 I.A. 197—18 A.L.J. 235—22 Bom. L.R. 451=24 C.W.N. 394—38 M.L.J. 259—11 L.W. 384—1920 M.W.N 3—1919 P.C. 60; *Sham Koer* v. *Dah Koer*, 29 C 664—29 I.A. 132—6 C.W.N. 657=4 Bom. L.R. 547.

(r) *Lajwanti* v. *Safa Chand*, 5 Lah. 192 =51 I.A. 171=22 A.L.J. 304=28 C.W.N 960 —1924 M.W.N. 442—26 Bom. L.R. 1117= 47 M.L.J. 935=6 P.L.T. 1=1924 P.C. 121= 20 L.W. 10.

(s) *Lachhan Kunwar* v. *Manorath*, 22 C. 445=22 I.A. 25=5 M.L.J. 1 (P.C.).

(t) *Sham Koer* v. *Dah Koer*, 29 C. 664 =29 I.A. 132—6 C.W.N. 657=4 Bom. L.R. 547 (P.C.); *Adya Shankar* v. *Mt. Chandrawat*, 1934 O. 265.

absolute owner by prescription if she remains in possession for the requisite period from the date of her remarriage.[u] See also S. 477.

527. Widow's power over the corpus.—Though a widow can alienate her own life interest in the property irrespective of any question of necessity justifying the alienation,[v] her powers of disposal over the corpus are limited. She can on no account dispose of her husband's estate by will,[w] and she can dispose of the property *inter vivos* only for legal necessity. The word "necessity," when used in connection with an alienation by a Hindu widow of her husband's estate, "has a somewhat special, almost a technical meaning. A widow can alienate, if there are no other means available, for the obligatory ceremonies to secure the repose of the soul of her husband. A holder of a Hindu woman's estate can in some circumstances alienate immovable property to pay the last owner's debts or (if there is no other available source of supply) for her own or infant children's maintenance. Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient."[x] Except in places governed by the Mithila law[y] and in those parts of the Bombay Presidency governed by the Mayukha where the holder of a woman's estate can dispose of the inherited movables in any way she likes[z] except by will,[a] the reasons for the restrictions which the Hindu Law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to movable property as they are to immovables.[b] Thus in order to sustain an alienation by a Hindu widow of the corpus of her husband's estate, it must be shown, in accordance with the often cited case of *Hunooman Persaud*, either that there was legal

(u) *Hasu* v. *Ibrahim*, 1933 L. 218; *Mt Sattan* v. *Mt. Saban*, 1933 L. 1043; But see contra in *Parbati* v. *Ram Prasad*, 7 Luck 320=10 Oudh. W.N. 21=1933 Oudh. 92.

(v) *Moniram Kolita* v. *Kery Kolitani*, 5 C. 766=7 I.A. 146; *Durga* v. *Matu*, 35 A 311 (F.B.); *Bibi Sahodra* v. *Rai*, 8 I.A. 210=8 C. 224.

(w) *Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 139; *Sarat Chandra* v. *Charusila*, 55 C. 918=1928 C. 794; *Narasimha* v. *Venkatadri*, 8 M. 290; *Keerut Singh* v. *Koolahul Singh*, 2 M.I.A. 331.

(x) *Ramsumran Prasad* v. *Shyam Kumari*, 1 P. 741=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=44 M.L.J. 751=25 Bom. L.R. 634=1922 P.C. 356=16 L.W. 956.

(y) *Latur Rai* v. *Bhagwan*, 1936 P. 80 =17 P.L.T. 372; *Jagarnath* v. *Surajdeo*, 1937 Pat. 483; *Sureshwar* v. *Maheshrani*, 48 C. 109=47 I.A. 233.

(z) *Bhagirthibai* v. *Kahnujirav*, 11 B. 285; *Chamanlal* v. *Bai Parvati*, 180 I.C. 854=58 B. 246=36 Bom. L.R. 152.

(a) *Chamanlal* v. *Doshi Ganesh*, 28 B. 453=6 Bom. L.R. 460.

(b) *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Buchi* v. *Jagapathi*, 8 M. 304; *Jumna Prasad* v. *Mt. Durga Dei*, 1933 A. 138; *Pandharinath* v. *Govind*, 32 B. 59=9 Bom. L.R. 1305; *Durga Nath* v. *Chintamoni*, 31 C. 214=8 C.W.N. 11; *Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 139; *Sheo Das* v. *Ramkali*, 1936 Oudh. 4=11 Luck. 508; *Mt. Kallasha* v. *Bitto*, 15 Oudh. Cases. 223=16 I.C. 471.

necessity for the alienation, or at least the alienee was led on reasonable grounds to believe that there was such a necessity.[c] But the fact that her alienation of the corpus of her husband's estate was in excess of her powers, does not make the alienation void, but only voidable in the sense of the reversioners being entitled either to affirm the transaction or treat it as a nullity when the reversion falls in.[d]

The position and powers of a Hindu widow have been succinctly stated in a recent decision of the Madras High Court, *Viraraju* v. *Venkataratnam*, 48 L.W. 692 = 1939 M. 98, as follows :—

A Hindu widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the owner for the time being, fully capable of representing the estate in her transactions with the outside world so long as she acts *bona fide* and in the interests of that estate but it is an ownership qualified by limitations which are of the very essence of her estate —limitations which the law imposes, not out of a tender regard for the right of the reversioner, for none such exists during her life, but for reasons which are intimately bound up with the ideals of life and conduct considered proper and appropriate for a person in her position. A simple life of abstemious piety directed to the acquisition of merit for the departed soul of her husband and a cessation from mere sense-enjoyments in the pursuit of pleasure for its sake, lie at the bottom of restrictions on her powers of disposal. It is to be remembered that according to the ancient law-givers, restriction was indeed the rule, absolute power an exception, whether the holder was a female or even a male. For purposes which are purely secular or temporal, her powers are no wider than those which inhere in the manager of an infant's estate. But in respect of those other purposes which the Hindu Law regards as religious or charitable, she possesses, as might naturally be expected, a larger discretion, and a wider authority. [Texts collected in *Ram Sumran Prasad* v. *Govind Das*[d-1]]. For obligatory or necessary observances essential for the salvation of her husband's soul, she could go the length of disposing of the entirety of the estate, where it is not considerable, and where the requirements of the particular occasion demand it. For other but less peremptory purposes, though in themselves meritorious yet not indispensable, her authority is necessarily circumscribed. She may, for such objects, only dispose of a small and no more than a reasonable portion of the estate, the quantum to be measured by the custom and sentiment prevalent in the community to which she belongs. It is impossible to define her powers in this behalf with any more precision. The circumstances of the family, the extent of its property, the demands upon it of other legitimate calls, and all those social customs and sentiments which make up what one may call the conscience of the community, must, it seems to us, be among the main factors to be considered. We think that it is this same principle, though expressed in different language, which we find laid down in *Cossinaut Byzack* v. *Hurrosoondry Dossee*,[d-2] where Lord Gifford said that care might be taken to avoid impressions derived from the English Law, and to consider in what way a Hindu Court of justice would have decided the point.

(c) *Amarnath* v. *Achan Kuar*, 14 A. 420 = 19 I.A. 196.

(d) *Bijoy Gopal* v. *Krishna*, 34 C. 329 = 34 I.A. 87 ; *Ramgouda* v. *Bhausaheb*, 52 B. 1=54 I.A. 396.

(d-1) 5 Pat. 646 at 677 to 679.

(d-2) (1819) 2 Morley's Digest, 198.

Marriages of girls born in the family and the maintenance of female members stand on a higher footing. For, it is a legal obligation cast on the father, the *karta* or whoever happens to be in possession of the family estate, to defray, out of it, the expenses necessary for these purposes, which accordingly come under the head of strict legal necessity. How exactly this obligation is to be carried out, whether by a mortgage, sale or other means, is not to be determined by strict rules or legal formulae, but must be left to the reasonable discretion of the party bound. In the absence of *mala fides* or extravagance and so long as it is neither unfair in character nor unreasonable in extent, the Court will not scan too nicely the manner or the quantum of the alienation. A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers provided she acts fairly to her expectant heirs and in a manner conformable with the legitimate wishes of her husband or the prescriptions of Hindu religious law. It may also be observed that, in respect of pious or charitable acts, what a husband might have done, the widow is competent to do after his death. For, according to an ancient text of Brihaspathi [quoted at page 582 of *Khub Lal Singh* v. *Ajodhya Misser*(d-3)] the husband and wife participate in the effects of good and evil actions and this mutual relation is not dissolved by death of either partner [*Khub Lal Singh* v. *Ajodhya Misser*(d-3) and *Venkaji Shridhar* v. *Vishnu Babaji Beri*(d-4).] Her position will be much stronger if the husband had himself instructed or directed her to incur the particular charge or specified the objects for which the alienation was to be made. Such directions, though short of the requirements of a valid bequest, are, we think, a sufficient justification for her acting upon them.

528. Legal necessity.—A widow is entitled to alienate the corpus of her huband's estate either for legal necessity or its benefit. The legal necessity may be either spiritual or secular. "For religious and charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity"(e) while in the case of an alienation for religious purposes no necessity in the sense of any pressure on the estate need be proved to justify the alienation since the expenditure in respect thereof is only optional.

529. Alienation for spiritual purposes.—"The Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performances of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul....With reference to the first class of acts, the powers of the Hindu female who holds the property are wider

43 Cal. 574
18 Bom. 534.

(e) *Collector of Masul Venkata*, 8 M.I.A. 529.

than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses she is entitled to sell the whole of it. In the other case she can alienate only a small portion of the property for the pious or charitable purposes she may have in view."(f) Confusion often arises from mixing up the indispensable or obligatory duty with a pious purpose, which although optional, is spiritually beneficial to the deceased. The former class of acts may be called spiritual necessity, while the latter class of acts come under the category of spiritual luxury.

530. Acts of spiritual necessity.—"An indispensable act or duty is that which must be performed and cannot be neglected without sinning, as the first Shradh of the father or the husband, the marriage of his daughter or the like. An optional religious act is such as the performance of it rests upon option and there is no sin on the non-performance, but religious merit (punya) on the performance thereof, as pilgrimage to Benares and the like."(g) If the former cannot be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties must be performed.(g) In considering the validity of such an alienation, the question of any pressure upon the estate or benefit to it is irrelevant.(h) The funeral obsequies of the husband or the father whose estate the female holder has inherited and all ceremonies incidental or subsequent to those obsequies such as the annual Shradhs come under the category of absolute necessities.(i) So also, payment of husband's debts though barred,(j) *and though* they were incurred by the husband *neither for the necessity nor* benefit of his estate,(k) provided they were neither repudiated by the husband,(l) nor incurred for immoral purposes or while the husband was a minor,(m) comes under the class of acts justifying alienation of the whole corpus of the husband's estate, the reason

(f) *Sar'ar Singh* v. *Kunj Bihari Lal*, 44 A. 503=49 I.A. 383=44 M.L.J 766=27 C.W.N. 653=25 Bom. L.R. 648=16 L.W. 871 =1922 P.C. 261, *Radha Madhab* v. *Rajendra*, 12 P. 727=1933 P. 250; *Ram Surat* v. *Hitanandan*, 10 Pat. 474; *Madhav Mohan* v. *Rakhal*, 57 C. 570; *Venkata* v. *Ananda*, 57 M. 772.

(g) Vyavastha Chandrika, paragraph 105 cited in *Sardar Singh* v. *Kunj Bihari Lal*, 44 A. 503=49 I.A. 383=44 M.L.J. 766 =27 C.W.N. 653=25 Bom. L.R. 648=16 L.W. 871=1922 P.C. 261 (P.C.).

(h) Collector of Masulipatam v. Cavaly Venkata, 8 M.I.A. 529.

(i) *Lakshminarayana* v. *Dasu*, 11 M. 288; *Srimohan* v. *Brijbehary*, 36 C. 753 = 2 I.C. 152; *Daroga* v. *Baldeo*, 16 P. 45 = 1937 P. 10.

(j) *Chimnaji* v. *Dinkar*, 11 B. 320; *Ashutosh* v. *Chidam*, 57 C. 904 .34 C.W.N. 153 1930 C. 351; *Kondappa* v. *Subba*, 13 M. 189; *Santu Ram* v. *Mt. Dodan*, 9 Lah 85 1927 L. 657; *Tulshi* v. *Jagmohan*, 1934 A. 1048=1934 A.L.J 1163; *Gajadhar* v. *Jagannath*, 46 A 775 (F.B.).

(k) *Jayanti* v. *Alamelu*, 27 M. 45=12 M.L.J. 270; *Lakshman* v. *Satyabhamabai*, 2 B. 494; *Venkatachala* v. *Raja Rangasami*, 8 M.I.A 319.

(l) *Bhagawat* v. *Nivratti*, 39 B. 113=27 I.C. 356=16 Bom. L.R. 738.

(m) *Bajrang* v. *Gobind*, 11 Luck. 11=1935 Oudh. W.N. 354=1935 Oudh. 373.

being that the prescription of the religious law of the Hindus is that the satisfaction of the husband's debts is a duty essentially necessary to be fulfilled by the widow before she rejoins him in the state of existence to which he is considered to have been translated.[n] This duty extends even to the payment of the debts of her father-in-law which would be binding on her husband.[o] But a widow succeeding to her son's estate cannot alienate it for discharging the time-barred debts of her husband.[p] The principle seems to be that a Hindu female holder can validly charge the estate with the payment of the time-barred debts of the last male-holder to whose estate she has succeeded and she has not the same power in respect of the debts of any other person though he be her husband. 11 B. 325,[q] where an alienation by the daughter-in-law for payment of her father-in-law's debts was held binding on the reversioners is reconcilable with this principle as in that case the daughter-in-law succeeded to the estate of the father-in-law. But if a debt has been incurred by a female limited owner, like the widow or the daughter, for a necessary purpose, just as the Shradh of the last male-holder to whose estate she has succeeded, then, even though the debt has become barred, she can validly alienate the property for its discharge.[r] But no widow is under an obligation to pay her husband's debts from the estate's income which is absolutely hers,[s] nor is she entitled to sell the corpus of her husband's estate to realise the amounts spent by her in discharging her husband's debts during his life-time.[t]

531. Acts of spiritual luxury or benefit.—An alienation by a widow cannot be recognised as valid against the reversioner, when it is made in view to raise money for doing pious acts which are not in the nature of spiritual necessities, unless such alienation is reasonable in the circumstances of the case and the property alienated is but a small portion of the property inherited from her husband.[u] It is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition.[v] If

(n) *Awadh Narain* v. *Santan*, 1937 Pat 325.

(o) *Ram Adhar* v. *Jagnoo*, 1938 A. 100.

(p) *Sheo Ram* v. *Sheo Ratan*, 43 A 604 -1921 A. 163.

(q) *Bhau Babaji* v. *Gopala*, 11 B. 325.

(r) *Daropi* v. *Bandeo*, 16 P. 45-1937 P. 40.

(s) *Ramasami* v. *Mangaikarasu*, 18 M. 113; *Debi Dayal* v. *Bhan Pratap*, 31 C. 433=8 C.W.N. 409.

(t) *Bhawani* v. *Himmat*, 33 A. 342=10 I.C. 274 21 M.L.J. 641-15 C.W.N. 466-8 A.L.J. 474-13 Bom. L.R. 384 - (1911) 2 M.W.N. 415 (P.C.).

(u) *Rama* v. *Ranga*, 8 M. 552; *Ganpat* v. *Tulsiram*, 36 B. 88=13 Bom. L.R. 860 -12 I.C. 271; *Kunj Bihari* v. *Lallu*, 41 A. 130-16 A.L.J. 996=48 I.C. 847.

(v) *Cossinanth Bysack* v. *Hurroosoondry*, Morley Digest, Vol. II, 198; *Khub Lal Singh* v. *Ajodhya Misser*, 43 C. 574-31 I.C. 433; *Viraraju* v. *Venkataratnam*, 1939 M. 98=48 L.W. 692.

the property sold or gifted bears a small proportion to the estate inherited, and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner.[w] It is difficult to dogmatise on the question as to what fraction is reasonable since that question has to be considered in relation to various circumstances other than the mere ratio of the fraction gifted to the entire estate. Hindu law recognises the validity of a dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner.[x] Thus where a Hindu widow in possession of large properties dedicated 1/75th part of the estate for the daily offering of food to the presiding deity at Puri (Jagannath),[y] or raised money upon a small portion of her husband's property for the purpose of excavating a tank in connection with a temple founded by her husband,[z] the dedication in the one case and the charge in the other were held binding upon the reversioner. The construction of temples, the installation of deities and the creation of an endowment for a deity come within the category of such pious and meritorious acts, and hence where a widow who has built a temple and installed therein a deity, made a gift of about 1/6th of the property belonging to her husband's estate, for the performance of the puja to the deity so installed, the gift would be perfectly within the competence of the widow, being only a reasonable portion of her husband's estate, and being one which would benefit not only her soul, but also that of the husband. The fact that the said gift was not made on some suitable occasion enjoined by the Sastras, such as the performance of the Shradh or the like, would not render it invalid.[a] In a recent Madras case,[b] the question whether a sale by a widow of a parcel of her husband's estate to discharge the debts contracted by the widow for the thread and marriage expenses of her daughter's son was justifiable on the ground of spiritual benefit was answered in the affirmative even though the grandson was not so indigent as to be dependent

(w) *Venkatasubba Rao* v. *Ananda*, 39 L.W. 690=1934 M.W.N. 536=67 M.L.J. 201=57 M. 772=1934 M. 432 ; *Tatayya* v. *Ramkrishnamma*, 34 M. 288=6 I.C. 240=20 M.L.J. 798=1910 M.W.N. 222 ; *Sardar Singh* v. *Kunj Bihari*, 44 A. 503=49 I.A. 383=44 M.L.J. 766=27 C.W.N. 653=25 Bom. L.R. 648=1922 P.C. 261=16 L.W. 871 ; *Radha Madhab* v. *Rajendra*, 12 Pat. 727=14 Pat. L.T. 258=1933 Pat. 250, holding dedication of one-third of the estate to an idol as invalid ; *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352=1931 Pat. 442 holding that an endowment of five-sixth of the properties inherited as invalid ; *Viraraju* v. *Venkataratnam*, 1939 M. 98.

(x) *Sohan Lal* v. *Mt. Bhagwati*, 1936 A. 205 1936 A.L.J. 180.

(y) *Sardar Singh* v. *Kunj Bihari*, 44 A. 503 49 I.A. 383=44 M.L.J. 766=27 C.W.N. 653=25 Bom. L.R. 648=1922 P.C. 261=16 L.W. 871.

(z) *Khub Lal Singh* v. *Ajodhya Misser*, 43 C. 571 31 I.C. 433 ; *Ram Surat* v. *Hitanandan*, 10 Pat. 474=1931 Pat. 330.

(a) *Krishnamurti* v. *Lingayya*, 43 M.L.W. 653=1936 M. 677=1936 M.W.N. 534 ; *Indraj Bux* v. *Sheo Naresh*, 2 Luck. 713=1927 Oudh 450=4 O.W.N. 820.

(b) *Venkatasubba Rao* v. *Ananda*, 39 L.W. 690=1934 M. 432=57 M. 772=67 M.L.J. 204=1934 M.W.N. 536.

on the grandmother. Justice Jackson has the following observations to make on the question in the course of the judgment which he delivered on behalf of the Bench of which he was a member.

Venkatasubba Rao v. **Ananda, 39 L.W. 690=1934 M. 432.**

"An ancient text of Brihaspathi runs 'A widow inheriting her husband's estate should honour with food and presents . . . a daughter's son.' As pointed out in *Mallayya* v. *Bapi Reddi*,[c] it is the daughter's son who offers the funeral oblation, and who therefore is particularly worthy of honour. Mr. Lakshmanna argues that this is mere sentiment, but it is just here that the line of cleavage appears. Who is to distinguish positively between sincere religious feeling and idle sentiment? All that can safely be said is that where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud, the benefit of the doubt should be given to religious feeling. It is not for a Court of law to disparage the pious acts of devout people. And this principle has been followed by the Judicial Committee. In *Sardar Singh* v. *Kunj Bihari Lal*,[d] an alienation by a widow was being considered where its avowed object was to offer food to an idol; and the following passage from *Vuppuluri Tatayya* v. *Ramakrishnamma*,[e] at p. 291 was quoted with approval.

"We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited, and the occasion of the (disposition or) expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner."

And the Judicial Committee proceeds:

"In the present case the purpose for which the alienation was made was undoubtedly not for the performance . . . of any such duty as might be regarded as obligatory under the Hindu Law. But at the same time there can be no question that it was a pious act."

And accordingly the alienation was allowed.

The quantitative ratio approved in this judgment is not at first sight easy to understand. If a small gift to an idol is conducive to the husband's spiritual bliss, would not a larger gift be still more conducive? Probably human nature being what it is, Courts are not prepared to sanction transactions which offend ordinary commonsense and good husbandry. If a widow devotes the whole of her estate to an idol, there may be suspicion of fraud or undue influence. In our present case there is no suggestion of undue extravagance, and it must be remembered that the quantitative ratio works in both directions. Her pious duty for her husband's satisfaction is to honour the daughter's son, and some meagre gift for his ceremonies which would only make him ridiculous in the eyes of the neighbours would not fulfil this obligation. It may be taken then that the quantum of this alienation is reasonable, and one need not embark on an argument as to whether feeding an idol is or is not more meritorious than honouring a daughter's son. Both involve an expenditure "reasonable according to the common notions of Hindus" and that is sufficient justification for the impugned sale.

(c) 62 M.L.J. 39 at p. 44=35 L.W. 134 =1931 M.W.N. 806=1932 Mad. 28.

(d) 44 A. 503=16 L.W. 871=44 M.L.J. 706 27 C.W.N. 653=25 Bom. L.R. 648=49 I.A. 383=1922 P.C. 261.

(e) 34 M. 288=6 I.C. 240=20 M.L.J. 798 =1910 M.W.N. 222.

In the judgment under appeal it is stated " we have here no purpose connected with the husband's spiritual welfare "; a proposition which we should not think of questioning as an authoritative statement of Hindu doctrine, but we are not so much concerned with what is the correct doctrine as with 'the common notions of the Hindus.' The pious endeavour of this widow to promote her husband's spiritual bliss by honouring his daughter's son may for aught we know in its result fall short of her intention; but so long as she acted with piety and in consonance with prevalent notions we do not think it incumbent upon us to interfere any more than the Judicial Committee interfered with the gift to the idol. No doubt there is much conflict in the authorities as observed by our late Chief Justice in *Srinivasaraghava Chariar* v. *Rajagopalachariar*,(*f*) and little will be gained by attempting to piece them together into a coherent pattern—for instance discussing whether if a daughter's daughter may be honoured at marriage, the same does or does not apply to a son and so on. We prefer to base our judgment simply upon *Sardar Singh* v. *Kunj Bihari Lal*,(*g*) with the satisfaction that substantial justice has been done; and the result is not, as is candidly admitted in the judgment under review, one which a Court of law would like to avoid."

Among the religious or charitable acts which are not obligatory upon the widow, but are only optional, for which she is entitled to alienate a reasonable portion of the husband's estate come the following:

1. Performance of the Shradh of her husband's relations which he himself was under a duty to perform.(*h*)

2. Pilgrimage for performing her husband's Shradh at Gaya,(*i*) and Pandharpur.(*j*)

3. Pilgrimage to Sethubandh,(*k*) but not to Benares.(*l*)

4. Feast given at Gaya but not a feast given after return therefrom.(*m*)

Note. According to Hindu law only those pilgrimages which conduce to the spiritual welfare of the husband constitute a valid ground for an alienation by a widow. A pilgrimage to Gaya for the performance of the husband's Shradh constitutes such necessity,(*n*) but not pilgrimages to places like Benares. Muttra, Brindavan,(*o*) Dwarka, Jagannath,(*p*) or Prayag.(*q*)

(*f*) 54 M.L.J. 618=27 L.W. 838=1927 M. 438=1927 M.W.N. 231.

(*g*) 44 A. 503=16 L.W. 871=44 M.L.J. 766=27 C.W.N. 653=25 Bom. L.R. 648=49 I.A. 383=1922 P.C. 261.

(*h*) *Junmejoy* v. *Russomoyee*, 11 Beng. L.R. 418; *Nabinchandra* v. *Shona*, 35 C.W.N. 279=1932 C. 25 (a case of a daughter alienating a portion of the father's property which she has inherited for defraying the expenses of her mother's shraddha); *Mt. Nandrani* v. *Krishna*, 57 A. 997=1935 A.L.J. 715=1935 A. 698; *Tatayya* v. *Ramakrishnamma*, 34 M. 288=6 I.C. 240=20 M.L.J. 798=1910 M.W.N. 222; *Sri Mohan* v. *Brijbehari*, 36 C. 753.

(*i*) *Darbari Lal* v. *Gobind*, 46 A. 822=1924 A. 902=22 A.L.J. 753; *Latwi Rai* v. *Bhagwan*, 1936 P. 80.

(*j*) *Ganpat* v. *Tulsiram*, 36 B. 88=12 I.C. 271=13 Bom. L.R. 860.

(*k*) *Tatayya* v. *Ramakrishnamma*, 34 M. 288=6 I.C. 240=20 M.L.J. 798=1910 M.W.N. 222.

(*l*) *Hari* v. *Bajrang*, 13 C.W.N. 544=1 I.C. 434.

(*m*) *Makhan Lal* v. *Gayan Singh*, 33 A. 255=9 I.C. 199=8 A.L.J. 13.

(*n*) *Ram Adhar* v. *Jagnoo*, 1938 A. 100.

(*o*) *Ahmad Din* v. *Tulsa Singh*, 113 I.C. 292=1928 L. 875.

(*p*) *Ramlal* v. *Rachpal*, 102 I.C. 275=1927 O. 231.

(*q*) *Tirbeni* v. *Ram*, 1937 Oudh W.N. 433=1937 Oudh 361.

5. Gift at Gaya to the priest,[r] and the family purohit,[s] a gift at the time of Shradh on the occasion of Pushkaram,[t] or a gift for the erection of a tank,[u] or the erection of a temple.[v]

A widow is held not entitled to alienate her husband's property for pious or religious purposes for her own spiritual welfare,[w] though she is entitled to alienate it for purposes conferring spiritual benefit both upon her and her husband.[x] It is extremely doubtful whether this distinction is tenable in the case of a widow's alienation in view of the textual prescription that she is the surviving half of the husband. As observed by Dhavle J. in *Thakur Prasad* v. *Mt. Dipa Koer*,[y] . "On the text of Brihaspathi it is difficult to see how it is possible for a Hindu widow to aim at any spiritual good for herself in which the soul of her deceased husband would not participate." In any case an alienation trenching materially upon the husband's estate cannot be upheld against the reversioners.[z]

532. Alienation for secular necessity.—A widow is entitled to alienate the corpus of the property also for secular purposes when they amount to what is termed legal necessity. Her power in this respect is analogous to that of a manager of an infant's estate as defined in *Hunoomanpersaud's case*.[a] This is a limited and qualified power and can only be exercised rightly in case of need or for the benefit of the estate. The alienation may be by way of sale or mortgage. A widow like a manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to the expectant heirs,[b] and if she acts honestly, as also the purchaser, the fact that she sold a portion of the property instead of raising the fund on a mortgage, which would have been more beneficial, does not invalidate the transaction.[c] If a mort-

(r) *Baldeo* v. *Fateh*, 46 A. 533=1924 A. 933=22 A.L.J. 490.

(s) *Gobind* v. *Lakhrani*, 43 A. 515=1921 A. 109=19 A.L.J. 499.

(t) *Tatayya* v. *Ramakrishnamma*, 34 M. 288=6 I.C. 240=20 M.L.J. 798=1910 M.W.N. 222.

(u) *Ram Surat* v. *Hitanandan*, 10 P. 474=1931 P. 330.

(v) *Indraj* v. *Sheo Naresh*, 104 I.C. 676=2 Luck. 713=1927 O. 450.

(w) *Thakur Prasad* v. *Mt. Dipa Kuer*, 10 P. 352=1931 P. 442; *Sham Dei* v. *Birbhadra Prasad*, 43 A. 463=1921 A. 178=19 A.L.J. 312; *Ram Kawal* v. *Ram Kishore*, 22 C. 506; *Suraj Kumar* v. *Shri Shri*, 1937 P. 78.

(x) *Indraj Bux* v. *Sheo Naresh*, 104 I.C. 676=2 Luck. 713=1927 O. 450; *Khub Lal Singh* v. *Ajodhya Misser*, 43 C. 574=31 I.C. 433; *Mallayya* v. *Bapi*, 62 M.L.J. 39 =1932 M. 28=1931 M.W.N. 808=35 L.W. 134 (a case of a daughter succeeding to father's property alienating it to perform her son's marriage).

(y) 10 Pat 352 quoted with approval in *Krishnamurti* v. *Lingayya*, 43 L.W. 653=1936 M. 677; See also *Khub Lal* v. *Ajodhya*, 43 C. 574 and *Vidibai* v. *Mandvi*, 1928 N. 217.

(z) *Sardar Singh* v. *Kunj Bihari*, 44 A. 503=49 I.A. 383=1922 P.C. 261=44 M.L.J. 766=27 C.W.N. 653=25 Bom. L.R. 648=16 L.W. 871.

(a) *Kameswar Pershad* v. *Run Bahadur*, 8 I.A. 8=6 C. 843; *Hanumantha* v. *Subbayya*, 41 C.W.N. 18=1936 P.C. 283=44 L.W. 414=1936 M.W.N. 1253.

(b) *Venkaji* v. *Vishnu*, 18 B. 534.

(c) *Phoolchund* v. *Raghoobuns*, 9 Suth. 108; *Nabakumar* v. *Bhabasundari*, 3 Beng. L.R. 375.

gage would be less beneficial to her from the point of view of her income from the estate than a sale, she is at liberty to sell off a part of the estate instead of mortgaging it, thereby reducing her income for life.[d] In any case the touchstone of her authority to alienate the corpus is legal necessity or benefit.[e] The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. But it must be remembered that only a *bona fide* lender under this principle will be protected. If that danger arises 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 favour against the widow grounded on a necessity which his own wrong has helped to cause.[f] Thus for an alienation (by way of mortgage or sale) by a widow for secular purposes to be upheld on the ground of necessity it must be shown either that there was actual necessity for the transaction, or that the alienee after reasonable enquiry as to the existence of the alleged necessity entered into the transaction honestly believing that the necessity existed. In a case where there was neither necessity nor reasonable enquiry and *bona fide* belief in its existence on the part of the alienee, the transaction is not binding upon the reversioner.[g] The term necessity in this connection does not mean actual compulsion but the kind of pressure which the law recognises as serious and sufficient.[h] The mere existence of debts, it has been held, is not pressure so as to validate an alienation for their discharge and that it must first be shown that they were alive[i] and had not been already discharged,[i] and that the alienation had to be undertaken under the pressure of a present necessity for the discharge of the debts, i.e., that there was an immediate pressure on the alienor at the time of the alienation.[j] In a recent case of the Madras High Court, Mr. Justice Venkatasubba Rao has the following observations to make on the question of necessity. "The sale is next impeached on the ground that it has not been shown that there were circumstances of actual pressure. According to this contention, where money is raised for paying off a binding debt, an alienation can be

(d) *Bal Krishna* v. *Hira Lal*, 41 A. 338 =17 A.L.J. 239=50 I.C. 74; *Singam* v. *Draupadi*, 31 M. 153=18 M.L.J. 11.

(e) *Sham Sundar* v. *Achhan Kunwar*, 21 A. 71=25 I.A. 183=2 C.W.N. 729 (P.C.).

(f) *Ahmad Din* v. *Tulsa Singh*, 113 I.C. 292=1928 L. 875 following *Hunooman persaud's case*, 6 M.I.A. 393.

(g) *Hunoomanpersaud* v. *Mt. Babooee*, 6 M.I.A. 393; *Rangasami Gounden* v. *Nachiappa Gounden*, 42 M. 523=46 I.A. 72 =17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105= 1919 M.W.N. 262=1918 P.C. 196.

(h) *Ramsumran Prasad* v. *Shyam Kumari*, 1 P. 741=49 I.A. 342=27 C.W.N. 269=3 P.L.T. 749=21 A.L.J. 18=16 L.W. 956=44 M.L.J. 751=25 Bom. L.R. 634=1922 P.C. 356.

(i) *Makkhan Lal* v. *Mt. Sardar Kunwar*, 137 I.C. 193=1932 A. 555.

(j) *Bandhu Ram* v. *Ram Kishun*, 73 I.C. 1010=1923 A. 535=21 A.L.J. 354.

justified only if actual pressure is shown in the sense of some pressure from without. For instance, it must be shown that legal proceedings were threatened or a forced sale of the mortgaged property was imminent.[k] In our opinion this is not the correct test of justifying necessity, for, a restraint of this kind, far from benefiting or preserving the estate, would lead to the very opposite result. Why should a widow, for instance, be compelled to allow a mortgage debt to grow and swallow up the property mortgaged, when the early paying off of that debt would be beneficial to the estate and tend to its preservation? If the alienation was made in the exercise of a reasonable discretion and could be justified as the act of a prudent manager, the objection that there was no compulsion from without and that the necessity was not imminent should not be allowed to prevail."[l] This reasoning is perfectly sound though it will apply more appropriately to the question of benefit to the estate. In the recent case of *Hanumantha* v. *Subbayya*,[m] it is held by the Privy Council, that a widow being under a duty to pay a decretal amount representing a debt due from her husband, a mortgage effected by her in order to satisfy that decree is an act advantageous to the estate and is hence binding on the reversioners. If the widow, not being able to pay off this mortgage, executes subsequently in lieu thereof, other mortgages, the later mortgages must be regarded as the necessary consequences of the first mortgage, and have the same binding force as the first mortgage except as to terms which may be unreasonable. A widow is not bound to pay a debt binding on the husband's estate out of its income which is barely sufficient for her maintenance, nor is she bound to discharge that debt by selling the properties (instead of mortgaging them) thus depriving herself of her maintenance out of the income of the estate.[m]

533. Purposes of legal necessity.—The following are some examples of legal necessity justifying an alienation by the widow of her husband's estate.

(1) Costs of legal proceedings in respect of the effective vesting of the estate in her, such as the cost of obtaining Probate, Letters of Administration or Succession Certificate.[n]

(2) Arrears of Government revenue[n] and municipal rates and taxes[o] which the widow was unable to pay from the gross

(k) *Ghansham* v. *Badiya Lal*, 24 A. 547, *Lakshman* v. *Radhabai*, 11 B. 609.

(l) *Jagannadhan* v. *Vighneswarudu*, 34 L.W. 551=1931 M.W.N. 965=61 M.L.J. 507 =1932 M. 177=134 I.C. 810=55 M. 216

(m) *Hanumantha* v. *Subbayya*, 44 M.L.W. 414=1936 P.C. 283=41 C.W.N. 18 =38 B.L.R. 1229=1936 M.W.N. 1253.

(n) *Srimohan* v. *Brijbehary*, 36 C. 753 =2 I.C. 152.

(o) *Rajlakshmi* v. *Corporation of Madras*, 35 C.W.N. 341=1931 C. 597.

income of the property.[p] It is the duty of the widow to pay the public charges out of the current income.[q]

(3) Reasonable costs of necessary litigation in preserving the estate or defending her title.[r] Litigation expenses incurred by a widow for recovering certain documents for the protection of her husband's estate and in defending herself against a criminal charge of forgery in respect of a document produced by her as belonging to her husband constitute legal necessity justifying her alienation of her husband's estate, and the question whether there was legal necessity for raising the loan cannot be made to depend upon the result of the trial.[s] But in all such cases of litigation for protection of the estate, necessity for the alienation made for the expenses thereof, is not established if it is proved that the alienee knew at the time he advanced the money that the widow had the requisite money in her hands out of the income of the husband's estate.[t]

Note.—"A distinction should be drawn between litigation undertaken to protect the property and litigation the object of which is to obtain a possible benefit for the estate. The former relates to the security of that which has already been acquired. As a general rule, the former class of litigation would no doubt amount to legal necessity; and in regard to the latter class of litigation it may be laid down, that if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner upon the analogy of the maxim "he who enjoys the benefit ought to bear the burthen also." It may be further laid down that in cases where the litigation undertaken by the widow is not undertaken for the benefit of the estate, any alienations made by her for the purpose of prosecuting the litigation are necessarily invalid and do not bind the property. It may even be a question of nicety to determine the exact nature of a litigation when it actually ends in failure. The widow may have been acting with a view to benefit the estate; the creditor may have advanced money to her without any fraudulent intention. But these circumstances do not in my judgment warrant the conclusion that the charge created by the widow should bind the property against the reversioners."—Per Mahmood J., in *Indar Kuar* v. *Lalta Prasad*.[u]

4. Expenses of maintenance of both herself[v] and other de-

(p) *Mutteeoollah* v. *Radhabinodi*, S.D. of 1856 p. 596; *Jagannath* v. *Gur Charan*, 4 Luck. 279=1929 O. 422; *Karimuddin* v. *Gobind*, 31 A. 497=36 I.A. 139=6 A.L.J. 807=11 Bom. L.R. 911=13 C.W.N. 1117=19 M.L.J. 687=3 I.C. 795 (P.C.).

(q) *Veerabadra* v. *Marudaga*, 34 M. 188 =8 I.C. 1072=1910 M.W.N. 799=21 M.L.J. 320.

(r) *Karimuddin* v. *Gobind*, 31 A. 497=36 I.A. 138=3 I.C. 795=6 A.L.J. 807=11 Bom. L.R. 911=13 C.W.N. 1117=19 M.L.J. 687 (P.C.); *Debi Dayal* v. *Bhan Pertap*, 31 C. 433=8 C.W.N. 408; *Bisheshar* v. *Nanhu*, 8 Oudh. W.N. 185=132 I.C. 791; *Ram Adhar* v. *Jagnoo*, 1983 A. 100.

(s) *Krishna* v. *Muthulakshmi*, 39 L.W. 701=1934 M. 169=66 M.L.J. 342.

(t) But see *Official Receiver, Delhi* v. *Kishen Lal*, 1936 L. 98; *Ravaneswar* v. *Chandi*, 38 C. 721=12 I.C. 931; *Narain* v. *Sarjung*, 60 I.C. 486.

(u) 4 A. 532.

(v) *Kuthalinga* v. *Shanmuga*, 50 M.L.J. 234=23 L.W. 373=1926 M. 464=1926 M.W.N. 274; *Santosh Kumar* v. *Ganesh*, 31 C.W.N. 65=1927 C. 160; *Sadashiv* v. *Dhakubai*, 5 B. 450; *Darbari Lal* v. *Gobind*, 46 A. 822=1924 A. 902=22 A.L.J. 753.

pendent members whom the deceased owner was bound to maintain.(w)

Note.—A widow is not liable to meet the maintenance expenses of the dependent members out of the current income of the estate. On the death of the person morally or legally bound to maintain them, his widow or daughter inheriting the estate is entitled to alienate it for these expenses.(x)

5. Marriage expenses of the girls in the deceased's family such as his sister, daughter, son's daughter, grandson's daughter(y) and customary presents on the marriage occasions.(z)

Note.—Where a daughter whose husband is too poor to incur the expenses of the marriage of their daughter, succeeds to her father's estate, she is entitled to alienate a portion of the father's property for meeting those expenses.(a) A widow can make a gift of a reasonable part of landed property to her daughter or son-in-law(z) on the occasion of her marriage or any ceremonies connected with it and even a promise to that effect may be fulfilled afterwards.(b) She can also make an alienation to a reasonable extent of her husband's estate to provide a dowry for the daughter, and it is immaterial whether the deed was executed before or after the marriage ceremony.(c) The marriage of a daughter's daughter is not a legal necessity(d) but that of the daughter's son, even though his father had sufficient property to meet the expenses himself, would justify an alienation by the widow for its expenses if the alienation is not of an unreasonably large portion of the estate and is in conformity with the common notions of the community.(e)

6. Preservation of property and necessary repairs thereto.(f)

534. Preservation of property and necessary repairs thereto.—

Note.—An alienation to meet the cost for erecting a house not necessary for the management of the estate,(g) or one for developing the existing properties (See 10 C. 823 and 33 A. 255 above) does not bind the reversioner. It is not open to a widow or other limited owner, such as a daughter, to sell

(w) *Darbari Lal* v. *Gobind*, 46 A. 822 =1924 A. 902 22 A.L.J. 753; *Sallabala* v. *Baikuntha Nath*, 91 I.C. 186=1926 C. 486; *Viraraju* v. *Venkataratnam*, 48 L.W. 602.

(x) *Debi Dayal* v. *Bhan Pertap*, 31 C. 433=8 C.W.N. 408; *Baijnath* v. *Mangla Prasad*, 90 I.C. 732=1926 P. 1.

(y) *Ibid—Bhagwati* v. *Ram Jatan*, 45 A. 297 1924 A. 23=21 A.L.J. 232; *Brij Mohan Singh* v. *Mt Rachhpal*, 1933 Oudh 426=10 Oudh W.N. 934.

(z) *Brij Mohan Singh* v. *Mt. Rachhpal*, 1933 O. 426=10 Oudh W.N. 934; *Ramsumran* v. *Gobind*, 5 Pat. 646; *Udai* v. *Ambika*, 1927 Oudh 110=2 Luck. 412; *Churamon* v. *Gopee*, 37 C. 1; *Ramasami* v. *Vengidusami*, 22 M. 113=8 M.L.J. 170; *Jowala* v. *Hari*, 5 Lah. 70.

(a) *Kamala Prasad* v. *Lalji Prasad*, 9 P. 721=1930 P. 600; *Rajagopalachariar* v. *Sami Reddi*, 50 M.L.J. 221=1926 M. 517=1926 M.W.N. 266.

(b) *Ramsumran Prasad* v. *Gobind Das*, 5 P. 646=1926 P. 582; *Ramasami* v. *Venkidusami*, 22 M. 113=8 M.L.J. 170; *Chiruman* v. *Gopi*, 37 C. 1=13 C.W.N. 994=1 I.C. 945

(c) *Udai* v. *Ambika Prasad*, 2 Luck. 412=1927 O 110.

(d) *Narainbati* v. *Ramdhari*, 34 I.C. 277=1 P.L.J. 81; But see contra in *Jatram* v. *Bhagat*, 1935 Lah. 440.

(e) *Venkatasubba Rao* v. *Ananda*, 39 L.W. 690=1934 M. 432=1934 M.W.N. 536=67 M.L.J. 204=57 M. 772; See also *Mallayya* v. *Bapi*, 62 M.L.J. 39.

(f) *Hurry Mohun* v. *Ganesh Chunder*, 10 C. 823; *Makhan Lal* v. *Gayan Singh*, 33 A. 255=9 I.C. 199=8 A.L.J. 13; *Fani Lal* v. *Chunilal*, 62 C.L.J. 390, a case of permanent lease to meet the expense of repairs; *Ram Nayak* v. *Mt. Rup Kali*, 1934 A. 557.

(g) *Bhogaraja* v. *Addepalli Seshayya*, 35 M. 560=12 I.C. 123.

the property because she cannot manage it or because it will be beneficial to her as well as the reversioners to sell and buy some other property.(h)

535. Alienation for the benefit of the estate.—It is impossible to give a precise definition of the term "benefit to the estate" used in *Hunoomanpersaud's case*. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation, these and such like things would obviously be benefits.(i) It is not necessary that the transaction justifiable on this ground should be one of a defensive nature.(j) In order to sustain the alienation the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at that time.(k) See. S. 294.

536. Alienation and joint female holders.—Where two widows succeed as co-heiresses to their husband's estate, one of them cannot alien the property without the consent of the other even though the alienation is for the necessity of the estate.(l) They are entitled to obtain a partition of separate portions of the property and deal as each pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together, they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority express or implied(m) of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her life-time and a mortgage by a Hindu widow even for necessary purposes, when she has not even asked her co-widow to consent to the granting of the mortgage, is not binding upon the joint estate so as to affect the interest of the surviving widow(n) and the mere fact that there has been enmity

(h) *Srinivasa* v. *Alamelu*, 101 I.C. 571 =1927 M. 715.

(i) *Palaniappa* v. *Deivasikamony*, 40 M. 709=44 I.A. 147=15 A.L.J. 485=19 Bom. L.R. 567=21 C.W.N. 729=33 M.L.J. 1=6 L.W. 222=1917 M.W.N. 507=1917 P.C. 33.

(j) *Jagat Narain* v. *Mathura Das*, 50 A. 969=1928 A. 454=26 A.L.J. 841.

(k) Ibid. *Ballaram* v. *Goverdhan Das*, 1930 L. 679; See also *Hanumantha* v. *Subbayya*, 1936 P.C. 283=41 C.W.N. 18=4 L.W. 414 and *Baijnath* v. *Binda*, 17 Pat. 549=1939 Pat. 97 (case of family manager distinguishing between necessity and benefit).

(l) *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Gajapati Radhamani* v. *Maharani Sri Pusapati*, 19 I.A. 184=16 M. 1; *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*, 55 I.A. 395=1928 P.C. 251=28 L.W. 378=55 M.L.J. 339=33 C.W.N. 39=1928 M.W.N. 758=26 A.L.J. 1174=31 Bom. L.R. 1.

(m) *Babhnaji* v. *Ratanlal*, 148 I.C. 1033 =1934 N. 106.

(n) *Gajapati Radhamani* v. *Maharani Sri Pusapati*, 16 M. 1=19 I.A. 184; *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*, 111 I.C. 485 (P.C.)=28 L.W. 378=55 I.A. 399=1928 P.C. 251=55 M.L.J. 339=33 C.W.N. 39=1928 M.W.N. 758=26 A.L.J. 1174=31 Bom. L.R. 1.; Gaya Dei v. Tulsha Dei, 10 Luck. 587=1935 Oudh 296.

between the co-widows is no justification for the failure to ask the consent of the co-widow.[o] But in cases where the concurrence of a co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such debt granted only by one widow might be held binding on what may be termed the corpus of the estate.[p] This question of alienation and co-widows has been exhaustively considered with reference to the whole case-law thereon in a decision of the Madras High Court reported in *Appalasuri* v. *Kannamma*,[q] referred to with approval by the Privy Council in *Gauri Nath Kakaji's case*,[r] and the following propositions were laid down by Ramesam and Venkatasubba Rao, JJ., as established by the decisions.

"(1) The estate of co-widows or other co-heiresses in Hindu Law is a joint estate, but it is unlike other joint estates. It is indivisible.[s] Strictly it can never be divided, so as to create separate estates such that each sharer is the owner of her share and at her death, the reversioner's estate falls in. Such a division is impossible in law.

(2) Such partition as is permissible is merely for the convenience of their enjoyment by the sharers; and may be of two kinds,

(i) so as to last during the life-time of both the widows;

(ii) so as to bind them until the death of all of them. In the latter case, if one of the widows dies before the other, without alienating the property, it passes to the heirs of her private property and not to the other co-widow, or their reversioners, the dictum to the contrary in *Rindamma* v. *Venkatarammapa*[t] not being good law.[u]

(3) By the very nature of the arrangement, there can be no survivorship, if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other.

(4) One of the co-widows can alienate her share, which may be defined or undefined, according as there is a partition or not. If the alienor dies before the co-widow, the alienation ceases to be

(o) *Gajapati Radhamani* v. *Maharani Sri Pusapati*, 19 I.A. 184=16 M. 1.

(p) *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*, 111 I.C. 485=55 I.A. 399=1928 P.C. 251=1928 M.W.N. 758=55 M.L.J. 339=26 A.L.J. 1174=33 C.W.N. 39=31 Bom. L.R. 1=28 L.W. 378 (P.C.); *Appalasuri* v. *Kannamma*, 22 L.W. 287=49 M.L.J. 479 =1925 M.W.N. 622=1926 M. 6.

(q) 22 L.W. 287=49 M.L.J. 479=1925 M.W.N. 622=1926 M. 6; See also *Parbati* v *Baijnath*, 1936 P. 200=14 P. 518.

(r) 111 I.C. 485=55 I.A. 399=1928 P.C. 251=1928 M.W.N. 758=55 M.L.J. 339=26 A.L.J. 1174=33 C.W.N. 39=31 Bom. L.R. 1=28 L.W. 378 (P.C.).

(s) See *Kathaperumal* v. *Venkabai*, 2 M. 194.

(t) 3 M.H.C.R. 268; See also *Uchmatan* v. *Rajendra*, 1938 C. 689=67 C.L.J. 115 (case of one widow transferring her interest to her co-widow).

(u) *Ammani Ammal* v. *Periasami Udayan*, 45 M.L.J. 1=1924 M. 75=1923 M.W.N. 652; and *Chengappa* v. *Buradagunta*, 43 M. 855=12 L.W. 656=1921 M. 246=39 M.L.J. 567=1921 M.W.N. 29; *Parbati* v. *Baijnath*, 14 Pat. 518=1936 P. 200; *Kittamma* v. *Sheshamma*, 43 Mys. H.C.R. 43.

operative, if there is no partition, or if the partition is of the first kind, the property goes to the co-widow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee(v) until the other co-widow dies.(w) The obiter dictum to the contrary in *Durga Dat* v *Gita*(x) has not been followed here.

(5) Except for the limited purposes mentioned above, i.e., during the life-time of the alienor in a partition of the first kind, or during the life-time of all the co-widows in a partition of the second kind, there can be no alienation by a widow of her interest,(y) and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioner.(z)

(6) If an alienation for necessity is to bind the reversioners, all the co-widows must join in it."

To the above propositions may be added the one laid down by the Privy Council in *Kakaji's case* that in cases where the concurrence of the co-widow has been asked for to an alienation for necessary purposes and has been improperly refused, the alienation will be binding not only upon the other widow but also the reversioners. A compulsory sale in execution in respect of a personal decree against one of the co-widows is, however, valid during her life.(a)

The following is the relevant portion of the Privy Council judgment in *Kakaji's* case :-

Gauri Nath Kakaji v. Mt. Gaya Kuar, 28 L.W. 378 at 380-383.

"The general law is so well settled that it scarcely requires re-statement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right

(v) *Ramakkal* v. *Ramasami*, 22 M. 522 =9 M.L.J. 101 ; *Kanni Ammal* v. *Ammakannu Ammal*, 23 M. 504=10 M.L.J. 253 ; *Ammani Ammal* v. *Periasami Udayan*, 45 M.L.J. 1=1924 M. 75=1923 M.W.N. 652 ; *Parbati* v. *Baijnath*, 1936 P. 200=14 P. 513.

(w) *Parbati* v. *Baijnath*, 14 Pat. 518= 1936 Pat. 200.

(x) 33 A. 443=9 I.C. 498=8 A.L.J. 220.

(y) *Gajapathi Nilamani* v. *Gajapathi Radhamani*, 1 M. 290=4 I.A. 212 (P.C.) ; *Gajapathi Radhamani* v. *Maharani Sri Puspati*, 16 M. 1=19 I.A. 184 (P.C.)

(z) *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*, 3 M.H.C.R. 424 ; *Kailash Chandra* v. *Kashi Chandra*, 24 C. 339 ; *Ramakkal* v. *Ramasami*, 22 M. 522=9 M.L.J. 101 ; *Kanni Ammal* v. *Ammakannu Ammal*, 23 M. 504=10 M.L.J. 253 ; and *Durga Dat* v. *Gita*, 33 A. 443=9 I.C. 498 =8 A.L.J. 220.

(a) *Ariyaputri* v. *Alamelu*, 11 M. 304.

to prejudice the claim of the survivor to enjoy the full fruits of the property during her life-time. These principles have been established by a long series of decisions, one of the earliest and most authoritative of which is the case of *Bhugwandeen Doobey* v. *Myna Baee*,[b] the head-note of which contains the following passage:

"Where a childless Hindu dies leaving two widows surviving, they succeed by inheritance to their husband's property as one estate in coparcenary with a right of survivorship; and there can be no alienation or testamentary gift by one widow without the concurrence of the other."

In that case there had been a division effected by the Judge of Benares of the estate between the two widows and the argument was that such division having been acquiesced in, the estate of the one widow became a divided and separate estate which she was competent to leave to whomsoever she pleased. This contention was negatived by the Privy Council. In the course of his long and detailed judgment, Sir James Colvile said:

"The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are, therefore, in the strict sense coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other."

The authority of this case has not been questioned before the Board, but it was contended that as the Subordinate Judge found that the elder widow had incurred debts of necessity which she had charged by the mortgages in favour of the appellant upon the villages which had been assigned to her under the partition agreed upon by the parties and confirmed by the Court, these mortgages were binding on the survivor. In support of this argument, he maintained that the respondent had impliedly consented to such a dealing by the elder widow with the property of which she had the sole management under the partition between them. Express consent was not alleged, and indeed under the only issue which deals with this matter it appears to be assumed that no consent was ever given. That issue is expressed in these terms:

"2. Were the said mortgages made for a legal necessity and for payment of antecedent debts? Are they for that reason binding on the plaintiff, even though they were not made with her consent?"

It was, however, contended that while no express consent was ever given, such consent is to be implied from the proved facts Both Courts have found that no consent on the part of the respondent can be inferred to the granting of the mortgages which are charged. Their Lordships are quite content with the conclusion reached by the High Court, which is thus expressed:

"The most that this evidence can establish is that Umrao Kunwar and Gaya Kunwar each acted independently of one another in making transfers. Each asserted a right, which was not possessed, to deal absolutely with the property in her separate possession . . . The circumstance that neither objected to a transfer made by the other cannot in our opinion be construed to mean more than that neither objected to the other making a transfer, provided that transfer did not affect her own interests in the event of her succeeding to the estate by survivorship . . . We find an absolute absence of evidence which

would justify us in drawing a conclusion that Gaya Kunwar consented to the transfers in question."

There remains the question whether to the extent that the mortgages were made for a legal necessity they are binding on the respondent. This was not expressly decided by the case in *Bhugwandeen Doobey* v. *Myna Baee*,(c) which dealt with a gratuitous alienation by one widow to the prejudice of the other, but it was made the subject of decision in the well-known case of *Gajapati Radhamani* v. *Maharani Sri Pusapati*.(d) There it was held, as expressed in the head-note, that a mortgage by a Hindu widow, even for necessary purposes, without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow, but the question was left open whether a

"case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate."

and the only thing that was definitely decided was that it could not do so where the concurrence of the co-widow was not even applied for.

Their Lordships can conceive of cases where when the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate. That case does not arise here. Umrao Kunwar never asked the respondent to consent to the granting of the mortgages in dispute. What attitude the respondent might have taken up had such a request been made can only be matter for conjecture. The decision of the Board was pronounced in 1892 and with the exception of two cases to which reference is afterwards made, it has been consistently followed.

The two cases which are founded on as forming an exception to the general current of authority are *Kalliyansundaram Pillai* v. *Subba Mooparar*(e) and *Jay Narain Singh* v. *Muna Lal*.(f) In the former the head-note bears that

"a mortgage executed by the senior widow for a necessary purpose without the concurrence of the junior widow will be binding upon the latter."

This broad proposition is not supported by the actual decision, and it is explained in the recent case of *Appalasuri* v. *Kannamma Nayuralu*,(g) on the footing that the judges were of opinion on the facts of that case that the senior widow was recognised as manager or agent of the other, and that such an inference can be made only in a case where there was no known hostility between the widows(h) and was not possible where (as in the present case) the widows were hostile to each other.

In the second case above referred to there was undoubtedly an expression of opinion by the learned Judges of the High Court of Allahabad that where two Hindu widows have separated for purposes of conveniently enjoying the estate left by the husband, if one of them alienates a portion of the estate in her possession under the pressure of legal necessity, the reversioner is bound by such alienation. This opinion was not necessary for the decision of the case, for the Court had already held that the widow who had not executed the mortgage deeds challenged, was nevertheless a consenting party to this alienation. It may be noted that the case arose not between the survivor of

(c) 11 M.I.A. 487.
(d) 19 I.A. 184=I.L.R. 16 Mad. 1 (P.C.).
(e) 14 M.L.J. 139.
(f) 1928 All. 92=26 A.L.J. 268=50 A. 489.
(g) 22 L.W. 287=49 M.L.J. 479=1925 M.W.N. 622=1926 M. 6.
(h) See 67 M.L.J. Short Notes, p. 6.

the widows and the mortgagee, but between the mortgagee and the reversioner after the death of both widows. The opinion of the High Court was, therefore, obiter and it is not consistent with the judgment of the Privy Council in *Gajapati Radhamani* v. *Maharani Sri Pusapati*.[i] Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs to the respondent."

537. Widow's power to grant leases.—A widow is entitled, in the exercise of her power of management, to grant leases for such term as may be reasonable or prudent, and the term should not exceed her own life[j] except when justified by necessity[k] or benefit of the estate.[l] It is not easy to define what is exactly the character of the transaction entered into by a Hindu widow, which can be supported on the ground that it enured for the benefit of the estate. The mere fact that the rent reserved was a fair market rent or the price obtained was a fair market price, cannot alone and in itself be regarded as sufficient to justify the transaction on the ground of benefit.[m] But a lease by a limited owner in excess of her powers is not absolutely void but only voidable at the option of the reversioner. "He may think fit to affirm it or he may, at his pleasure, treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court to set aside or cancel as a condition precedent to the right of action of the reversionary heir."[n]

538. Widow's power to make a gift or will.—A Hindu widow cannot transfer by gift her limited estate, and what she cannot do by gift, she cannot do by will[o] even with the consent of the reversioners.[p] If the alienation by way of gift is consented to by the next presumptive male reversioner receiving consideration for giving such consent or benefiting by the transaction, the transaction is binding on him and the person claiming through him, if he succeeds to the estate after the widow's death.[q] In a recent Madras case it was, however, held that the consenting reversioner

(i) 19 I.A. 184=16 Mad. 1 (P.C.).

(j) *Palaniappa* v. *Devasikamony*, 40 M 709=44 I.A. 147=15 A.L.J. 485=19 Bom. L.R. 567=21 C.W.N. 729=33 M.L.J. 1=6 L.W. 222=1917 M.W.N. 507=1917 P.C. 33 : of a shebait; *Sewak Ram* v. *Municipal Board, Meerut*, 1937 A.L.J. 297=1937 A. 328.

(k) *Bijoy Gopal* v. *Govindranath*, 41 C. 793=1 L.W. 533=12 A.L.J. 711=16 Bom. L.R. 425=18 C.W.N. 573=27 M.L.J. 123=1914 M.W.N. 430=1914 P.C. 128; *Sankar* v. *Bejoy*, 13 C.W.N. 201=4 I.C. 513.

(l) *Dayamani* v. *Srinibash*, 33 C. 842.

(m) *Nabakishore Mandal* v. *Upendra Kishore*, 1922 P.C. 39=20 A.L.J. 22=42 M L J. 253=1922 M.W.N 95=26 C.W.N. 322 3 P L.T. 311 24 Bom L.R. 346=15 L.W. 417.

(n) *Bijoy* v. *Krishna*, 34 C. 329=34 I.A. 87 9 Bom. L.R. 602=11 C.W.N. 424=17 M.L.J. 154=4 A.L.J. 329 (P.C.); *Modhu Sudan* v. *Rooke*, 25 C. 1=24 I.A. 164=1 C.W.N. 433=7 M.L.J. 127 (P.C.).

(o) *Tagore* v. *Tagore*, 9 Beng. L. R. 377 (P.C.)=L.R. I.A. Sup. 47.

(p) *Raghava* v. *Narayanaswami*, 4 M.L.J. 89; *Tukaram* v. *Yesu*, 55 B. 46=1931 B. 100=32 Bom. L.R. 1463; *Tejmal* v. *Sawaji*, 27 N.L.R. 283=1931 N. 194.

(q) *Babu Singh* v. *Rameshwar Baksh*, 7 Luck. 360=1932 O. 90.

would be bound by the gift even if he had received no consideration for giving the consent.(r) It is, however, competent to a widow to make a gift of a reasonable portion of her husband's property to her daughter or her husband on the occassion of the daughter's marriage(s) and even otherwise if a gift or will is executed by her it would be valid if the same was executed in accordance with her husband's directions.(t)

EVIDENCE AS TO NECESSITY FOR ALIENATION.

539. Onus of proof of necessity.—In cases of alienation of the corpus of the estate by a woman with the usual limited interest which a woman takes, the burden is on the alienee to prove not only the genuineness of the alienation, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity.(u) In a suit to enforce a mortgage of her husband's estate by a Hindu widow it is the burden of the mortgagee to prove not only the benefit or necessity that justified the transaction but also that the rate of interest on which he granted the loan was also justified by the circumstances of the case.(v) An alienee from a widow is in the same position as an alienee from the manager for an infant heir as defined in *Hunooman Persaud's case.*(w) If the alienee is able to establish that the alienation was in fact supported by necessity, the circumstance that the necessity was the result of the precedent mismanagement of the widow does not invalidate the alienation except when the alienee himself was shown to have contributed to such mismanagement.(x) If the widow is shown to have had, to the knowledge of the lender or alienee, large available resources, as for instance actual cash, which

(r) *Ramakotayya* v. *Viraraghavayya*, 52 M. 556=29 L.W. 818=1929 M.W.N. 323. 56 M.L.J. 755=1929 M. 502.

(s) *Amulya* v. *Putumani*, 1934 P. 62; *Brij Mohan Singh* v. *Mt. Rachhpal Singh*, 1933 O. 426=10 Oudh W.N. 934; *Ramasami* v. *Vengidusami*, 22 M. 113=8 M.L.J. 176; See also *Venkatsubba Rao* v. *Ananda*, 39 L.W. 690=1934 M.W.N. 536=67 M.L.J. 204=57 Mad. 772=1934 M. 432, a case of a daughter's son.

(t) *Suraj Prasad* v. *Gulab*, 1937 A. 192; *Krishnamurti* v. *Lingayya*, 43 L.W. 653=1936 M. 677=1936 M.W.N. 534; *Viraraju* v *Venkataratnam*, 48 L.W. 692=1939 M. 98=1938 M.W.N. 1189=(1939) 1 M.L.J 23.

(u) *Bhagwat Dayal* v. *Debi Dayal*, 35 C. 420=35 I.A. 48=5 A.L.J. 184=10 Bom. L.R. 230=12 C.W.N. 393=18 M.L.J. 100; *Amarnath* v. *Achan Kuar*, 19 I.A. 196=14 A. 420; *Hari Kishen* v *Kashi Pershad*, 12 I.A. 64. 12 C. 876=13 A.L.J. 223=17 Bom. L.R. 426=19 C.W.N. 370=28 M.L.J. 565=2 L.W. 219=1915 M.W.N. 511 1914 P.C. 90 27 I.C. 674; *Obala Kondama Naicker* v. *Kandasami*, 47 M. 181=51 I.A. 145; See also S. 38 of the Transfer of Property Act.

(v) *Radha Kishun* v. *Jag Sahu*, 51 I.A 278. 4 P. 19=1924 P.C. 184=20 L.W. 285=5 P.L.T. 434=26 Bom. L.R. 732=47 M.L.J. 329.=22 A.L.J. 959=29 C.W.N 293; *Bajrang Singh* v. *Gobind*, 11 Luck. 11=1935 Oudh W.N. 354=1935 Oudh 373.

(w) *Amarnath* v. *Achan Kuar*, 14 A. 420=19 I.A. 196; *Hanumantha* v. *Subbayya*, 41 C.W.N. 18=1936 P.C. 283=44 L.W. 414.1936 M.W.N. 1253.

(x) *Rajeshar* v. *Har Kishen*, 10 Oudh W.N. 147=1933 Oudh 170.

would have been sufficient to meet the alleged necessity, neither the lending nor the alienation would be binding on the reversion.(y)

540. Effect of reversioner's consent.—Where the presumptive reversioners consent to an alienation either of the whole or a part of the estate(z) by a limited owner, in the absence of evidence to the contrary, their consent is *prima facie* evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity and which would be sufficient to bind the reversion.(a) As their Lordships of the Privy Council observed in *Rangasami* v. *Nachiappa*.(z) "When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which if not rebutted by contrary proof, will validate the transaction as a right and proper one". But the alienation must be one for consideration and not a gift,(b) and must not be in favour of the reversioners themselves;(c) otherwise this presumption of legal necessity does not arise. This is a rebuttable presumption,(d) and, ordinarily, to get the benefit of this presumption, the consent of the whole body of persons constituting the next reversion should be obtained,(e) though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.(e) But the consent of female reversioners, whether they would take a limited(f) or absolute estate,(g) does not raise any presumption of legal necessity,(h) nor does a consent given

(y) *Ganpat* v. *Ishwar*, 1938 N. 476 (case of manager)

(z) *Rangasami* v. *Nachiappa*, 42 M. 523 46 I A 72-17 A L.J. 536-21 Bom. L.R. 640-23 C.W.N 777-36 M L J. 493-10 L.W. 105 1919 M W N. 262-1918 P.C. 196

(a) *Rangasami Goundan* v. *Nachiappa Goundan*, 42 M 523=46 I A 72-17 A L.J. 536-21 Bom. L.R. 640=23 C W.N. 777=36 M L J. 493=10 L.W 105=1919 M.W.N. 262 1918 P.C. 196; *Ramanasami Reddi* v. *Rajagopalacharior*, 22 L.W. 518 91 I.C 270=1926 M. 29; *Manjaya* v. v. *Seshagiri*, 49 B. 187 1925 B 129 (2) =26 Bom. L.R. 1267.

(b) *Pilu* v. *Babaji*, 34 B. 165=11 Bom L R 1291 4 I.C. 584; *Abdulla* v. *Ram Lal*, 34 A. 129=8 A.L.J. 1318=12 I.C. 601; *Rangasami* v. *Nachiappa*, 42 M. 523=46 I.A. 72-17 A L.J. 536=21 Bom. L.R. 640 =23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262=1918 P.C. 196; *Tukaram* v. *Yesu*, 55 B. 46=32 Bom. L.R. 1463=1931 B. 100; *Rajib Nain* v. *Mt. Bindeshwari*, 15 Pat. L.T. 596; *Bala* v. *Baya*, 60 B. 211.

404 -1930 C. 506.

(d) *Indrajit* v. *Jadu*, 1932 A. 169—55 A. 157..1933 A.L.J. 42; *Thimmanna* v. *Ramabhatta*, 1938 M. 300; *Brijraj* v. *Rameshar*, 1937 Oudh 189=1936 O.W.N. 1198; *Thakur Prasad* v. *Mt. Dipa Kuer*, 10 Pat. 352 1931 Pat. 442; *Ramamurthy* v *Bhimasankara*, I.L.R. 1938 M. 688=47 L W 295 (1938) 1 M.L.J. 296=1938 M. 433.

(e) *Gajadhar Lal* v. *Makhan Lal*, 99 I.C. 17; *Sham Sundar* v. *Achan Kunwar*, 21 A. 71=25 I.A. 183; *Debi Prasad* v. *Golap*, 40 C. 721.

(f) *Koer Goolab Sing* v. *Rao Kurun Sing*, 14 M.I.A. 176; *Akkineri* v. *Mallapudi*, 25 M. 731.

(g) *Pilu* v. *Babaji*, 34 B. 165=11 Bom. L.R. 1291—4 I.C. 584. See contra in *Mallick* v. *Arjunappa*, 38 B. 224=15 Bom. L R. 1142=22 I.C. 292.

(h) *Bepin Behari* v. *Durga Charan*, 35 C. 1086=12 C.W.N. 914; *Kuvetappa* v. *Nigayya*, 32 Bom. L.R. 626—1930 B. 299; *Muhammad* v. *Brij Behari*, 46 A. 656= 1924 A. 939=22 A.L.J. 650; *Chidambara*

without full knowledge of the circumstances and of the nature and effect of the alienation.[a] A consent which must be established by clear and unambiguous evidence[j] is not invalid merely because it is given subsequent to the alienation[k] or because the purpose of the alienation is not mentioned in the document.[l] Reversioners may consent to the alienation either by joining in executing the deed[m] or by execution of an independent consent deed[n] or by attesting the deed of transfer with a note that they approved of it.[o] Mere attestation by itself does not amount to consent since it is no proof that the attestor knows the contents,[p] but attestation combined with other circumstances may fix the attesting reversioner with the knowledge of the contents of the deed.[q] The effect of a presumptive reversioner's consent is that if he happens to be the actual reversioner on the death of the widow he will be precluded from avoiding the alienation.[r] Thus where an alienation without necessity by Hindu widow was consented to by the next presumptive male reversioner without receiving any consideration for giving such consent, the transaction was held binding on the consenting reversioner when he succeeded after the death of both the widow and of the female reversioner who succeeded her.[s] If the reversioner gave his consent as manager of a joint

(i) *Sham Sundar* v. *Achhan Kunwar*, 21 A. 71=25 I.A. 183=2 C.W.N. 729 (P.C.); *Hari Kishen* v. *Kashi*, 42 C. 876=42 I.A. 64=13 A.L.J. 223. 17 Bom. L.R. 426 .19 C.W.N. 370=28 M.L.J. 565..2 L.W. 219..1915 M.W.N. 511=1914 P.C. 90.

(j) *Hari Kishen* v. *Kashi Pershad*, 42 C. 876 42 I.A. 64=13 A.L.J. 223.=17 Bom. L.R. 426=19 C.W.N. 370=28 M.L.J. 565= 2 L.W. 219 .1915 M.W.N. 511=1914 P.C. 90.

(k) *Maroli* v. *Maroli*, 1930 Nag. 287; *Bajrangi* v. *Manokarnika*, 30 A. 1=35 I.A. 1=9 Bom. L.R. 1348=12 C.W.N. 74=17 M.L.J. 605..5 A.L.J. 1.

(l) *Ramasami Reddi* v. *Rajagopalachariar*, 91 I.C. 270=22 L.W. 518=1926 M. 29.

(m) *Shunmuga* v. *Koyappa*, 60 I.C. 635 (M.)=1920 M.W.N. 679.

(n) *Bajrangi* v. *Manokarnika*, 30 A. 1 =35 I.A. 1. 9 Bom. L.R. 1348=12 C.W.N. 74=17 M.L.J. 605=5 A.L.J. 1 (P.C.).

(o) *Anantoo* v. *Ram Rup*, 87 I.C. 315 =1925 A. 692.

(p) *Hari Kishen* v. *Kashi Pershad*, 42 C. 876=42 I.A. 64=13 A.L.J. 223=17 Bom. L.R. 426=19 C.W.N. 370=28 M.L.J. 565= 2 L.W. 219=1915 M.W.N. 511=1914 P.C. 90; *Banga Chandra* v. *Jagat Kishore*, 44 C. 186=43 I.A. 249=14 A.L.J. 1103 =18 Bom. L.R. 868=21 C.W.N. 225= 31 M.L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=1916 P.C. 110; *Thakur Prasad* v. *Mt. Dipa*, 10 P. 352=1931 Pat. 442; *Satyanarayana* v. *Venkanna*, 65 M.L.J. 282 =38 L.W. 230=1933 M.W.N. 1301=1933 M. 637.

(q) *Ram Adhar* v. *Bhagwan Singh*, 85 I.C. 580 .1925 A. 209; *Anantoo* v. *Ram Rup*. 87 I.C. 315..1925 A. 692; *Pandurang* v. *Markandaya*, 30 M.L.J. 249—1922 P.C. 20=42 M.L.J. 436=24 Bom. L.R. 557=15 L.W. 186=20 A.L.J. 305. 26 C.W.N. 201= 49 C. 334 .49 I.A. 16 P.C

(r) *Rangasami* v. *Nachiappa*, 42 M. 523 =46 I.A. 72=17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777 =36 M.L.J. 493=10 L.W. 105= 1919 M.W.N. 262=1918 P.C. 196. *Ram Gowda* v. *Bhaunsheb*, 52 B. 1 .53 M.L.J. 350=54 I.A. 396=29 Bom. L.R 1380 .32 C.W.N. 88=27 L.W. 140=1927 M.W.N. 736 =1927 P.C. 227; *Ramakotayya* v. *Viraraghavayya*, 52 M. 556 (F.B.)=29 L.W. 818=1929 M. 502=1929 M.W.N. 323=56 M.L.J. 755; *Rampeyari* v. *Ramdhani*, 1938 Pat. 476; *Moti Singh* v. *Ghandarp*, 48 A. 63; *Babu* v. *Rameshwar*, 7 Luck. 360; *Barkhurdar* v. *Sat Behari*, 36 P.L.R 371 .1931 Lah. 677; *Kunja Behari* v. *Rasik*, 39 C.W.N. 474=1935 C. 495; *Tukaram* v. *Yesu*, 55 B. 46=32 Bom. L.R 1463=1931 B. 100; See also *Marudanayakam* v. *Subramanian*, 41 L.W. 783 1935 M. 425= 68 M.L.J. 643.

(s) *Ramakotayya* v. *Viraraghavayya*, 52 M. 556 29 L.W. 818 1929 M. 502=1929 M.W.N. 323..56 M.L.J. 755 (F.B.); *Fate Singh* v. *Thakur*, 45 A. 339 (F.B.); *Babu* v. *Rameshwar*, 7 Luck. 360; *Akkawa* v. *Sayad*, 51 B. 475.

family, his son subsequently born cannot impugn the validity of the mortgage.[t] *A fortiori* a reversioner who was a party to and was benefited by a transaction of a Hindu widow would be precluded from questioning any part of it and if he had survived the widow and had not challenged the alienation, his sons could not set it aside.[u] But if the actual reversioner at the death of the widow happens to be some one other than the consenting reversioner, he is not precluded from impugning the alienation even though he happens to be the son of the reversioner who had consented[v] unless the actual reversioner had enjoyed the benefit of the consideration for which the consent was given.[w] The reason is, that the presumptive reversioner, though he happened to be the direct paternal ancestor of the actual reversioners, is not a person through whom the actual reversioners take but such actual reversioners take directly through the last full owner. Such presumptive reversioner, even if he had been the guardian of the actual reversioners would not have had any authority to enter into any transaction with regard to the ward's prospects of succeeding a widow to her husband's estate, and such a transaction, even if it takes the form of a family arrangement, does not prevent his ward or his descendants from succeeding to the estate as actual reversioners in the absence of proof of individual conduct on their part which would make it unjust to give effect to their rights as actual reversioners.[x] When there are several reversioners, the consent of one of them to the widow's alienation does not preclude the non-consenting reversioners from impeaching the transaction and recovering their shares in the property alienated without necessity.[y]

The question of the effect of a reversioner's consent on the validity of a widow's alienation was elaborately considered in the following case :—

Rangasami Goundan v. Nachiappa Goundan. 10 L.W. 105—42 M. 523 P.C.

(t) *Bhagwan Singh* v *Ujagar Singh*, 107 I C 20—27 L.W. 672—1928 P.C. 20—54 M.L J 254—30 Bom. L.R 267-32 C.W.N. 538 26 A.L J. 553—1928 M.W.N. 933 (P C)

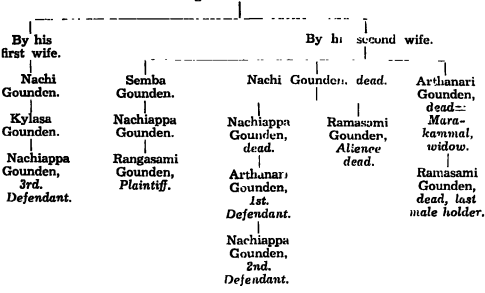
(u) *Ramgowda* v. *Bhausaheb*, 52 B. 1 54 I.A. 396 53 M.L.J. 350—29 Bom. L R 1380= 32 C.W.N. 88=27 L.W. 140=1927 M.W.N 736=1927 P.C. 227 ; *Mt. Maina* v. *Bhagwati*, 1936 A 557=1936 A L.J. 1230 ; *Babu Singh* v. *Rameshwar*, 7 Luck. 360 . 1932 Oudh 90 ; *Babu Rao* v. *Tukaram*, 33 Bom. L.R. 235=1931 B. 208.

(v) *Rangasami* v. *Nachiappa*, 42 M. 523 (P.C.) -46 I.A. 72=17 A.L.J. 536=21 Bom. L R. 640—23 C.W.N. 777=36 M.L.J. 493-1919 M.W.N. 262-1918 P.C. 196=10 L.W. 105 ; *Bahadur Singh* v. *Mohar Singh*, 24 A. 94=29 I.A. 1=6 C.W.N. 169=12 M.L.J. 56=4 Bom. L.R. 233 (P.C.); *Binda Kuer* v. *Lalita*, 44 M.L.W. 546=1936 P.C. 304=41 C.W.N. 161-38 Bom. L.R. 1256 ; *Vinayak* v. *Govind*, 25 B. 129=2 Bom. L.R. 820 See *Satyanarayana* v. *Venkanna*, 1933 M. 637—38 L.W. 230=65 M.L.J. 282=1933 M.W.N. 1301.

(x) *Binda Kuer* v. *Lalita*, 44 M.L.W. 546=41 C.W.N. 161=38 Bom. L.R. 1256= 1936 P.C. 304.

(y) *Ajudhia* v. *Mathura*, 1926 A. 609.

The subjoined pedigree will explain the position of the persons to be mentioned.



This suit is brought by the plaintiff as one of the reversionary heirs entitled to one half of the property last held by Marakammal, the widow of Arthanari Gounden, who had succeeded thereto as upon the death of her childless son, Ramasami Gounden. It was directed against 32 persons who were in possession of different pieces of the property. The suit was only contested by three defendants. The third defendant, who was only of the half-blood, as the pedigree will show, was held on that account to have no claim as a reversionary heir, and that finding is acquiesced in. He may be therefore dismissed from further notice. The first and second defendants were reversionary heirs, and as such entitled to the other half. But they were also in possession of two-fifteenths of an estate called Kongapuram Mitta, one-fifteenth of which was claimed by the plaintiff, and they resisted this claim. The first defendant is now dead, and the second defendant is in his right and is the sole respondent before the Board.

The grounds on which the claim was resisted arise out of the following facts. After the death of her husband Marakammal entered into possession of the estate. At that time Ramasami Gounden (designated in the pedigree as the "alienee") was the nearest reversionary heir. Marakammal executed in 1893 in his favour a conveyance of parts of the estate including the disputed part of the Kongapuram Mitta. The deed so far as material to the present questions ran as follows:—

"As you have performed the funeral rites to my husband the deceased Arthanari Gounden and my son the deceased Ramasami Gounden, as you have the right to inherit as surviving heir all my properties after my death, as you have spent on my behalf and on behalf of my son your own (monies) and after borrowing monies required for conducting O.S. No. 5 of 1883 on the file of the District Court of Salem conducted by my son the deceased Ramasami Gounden as plaintiff and all other civil and criminal proceedings in connection therewith in other Courts, as I am advanced in age and unable to supervise and manage the mitta and other lands and to collect the amounts due on the hypothecation debt bonds, and as you have consented to my possession and

enjoyment with all rights and interests of all the properties other than those mentioned below which belong to me under the razinama decree in O.S. No. 5 of 1883 on the file of the District Court of Salem and which I am enjoying and of which I make a gift to you, and as you have promised to support me during my lifetime at your expense and to have the marriage of my unmarried daughter performed according to our custom and to perform also *seeru* and *sirappu* for this and to another daughter who has been married, I have made a gift of the undermentioned properties valued at about Rs. 10,000 to you who is the elder brother's son of my husband, deceased Arthanari Goundan, and delivered possession to you. Therefore you shall in comfort possess and enjoy the undermentioned properties from generation to generation and with powers to give away by gift, sale, etc. I have no manner of right or interest over the said gift properties."

Ramasami Gounden entered into possession but died prior to 1896, and was succeeded by his two nephews, the sons of his undivided brother. The nephews were Sundara, now deceased and Arthanari, the first defendant.

In 1896 the nephews conveyed to the plaintiff by deed of sale two small properties which had been included in Marakammal's deed, and in the same year they borrowed from the plaintiff a sum of money, and in security therefor mortgaged four-fifteenths of Kongapuram Mitta on the recital that they held two-fifteenths in respect of their own succession, and two-fifteenths in respect of Marakammal's deed.

The learned District Judge, gave judgment in favour of the plaintiff. The judgment being for one-half of all the property held by Marakammal included *inter alia* one-fifteenth of Kongapuram Mitta. This judgment was acquiesced in by all concerned except the present respondent and his father, who as before stated subsequently died, so that the present respondent alone further proceeded with the litigation.

The grounds on which the suit was resisted were: (1) that the deed by Marakammal was valid and carried the property in question; (2) that even if it did not, the plaintiff had either ratified the deed by reason of his taking the conveyances and mortgages above set forth, or was at least estopped from saying that the deed was bad.

Appeal being taken to the High Court, the case was heard by Miller, J., and Sadasiva Aiyar, J. Miller, J. agreed *in omnibus* with the District Judge, Sadasiva Aiyar, J., dissented from this view and considered that the deed by Marakammal was good, it being in his view a correct proposition that "a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property."

The Judges thus differing in opinion, the appeal was dismissed. It was then again appealed under the Letters Patent to a Full Bench, and was heard by Wallis, C.J. and Seshagiri Aiyar and Kumaraswami Sastri, JJ. The learned judges all agreed with Miller, J., and the District Judge as to the law applicable to the deed, but they held that the plaintiff was estopped from denying its validity in respect of the mortgage transaction. The suit was therefore dismissed as against the present respondent. Appeal was then taken to this Board.

The first matter to be considered is the dictum of Sadasiva Aiyar, J., that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property. It is true that this did not find acceptance with any of the learned

Judges of the Court of Appeal, but it is founded in the opinion of the learned Judge on the most recent judgment of the Privy Council, *viz.*, *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*,(z) and it is obvious that if it is sound it disposes at once of the case in favour of the respondent.

This raises the consideration of the whole subject of the power of a Hindu widow over estate which belonged to her husband to which she has succeeded, either immediately on the death of her husband, or as here on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite individually, it has given rise to different currents of judicial opinion, and, as in this case and some others, to actual difference in judicial determination. The most recent examination of the subject in full in the Courts of India will be found in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat*,(a) and their Lordships wish to acknowledge how much they have been assisted by the lucid and able judgments of Jenkins, C. J. and Mookerjee, J. in that case, which, though expressed in terms which are not identical, are in substance the same.

It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English law applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in Western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which, as Seshagiri Aiyar, J. most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second.

To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in the opinions of the learned judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say she can so to speak by voluntary act operate her own death. The landmark of decision as to this may be taken as the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* (b) where in delivering the judgment of the Board Lord Morris said:—

"It may be accepted that according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee."

That this was no new doctrine but was only the final sanction of a long series of decisions may be taken from the opinions of Garth, C.J., and Mitter, J, in the case of *Nobokishore* v. *Hari Nath Sarma Roy*,(c) which had been decided six years before *Behari Lal's* case.

It has been suggested that the expressions in *Behari Lal's* case only meant that the widow should retain no interest in what was surrendered, and that

(z) 35 I.A. 1=30 A. 1=9 Bom. L.R. 1348 =12 C.W.N. 74=17 M.L.J. 605=5 A.L.J. 1 (P.C.).

(a) 40 C. 721=19 I.C. 273=17 C.W.N. 701

(b) 19 I.A. 30=19 C. 236 (P.C.).

(c) 10 C. 1102.

therefore a partial surrender, provided that the surrender was absolute as to that part, was valid. This however is quite against the principle on which the whole transaction rests. As already pointed out it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so, and consequently the suggestion was in their Lordships' view rightly rejected by the Calcutta Full Bench in the case of *Debi Prosad* already cited, and by the Full Bench in Madras in *Marudamuthu Nadan* v. *Srinivasa Pillai*,(d) and by all the learned Judges in this case.

The surrender once exercised in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Nobokishore* already cited. The judgment went upon the principle of surrender, and it might do so, for, the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth.

Turning now to the second head, *viz.*, the power of alienation, which may be alienation to any one whether an heir or not, there is again authority of long standing. As a leading case may be taken *The Collector of Masulipatam* v. *Cavaly Vencata Narainapah*,(e) in a passage which need not be quoted at length. The purposes for which alienation is legitimate may be summarised as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband, or necessity. Now necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof: *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*.(f) An equitable modification has also been admitted in the case where the alienee has in good faith made proper enquiry and been led to believe that there was a case of true necessity.

Thus far if the alienation stands alone. But it may be fortified by the consent of reversionary heirs. The remaining question is what is the effect of such consent. If the alienation be total and the reversionary heirs be the nearest, it falls within the first division. But what if it be partial?

The matter is mooted in the case of *The Collector of Masulipatam* just mentioned. Their Lordships there say:—

"On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so, if made with the consent of the husband's kindred. The exception in favour of alienation with consent may be due to a presumption of law that when that consent is given, the purpose for which the alienation is made must be proper."

The opinion which is here only tentatively expressed, *viz.*, that consent does not give force *per se*, but is of evidential value, is corroborated by much subsequent authority. In the case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhury*,(g) *Sir James Colvile says*:—"There should be such a concurrence

(d) 21 M. 128=8 M.L.J. 69 (F.B.).
(e) 8 M.I.A. 529.
(f) 43 I.A. 249=4 L.W. 458=44 C. 186=1916 P.C. 110=14 A.L.J. 1103=18 Bom. L.R. 868=21 C.W.N. 225=31 M.L.J. 563=(1916) 2 M.W.N. 336.
(g) 13 M.I.A. 209.

of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law." Lord Davey uses the same form of expression in *Sham Sundar Lal* v. *Achhan Kunwar*.(h) It was deliberately accepted in the case of *Debi Prosad* and was again affirmed by the Privy Council in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji*,(i) where it is said, that the consent of reversioners was looked on "as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

But further if the matter be considered on principle, it seems clear that this must be the true view. For first if mere consent as such of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly mere consent could only validate on the theory that the reversioner together with the widow represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a *spes successionis*.

The view that consent operates *proprio vigore* is, apart from casual expressions, really based on the authority of *Bajrangi Singh's* case. It is therefore expedient to examine what was really there decided. The only real point at issue (apart from the question as to a particular custom of succession which is *nihil ad rem*), was whether the strict rule which had been laid down by the Allahabad High Court should be followed, or whether the extension permitted by the High Court of Calcutta was allowable. The Allahabad Court had laid down that where necessity was not proved *aliunde* then the consent of any number of reversioners would not bind a reversioner who possessed that character at the death of the widow, and who had not himself been one of the consenters. The Calcutta Court had decided that if the consent of the reversioners at the time being was of an adequate character then the eventual reversioner could not challenge the transaction.

The Judicial Committee examined the various cases which had been decided from the beginning. They set forth the cases of surrender and those of partial alienation without discriminating for the purposes of the case before them between the two principles. They did not in any way throw doubt on the former judgment in *Behari Lal's* case which settled that a surrender must be total. Having set out the cases, the judgment after quoting the opinion of Ranade, J., in *Vinayak* v. *Govind*(j) "The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one," continues: "The principle being thus admitted by the High Courts in India the question of the *quantum* of consent necessary only remains." And then as the consent in that case had been given by the whole of the reversioners then in existence it decided that the Allahabad rule was too strict, and that the transaction must stand in a question with two reversioners who had not been parties to the transaction but were sons of those who had. The judgment affirmed the Calcutta as against the Allahabad rule, but it did not particularise on what exact ground the alienation was supported.

Now it is to be observed that in the particular case it might possibly have been supported on either ground. Although there were three successive alienations they *in cumulo* amounted to an alienation of the whole immovable property, and it is just possible that the fact was overlooked which was noticed

(h) 25 I.A. 183=21 A. 71=2 C.W.N. 729 (P.C.).

(i) 41 Cal. 793. S.C.=1 L.W. 533=12 A.L.J. 711=16 Bom. L.R. 425=18 C.W.N. 673=27 M.L.J 123=1914 M.W.N. 430=1914 P.C. 128.

(j) 25 B. 129=2 Bom. L.R. 820.

by the learned Chief Justice in this case, that the widow was also of movable property. But apart from that the alienations were all made for purposes of ostensible necessity. Their Lordships have examined the record and find that two of the alienations were to meet money spent in litigation presumably connected with the estate; and the third to pay government duty. This would protect the alienation on the principles already stated. It is true that the concluding words of the judgment as to the sons being bound by the consent of the fathers "through whom they claim" could be read as indeed they have been read as indicating that consent operated *proprio vigore*. But two remarks fall to be made. First the idea of an eventual reversioner claiming through any one who went before him is opposed both to principle and authority. It is opposed to principle because, as already stated there is no vested right till the death. It is opposed to authority: *Bahadur Singh* v. *Mohar Singh*.(k) Secondly, there is no hint in the judgment that their Lordships proposed to lay down a new doctrine which would render quite immaterial most of the cases quoted. It seems therefore much safer to conclude that the judgment was only meant to settle the point at issue, *viz.*, the comparative merits of the Allahabad and the Calcutta rules, leaving the operation of consent to stand on the perfectly logical grounds of the authorities quoted, than to hold that a new and illogical extension of the law was introduced, and to find consolation in the fact as stated by Sadasiva Aiyar, J., that Lord Halsbury once said that law was not a logical science.

The result of the consideration of the decided cases may be summarised thus. (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (2) when the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins, C.J, and Mookerji, J., in the case of *Debi Prosad*. It follows that their Lordships cannot agree with a good deal of what was said in the case of *Rangappa Naik*.(l)

It now becomes necessary to fix what was the character of the deed executed by Marakammal in favour of Ramasami Gounden. All the Judges in the Courts below concurred in holding that it was not a total conveyance of Marakammal's property, and that was scarcely contested by learned counsel before this Board. This prevents it receiving effect as a surrender. Counsel however strenuously argued that it was a deed for consideration and not a deed of gift. As to this all the Judges have decided that it was a deed of gift except Kumaraswami Sastri, J., who says that in his view it is unnecessary to decide, but that if he had to do so he would hold it a deed for consideration. Their Lordships see no ground for disagreeing with the result arrived at by the large majority of the learned Judges below. It calls itself a deed of gift, and it is apparent from the opinion of the Chief Justice that this point

(k) 29 I.A. p. 1 S.C.—24 All. 94=6 C.W.N. 169=12 M.L.J. 56=4 Bom. L.R. 233.

(l) 31 M. 366=18 M.L.J. 309.

was abandoned at the trial and is not mentioned in the reasons for appeal to the Appeal Court.

Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows, therefore, that the deed taken by itself cannot stand.

So far the result at which their Lordships have arrived is in consonance with the views of all the learned Judges in the Court below except Sadasiva Aiyar, J. But the Court of Appeal differing from the District Judge and from Miller, J., have held that the appellant cannot be allowed to challenge the deed on the ground of estoppel or ratification in respect of his conduct in taking the mortgage as above set forth. Their Lordships are unable to agree in this view. They think, with Miller, J., that there is here no room for the doctrine of estoppel. Of estoppel by record or by deed obviously there is none. The definition of estoppel in the Indian Evidence Act - a definition which covers both estoppel by deed and *in pais*—is Sec. 115. "When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing." How can it be said that the plaintiff, by any act of his, led the respondents to think that something was true and then to act on that belief? The learned Judges of the Appeal Court rest their opinion on the case of *Bajrangi Singh*. Their Lordships have already examined that case, and stated what in their view is the true import of the judgment. But apart from that, if *Bajrangi Singh's* case had been decided on the ground of estoppel, it affords no parallel to the present case. In that case all the reversioners in being had consented to the alienations. They were bound by their own consent and the *post nati* were held to claim through those that were bound. Here the plaintiff never consented to the deed, nor is his claim traced through Ramasami even in the matter of descent.

No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hyper-criticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable. (*Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*).(*m*) Now in all cases of voidable contracts there is a general equitable doctrine common to all systems, that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good. *Raja Modhu Sudan Singh* v. *Rooke Singh*.(*n*)

But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

(*m*) 34 C. 329=34 I.A. 87.=9 Bom. L.R. 502=11 C.W.N. 424=17 M.L.J. 154=4 A.L.J. 127 (P.C.).

(*n*) 24 I.A. 164=25 C. 1=1 C.W.N. 433=7 M.L.J.

Of course something might be done even before that time which amounted to an actual election to hold the deed good. In that view what was done here? The learned Appeal Judges dismiss as inadequate the fact of the purchase of the two small pieces of ground. But they attach great weight to the taking of the mortgage. Here they have made a slip as to the facts. The mortgage did not consist, as they think, of only the share of the Mitta which had come through the deed of gift. It consisted also of two-fourteenths of the Mitta which had come to the mortgagors in right of their own succession. The value of this share was more than the sum secured by it. Now at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that by so doing he barred himself from asserting his own title to a part of what was mortgaged seems to their Lordships a quite unwarrantable proposition.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, and to restore the decree of the District Judge; the appellant to have his costs in the Courts below and before this Board."

541. Recitals of necessity in the deed of alienation.—It is well established that recitals of necessity in deeds of alienation by a widow cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain.(o) If such proof were permitted the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. But these recitals are not always to be altogether disregarded. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probabilities and circumstances of the case, assumes greater importance and cannot lightly be set aside; for it should be remembered that even in the absence of actual necessity justifying the deed, a representation to the alienee as to the existence of such necessity together with his having acted honestly in the belief that it existed after making proper enquiries would be sufficient to validate the alienation. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual enquiry has become

(o) *Brij Lal* v. *Inda Kunwar*, 36 A. 187 =23 I.C. 715=1 L.W. 794=12 A.L.J. 495=16 Bom. L.R. 352=18 C.W.N. 649=26 M.L.J. 442=1914 M.W.N. 405=1914 P.C. 38 (P.C.); *Rangasami* v. *Nachiappa*, 42 M. 523 (P.C.) =46 I.A. 72=50 I.C. 498=17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=1919 M.W.N. 262=1918 P.C. 196=10 L.W. 105.

impossible, the recital coupled with such circumstances, would be sufficient to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction, perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time.(p) But this principle that in the case of ancient alienations, recitals are *prima facie* evidence of enquiry by the alienee is inapplicable to cases where (1) although witnesses to the transaction are not available there is documentary evidence which is shown as having been withheld by the alienee, (2) the recitals are inconsistent with the probabilities and (3) the recitals appear to have been made not as representing the truth but for an ulterior purpose.(q)

542. Ancient alienations.—Where the validity of an alienation made by a Hindu widow of her husband's property comes in question a long time after the alienation so that it is impossible to ascertain what were the circumstances in which it was made, presumptions are permissible to fill in the details which have been obliterated by time and it would be open to the Court to assume that the alienation was made for necessity so as to be binding upon the reversioners(r) even though the deed of alienation does not contain recitals of such necessity.(s) But this does not mean that mere lapse of time does as as a matter of law raise a presumption that the alienation was supported by necessity. In such a case, regard must be had to the amount of evidence likely to be available after the lapse of a long time and presumptions should be allowed to fill in gaps disclosed in the evidence, or in other words, to supplement that evidence, but if there is evidence justifying the conclusion that the alienation was not supported by necessity or was beneficial to the estate, presumptions to contradict that evidence would be out

(p) *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 (P.C.)=43 I.A. 249=4 L.W. 458=14 A.L.J. 1103=18 Bom. L.R. 868=21 C.W.N. 225=31 M.L.J. 563=(1916) 2 M.W.N. 336=1916 P.C. 110=36 I.C. 420; *Krishna* v. *Muthulakshmi*, 39 L.W. 701=1934 M. 169=66 M.L.J. 342; *Venkayamma* v. *Sitaramaraju*, (1938) 1 M.L.J. 157; See also *Bhajraj* v. *Sitaram*, 1936 P.C. 60=40 C.W.N. 257=70 M.L.J. 225.

(q) *Basantakumar* v. *Ramshankar*, 59 C. 859=1932 C. 600=53 C.L.J. 205; *Debendra* v. *Nagendra*, 60 C. 1158=37 C.W.N. 1001=1933 C. 900.

(r) Ibid—*Banga Chandra* v. *Jagat Kishore*, 44 C. 186=43 I.A. 249=14 A.L.J. 1103=18 Bom. L.R. 868=21 C.W.N. 225=31 M.L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=1916 P.C. 110; *Rajeshar Bali* v. *Har Kishen*, 1933 O. 170—7 Luck 588.

(s) *Kumarasami* v. *Narayanasami*, 36 L.W. 186=139 I.C. 766=1932 M. 762=1932 M.W.N. 850; *Venkata Reddi* v. *Rami Saheba*, 43 M. 541=47 I.A. 6=18 A.L.J. 367=22 Bom. L.R. 541=38 M.L.J. 393=11 L.W. 451=1920 M.W.N. 315=1920 P.C. 64=55 I.C. 538; *Magniram Sitaram* v. *Kasturbhai Manibhai*, 46 B. 481=42 M.L.J. 501=26 C.W.N. 473=20 A.L.J. 371=24 Bom. L.R. 584=1922 M.W.N. 319=49 I.A. 54=1922 P.C. 163; *Banga Chandra* v. *Jagat Kishore*, 44 C. 186=43 I.A. 249=14 A.L.J. 1103=18 Bom. L.R. 868=21 C.W.N. 225=31 M.L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=1916 P.C. 110; *Ram Narain* v. *Nandram*, 50 A. 823=1929 A. 128; *Thimmanna* v. *Rama*, 1938 M. 300.

of place.(t) In the case of *Kumarasami* v. *Narayanasami*,(u) where the validity of a widow's alienation was attacked in a suit by the reversioners 50 years after the date of the alienation so that it was impossible to ascertain what were the circumstances in which it was made, the alienation was upheld even though the deed of alienation did not contain any recitals as to necessity.

Kumarasami v. Narayanasami, 36 L.W. 186 at 190—191.

"The suit was brought more than fifty years after the sale. Both the vendor and the vendee have died. All the attestors of Ex. 7 (about 13 in [illegible] premissible to fill in the details which have been obliterated by time. This rule, which says, that detailed evidence may be dispensed with, applies not only where there are recitals in the deeds as in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*(v) and *Somayya* v. *Venkayya*(w) but also in other cases. As an instance of the latter, may be mentioned *Venkata Reddi* v. *Rani Saheba of Wadhwan*.(x) In that case, no deed was produced (See the argument of Mr. De Gruyther), but still the Judicial Committee held, agreeing with the High Court,

" * * * It will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question, as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time."

It may be mentioned that one of the circumstances that weighed with the High Court in upholding the alienation, was the inaction and silence of the presumptive heirs who could have brought but did not bring, a declaratory suit. (See page 543). We cannot therefore uphold the argument, that the rule that presumptions may be made to fill in gaps, is to be confined only to a case, where the alienee can point to recitals in the deed, under which he claims. We may also refer to *Maguiram Sitaram* v. *Kasturbhai Manibhai*,(y) another decision of the Judicial Committee. Where the validity of a permanent lease granted by a Shebait came in question a long time (nearly hundred years) after the grant, so that it was not possible to ascertain what were the circumstances in which it was made, the Privy Council held that the Court should assume that the grant was made for necessity so as to be valid. The following observations of their Lordships may usefully be quoted:—

"In the case of *Chockalingam Pillai* v. *Mayandi Chettiar*,(z) it was pointed out that although the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the

(t) *Bhojraj* v. *Sitaram*, 43 M.L.W. 120=1936 P.C 60=40 C.W.N. 257=38 Bom. L.R 344—70 M.L.J. 225=1936 A.L.J. 755; See also *Tej Bahadur* v. *Radha*, 1936 A.L.J 1373=1936 A. 853.

(u) 36 L.W. 186=1932 M. 762=1932 M.W.N. 850.

(v) 44 C. 186=14 A.L.J. 1103=18 Bom. L.R. 868=21 C.W.N. 225=31 M.L.J. 563=(1916) 2 M.W.N. 336=1916 P.C. 110=4 L.W. 458 (P.C.).

(w) 48 M.L.J. 224=22 L.W. 81=1925 M. 673.

(x) 43 M. 541=47 I.A. 6=18 A.L.J. 367=22 Bom. L.R. 541=38 M.L.J. 393=1920 M.W.N. 315=1920 P.C. 64.

(y) 46 B. 481=42 M.L.J. 501=26 C.W.N. 473=20 A.L.J. 371=24 Bom. L.R. 584=1922 M.W.N. 319=49 I.A. 54=1922 P.C. 163.

(z) 19 M. 485=6 M.L.J. 247.

challenge of its validity is a circumstance which enables the court to assume that the original grant was made in exercise of that extended power. Their Lordships have no hesitation in applying that doctrine to the present case. If in fact the grant was made by a person who possessed the limited power of dealing under which a shebait holds lands devoted to the purposes of religious worship, yet none the less there is attached to the office, in special and unusual circumstances, the power of making a wider grant than one which enures only for his life. At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made."

(See also the Judgment of Spencer, J., in *Natesa Aiyar* v. *Panchapagesa Aiyar*.[a])

On the evidence and on the probabilities, we agree with the lower Court in holding that it has been shown that the sale was made for legal necessity.

The appeal is dismissed with costs of the contesting respondents."

543. Widow's alienation in excess of her powers is only voidable.—A transfer made by a Hindu widow or other female limited holder in excess of her powers is not void but only voidable at the instance of the next reversioners[b] who may, either singly or as a body, be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid and binding[c] even before the reversion opened,[d] or they may treat it as a nullity as for instance by instituting a suit for possession.[b] But none except those who are entitled to succeed to the estate can question the transaction.[e] Thus a mortgagee has no *locus standi* to resist the claim of a donee from the widow to redeem the mortgage on the ground that the gift was beyond the powers of the widow.[f]

544. Alienation when to be upheld.—Sir Lawrence Jenkins C.J., in *Debi Prasad* v. *Golap*[g] summed up the law relating to the upholding of a widow's alienation as follows:

(a) 22 L.W. 874=1926 M. 247.

(b) *Bijoy Gopal* v. *Krishna*, 34 C. 329 =34 I.A. 87=9 Bom. L.R. 602=11 C.W.N. 424=17 M.L.J. 154=4 A.L.J. 329 (P.C.); *Lilku Mahto* v. *Amar*, 1936 P. 602=18 P.L.T. 63; *Ramgowda* v. *Bhausaheb*, 52 B. 1=54 I.A. 396=29 Bom. L.R. 1380=32 C.W.N. 88=27 L.W. 140=1927 M.W.N. 736 =53 M.L.J. 350=1927 P.C. 227; *Raja Modhu* v. *Rooke*, 25 C. 1=24 I.A. 164=7 Sar. 194; *Sitaram* v. *Khandu*, 45 B. 105= 22 Bom. L.R. 1155=1921 B. 413; *Ajodhia Prasad* v. Mt. *Sanhari Kuar*, 6 Luck. 710 =1932 Oudh 342.

(c) *Ramgowda* v. *Bhausaheb*, 52 B. 1= 29 Bom. L.R. 1380=32 C.W.N. 88=27 L.W. 140=1927 M.W.N. 736=53 M.L.J. 350=1927 P.C. 227=54 I.A. 396

(d) *Rangasami* v. *Nachiappa*, 42 M. 523 =16 I.A. 72=17 A.L.J. 536 21 Bom. L.R. 640 23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105 1919 M.W.N. 262=1918 P.C. 196.

(e) *Bupat Mahton* v. *Kulpet*, 13 Pat. 182 =1934 Pat. 498.

(f) *Ajodhia Prasad* v. *Mt. Sanjhari Kuar*, 6 Luck. 710=1932 Oudh 342=139 I.C. 631; *Sitaram* v. *Khandu*, 45 B. 105= 1921 B. 413=22 Bom. L.R. 1155; *Appavu Naicken*, In re., 60 M.L.J. 488=1930 M.W.N. 933=32 L.W. 592=1931 M. 377; *Sarojendra* v. *Binapani*, I.L.R. (1938) 2 C. 245=1938 C. 468.

(g) 40 C. 721=19 I.C. 273=17 C.W.N. 701 (F.B.).

"To uphold an alienation, by a widow, of her deceased husband's estate, where she is his heir it should be shown (i) that there was legal necessity or (ii) that the alienee, after reasonable enquiry as to the necessity acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity or of reasonable enquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation, capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where any one amongst the first three positions is established, the alienation may be of the whole or any part of the husband's estate, but where the fourth alone is proved then the alienation must be of the whole."(h) See also S. 562.

SURRENDER.

545. Surrender by widow.—A Hindu widow can renounce the estate in favour of the nearest reversioners, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights. This may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property.(i) But a surrender by a widow who is a ward of Court under the Court of Wards Act is invalid in the absence of the Court's consent thereto.(j) But the fact that the surrenderer is a minor does not affect its validity.(k)

546. Form of surrender.—The essence of surrender being self effacement, if there is a *bona fide* and total renunciation of the widow's right to hold the property no particular form is necessary to have it effected.(l) No written instrument is required under the

(h) *Chinnaswami* v. *Appaswami*, 42 M. 25=8 L.W. 512—35 M.L.J. 512=1918 M.W.N. 756—48 I.C. 147; *Moti* v. *Lalda*, 41 B. 93 -37 I.C. 945=18 Bom. L.R. 954; *Sham Rathi* v. *Jaichha*, 39 A. 520=40 I.C. 117—15 A.L.J. 364; *Rangasami* v. *Nachiappa*, 42 M. 523=46 I.A. 73=17 A.L.J. 536 =21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262 =19 I.C. 273=1918 P.C. 196.

(i) *Bhagwat Koer* v. *Dhanukdhari*, 47 C. 466=46 I.A. 259=17 A.L.J. 1036=22 Bom. L.R. 477=24 C.W.N. 274=37 M.L.J. 513=1 P.L.T. 1=12 L.W. 105=1919 M.W.N. 860=1919 P.C. 75; *Sitanna* v. *Viranna*, 39 L.W. 607=1934 M.W.N. 414=15 P.L.T. 497 —1934 A.L.J. 433—38 C.W.N. 697=36 Bom. L.R. 563=67 M.L.J. 20—61 I.A. 200=57 Mad. 749—1934 P.C. 105 (P.C.); *Behari Lal* v. *Madho Lal*, 19 C. 236=19 I.A. 30.

(j) *Man Singh* v. *Nowlakhbhati*, 6 P. 290=31 C.W.N. 49—53 I.A. 11—24 A.L.J. 250=50 M.L.J. 332=1926 M.W.N. 332=7 P.L.T. 223=29 Bom. L.R. 841—1926 P.C. 2.

(k) *Ramayya* v. *Bapanamma*, 42 L.W. 790=1936 M. 16 affd. in 44 L.W. 610=71 M.L.J. 700=1936 M.W.N. 1201=1937 M. 146.

(l) *Bhagwat Koer* v. *Dhanukdhari*, 47 C. 466=46 I.A. 259=17 A.L.J. 1036=22 Bom. L.R. 477=24 C.W.N. 274=37 M.L.J. 513=12 L.W. 105=1919 M.W.N. 860=1 P.L.T. 1=1919 P.C. 75; *Venkatadri* v. *Subbareddi*, 82 I.C. 1025=1925 M. 382.

law,[m] though if one is executed it requires to be registered.[n] The essence of surrender being that the widow should part with the whole of her interest, it does not matter if it is done by one single act or by a process consisting of several stages of successive acts.[o]

547. Essentials of surrender.—The following are the essential requisites of a valid surrender.

1. It must be in favour of the nearest reversioner, if only one, or the whole body of such reversioners, if more than one[p] whether male or female.[q] Where the surrender in effect is a surrender in favour of all the nearest reversioners, as where the document of surrender is executed in favour of one of them as the Karta of all which he in fact happens to be and the intention to transfer in favour of all of them is apparent, the mere fact of the document being in favour of one of them would not detract from the transaction being a valid surrender.[r]

Note. A surrender in favour of remoter reversioners with the consent of the nearer reversioners is to be considered as a double surrender and held valid.[s]

2. The surrender must be total, not partial,[t] and a partial surrender is invalid even if it is to the nearest reversioner and absolute as to that part.[u] But this rule applies only in the case of her husband's estate and the fact that a widow has not relinquished her Stridhana also does not affect the validity of her surrender.[v]

(m) *Barjore* v. *Kali Charan*, 111 I.C. 475; *Nirmal Chandra* v. *Mohitosh*, 1936 C. 106=40 C.W.N. 777.

(n) *Gauri Bai* v. *Gaya Bai*, 97 I.C. 995.

(o) *Surya Rao* v. *Suryanarayana*, 64 I.C. 488=14 L.W. 29=41 M.L.J. 208=1921 M.W.N. 431=1921 M. 332; *Maru* v. *Hanso*, 48 A. 485=1926 A. 413=24 A.L.J. 541.

(p) *Rama Aiyar* v. *Narayanaswami*, 96 I.C. 483=23 L.W. 496=51 M.L.J. 313=1926 M.W.N. 958=1926 M. 609; *Bechu Pande* v. *Dulhma*, 80 I.C. 4=1925 A. 8; *Rangasami* v. *Nachiappa*, 42 M. 523=46 I.A. 72 =19 I.C. 273=17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262=1918 P.C. 196; *Manjaya* v. *Seshagiri*, 49 B. 187=1925 B. 129 (2)=26 Bom. L.R. 1267.

(q) *Sitanna* v. *Viranna*, 39 L.W. 607= 1934 M.W.N. 414=15 P.L.T. 497=1934 A.L.J. 433=38 C.W.N. 697=36 Bom. L.R. 563=67 M.L.J. 20=61 I.A. 200=57 Mad. 749=1934 P.C. 105; *Sartaji* v. *Ramjas*, 16 A. 59=1924 A. 166=21 A.L.J. 796.

(r) *Radharani* v. *Brindarani*, 1936 C. 392 affirmed in 1939 P.C. 27.

(s) *Chito* v. *Jhunani Lal*, 124 I.C. 713 =1930 A. 395; *Nobokishore* v. *Hari Nath*, 10 C. 1102 (F.B.); *Narayanaswami* v. *Rama Aiyar*, 53 M. 692=57 I.A. 305=32 Bom. L.R. 1561=59 M.L.J. 666=32 L.W. 656=34 C.W.N. 1045=1930 P.C. 297 where the question was not specifically decided. *Chinnaswami* v. *Appaswami*, 42 M. 25=8 L.W. 512=35 M.L.J. 512=1918 M.W.N. 756 =48 I.C. 147 where surrender to daughter's son with daughter's consent upheld. See contra in *Tukaram* v. *Yesu*, 55 B. 46= 1931 B. 100=32 Bom. L.R. 1463 which is dissented from in *Pandurang* v. *Ishwar*, 40 Bom. L.R. 1270.

(t) *Sureshwar Misser* v. *Maheshrani*, 48 C. 100=47 I.A. 233=18 A.L.J. 1069= 39 M.L.J. 161=1920 M.W.N. 472=25 C.W.N. 194=1921 P.C. 107; *Behari Lal* v. *Madho Lal*, 19 C. 236=19 I.A. 30; *Rangasami* v. *Nachiappa*, 42 M. 523=46 I.A. 72=19 I.C. 273=17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105= 1919 M.W.N. 262=1918 P.C. 196.

(u) *Rangasami* v. *Nachiappa*, 42 M. 523 =46 I.A. 72=19 I.C. 273=17 A.L.J. 536= 21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262 =1918 P.C. 196.

(v) *Sureshwar Misser* v. *Maheshrani*, 48 C. 100=47 I.A. 233=18 A.L.J. 1069=39 M.L.J. 161=1920 M.W.N. 472=25 C.W.N. 194=1921 P.C. 107.

Note. When it is said that a surrender by a female limited owner must be of the entire estate, it means the entire estate then in the possession and enjoyment or control of the limited owner.[w] Where some of the properties have already been alienated away and are in possession of strangers, it cannot be the case that the widow or daughter surrendering her rights is required to mention all possible causes of action about them at the risk of finding her act invalid. If at the date of the surrender all that the surrenderer has is a chance of getting a prior alienation of an item of the estate effected by somebody else set aside, that is not property and the omission of such a right of action from the surrender cannot be held to diminish from the entirety of the surrender.[x] Besides, an honest omission, due to either ignorance or oversight, to include a small portion of the property in the surrender deed cannot affect the validity of the surrender which, apart from such omission, is shown to be a *bona fide* one.[y] Since a surrender must be of the whole estate one co-widow cannot surrender without the conjunction of the other co-widow.[z]

3. The surrender must be a *bona fide* surrender and not a device to divide the estate with the reversioners.[a]

A reasonable provision for maintenance of the widow does not vitiate the surrender,[b] even though the provision is by way of absolute transfer of a reasonable portion of the property to the widow[c] or takes the form of a lump payment by way of consideration.[d] But if as a consideration for the surrender, the widow gets the whole of the profits of the property for the whole of her life for maintenance, the transaction cannot be upheld as a valid surrender.[e] The surrender to be valid should not contain any provision for the maintenance of a third party, as for instance a daughter-in-law,[f] nor should it reserve any right in the widow to

(w) *Brojeswari* v *Manoranjan*, 1937 C. 167; *Ramayya* v. *Bapanamma*, 44 L.W. 610=71 M.L.J 700=1936 M.W.N. 1201=1937 M 146.

(x) *Krishnavenamma* v. *Hanumantha Rao*, 38 L.W. 773=146 I.C. 1093=1933 M. 860=1933 M.W.N. 1010.

(y) *Haribhai* v. *Narayan*, 40 Bom. L.R. 876=I.L.R 1938 B. 723 1938 B 438.

(z) *Anna Naidu* v. *Jagya Naidu*, 79 I.C. 646=1923 M. 153.

(a) *Sureshwar Misser* v. *Maheshrani*, 48 C. 100=47 I.A. 233 =18 A.L.J. 1069=39 M.L.J. 161=1920 M.W.N. 472=25 C.W.N. 194=1921 P.C. 107; *Ranyasami* v. *Nachiappa*, 42 M. 523=46 I.A. 72=17 A.L.J. 536 21 Bom. L.R. 640 =23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262=1918 P.C. 196=19 I.C. 273 (P.C.); *Govinda Prasad* v. *Shivlinga*, 32 Bom. L.R. 1482=1931 B. 107; *Santi Kumar* v. *Mukunda*, 62 C. 204=39 C.W.N. 226=1935 C. 20.

(b) *Bhagwat Koer* v. *Dhanukdhari*, 17 A.L.J. 1036=22 Bom. L.R. 477=24 C.W.N. 274=37 M.L.J. 513=1 P.L.T. 1=1919 M W N. 860 =46 I A. 259=47 C. 466=1919 P.C. 75=12 L.W. 105 (P.C.); *Adhar Singh* v. *Rani Manohar*, 45 A. 610=1924 A. 114 =21 A.L.J. 548; *Sureshwar* v. *Maheshrani*, 48 C. 100=47 I.A. 233=1921 P.C. 107 =18 A L.J. 1069=39 M.L.J. 161=1920 M.W.N. 472=25 C.W N. 194; *Bhuta Singh* v. *Mangu*. 1930 Lah. 9; *Sitanna* v. *Viranna*, 39 L.W. 607=1934 M.W.N. 414=15 P.L.T. 497=1934 A.L.J. 433=38 C.W.N. 697 =36 Bom. L.R. 563=57 M.L.J. 20=61 I.A. 200=57 Mad. 749=1934 P.C. 105 (P.C.); *Radharani* v. *Brindarani*, 1936 C. 392=63 C.L.J. 263 affirmed in 1939 P.C. 27.

(c) *Karuppa Gounden* v. *Mudali Goundan*, 1921 M. 681; *Subbalukshmi* v. *Narayana*, 58 M. 150=40 L.W. 196=67 M.L.J. 179=1934 M.W.N. 932=1934 M. 535.

(d) *Gopal Das* v. *Sri Thakurji*, 1936 A. 422.

(e) *Krishna Bhatta* v. *Subbanna*, 1929 M. 611; *Behari Lal* v. *Madho Lal*, 19 C. 236=19 I.A. 30.

(f) *Gangadhar* v. *Prabhudha*, 56 B. 410 =1932 B. 625=34 Bom. L.R. 1223.

resume the management of the properties under any contingencies.(g)

A widow cannot be said to have withdrawn her life estate, if notwithstanding her paper declaration, she continues to be in possession of the estate.(h)

Note. To constitute a device to divide the estate with the reversioner it is not necessary that the widow should take part of the property directly. An arrangement by which the reversioner as a consideration for the surrender promises to convey a portion of the property to a nominee of the lady may well fall under that description.(i) Can a widow who has already effected transfers of property not binding on the reversioner validly surrender her estate to the reversioners? "When the widow purported to surrender her estate, she did not and could not surrender the whole of her husband's estate so as to efface herself completely. The previous alienations were her own act and she could not get rid of them. To that extent she was unable to surrender the whole of the estate and therefore the surrender which she purported to make is invalid. This is also the view taken in the decision in *Sakharam* v. *Thama*,(j) and there is no reason whatever to take any other view in accordance with the doctrine laid down in *Rangasami Gounden* v. *Nachippa Gounden*.(k) Certain cases have been mentioned in which a surrender has been acted upon, but the question whether it was a valid surrender or not was not raised and therefore those decisions are not authority in the present case."(l) *Sakharam's case* was one where a surrender by a widow subsequent to a gift by her of her whole estate to a third party was held inoperative as a valid surrender on the ground that the widow by the gift had put it beyond her power to make a surrender of her whole interest in favour of the reversioner. But see S. 553 where this question is fully discussed.

4. A surrender effected by a widow in ignorance of her rights and without realising the true position of affairs is not valid in law.(m)

548. Alienation justified on the principle of surrender.—A widow's alienation otherwise invalid may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioners at the time of the alienation provided it is *bona fide*. The surrender once exercised in favour of the reversioners, the estate becomes theirs and it is an obvious extension of the doctrine to hold that inasmuch as they are in title to

(g) *Joges Chandra* v. *Prasanna Kumar*, 1932 C. 664=55 C.L.J. 283.

(h) *Man Singh* v. *Nawalakhbati*, 2 P. 607=1923 P. 492; *Subramania* v. *Piramu Ammal*, 90 I.C. 1024=1925 M. 1111=49 M.L.J. 128; *Behari Lal* v. *Madho Lal*, 19 C. 236=19 I.A. 30.

(i) *Sureshwar Misser* v. *Maheshrani* 48 C. 100=47 I.C. 233=18 A.L.J. 1089=39 M.L.J. 161=1920 M.W.N. 472=25 C.W.N. 194=1921 P.C. 107; *Subbalakshmi* v. *Narayana*, 58 M. 150=40 L.W. 196=67 M.L.J. 179=1934 M.W.N. 932=1934 M. 535.

(j) 51 B. 1019=1928 B. 26 29 Bom. L.R. 1571.

(k) 42 M. 823=46 I.A. 72=17 A.L.J. 536 21 Bom. L.R. 640=23 C.W.N 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 262 1918 P.C. 196.

(l) *Vijiaraghavacharior* v. *Ramanujacharior*, 29 L.W. 95=114 I.C. 233=55 M.L.J.

(m) *Krishna* 1929 M. 611.

convey to a third party, it comes to the same thing if the conveyance to the stranger is made by the widow with their consent.[n] Hence a surrender by the widow of the whole of her husband's property with the consent of her daughter, who would take her property as the next reversioner in full ownership, in favour of the husband of her other deceased daughter is valid and binding on the son subsequently adopted by the widow.[o]

549. Gift to reversioners.—Though a gift of the whole estate in favour of the whole body of reversioners can be justified on the principle of surrender[p] neither a gift of only a portion of the property in favour of all the reversioners[q] nor a gift of the whole estate in favour of some only of the reversioners without the consent of the rest[r] can be justified on that ground and both are avoidable by the actual reversioner as transfers in excess of the widow's powers.

550. Surrender and widow's motive.—A surrender otherwise valid cannot be attacked on the ground that it was prompted not by proper, religious or spiritual motives.[s]

551. Surrender for consideration.—If the surrender is a *bona-fide* one and not a device to divide the estate with the reversioner mere payment of consideration for the surrender does not vitiate the transaction.[s] If a surrender for consideration is lacking in *bona fides* and, by reason of the consideration being unreasonably heavy, is merely a device to divide the estate, it is devoid of legal effect and will not be upheld.[t] But the validity of a surrender cannot be questioned by a reversioner who was a party to it and in whose favour it was made, on the ground that there was consideration for the surrender.[u]

552. Widow's position after surrender.—A woman who surrenders is clearly not civilly dead for any other purpose than for

(n) *Rangasami* v. *Nachiappa*, 42 M. 523 =46 I A. 72 =17 A.L.J. 536 =21 Bom. L.R. 640=23 C.W.N. 777 36 M L J 493=10 L.W. 105 1919 M.W.N. 26 1919 P C 196 19 I.C. 273 (P.C.).

(o) *Antu Nawaji* v. *Yeshwant Bala*, 34 Bom. L.R. 811=1932 B. 430; *Nobokishore* v. *Hari Nath*, 10 C. 1102; See contra in *Tukuram* v. *Yesu*, 55 B. 46=1931 B. 100=32 Bom. L.R. 1463; *Yeshwantu* v. *Antu*, 58 B. 521 affirming 34 Bom. L.R. 811; See also *Bala* v. *Baya*, 60 B. 211.

(p) *Sartaji* v. *Ramjas*, 46 A. 59=1924 A. 166=21 A.L.J. 796 (gift to daughter of the entire estate).

(q) *Rangasami* v. *Nachiappa*, 42 M. 523 =46 I.A. 72=17 A.L.J. 536=21 Bom. L.R. 640=23 C.W.N. 777=36 M.L.J. 493=10 L.W. 105=1919 M.W.N. 26=1919 P C. 196=19 I C. 273 (P C.).

(r) *Raghunandan Singh* v. *Tulshi Singh*, 46 A. 38=1924 A. 315.

(s) *Subbiah* v. *Palury*, 31 M. 446; *Subbalakshmi* v. *Narayana*, 40 L.W. 196=67 M.L.J. 179=1934 M.W.N. 932=1934 M. 535=58 M. 150.

(t) *Man Singh* v. *Nowlakhbati*, 2 P. 607 =1923 P. 492 affirmed in *Man Singh* v. *Nowlakhbati*, 5 P. 290=31 C.W.N. 49=53 I A. 11=24 A.L.J. 250=50 M.L.J. 332=1926 M.W.N. 332=7 P.L.T. 223=28 Bom. L.R. 841=1926 P.C. 2; *Manmatha* v. *Gobindalal*, 1939 C. 135.

(u) *Jeka Dula* v. *Bai Jivi*, 39 Bom. L.R. 1072.

the purpose of bringing in the next reversioner as heir at once to her own husband's estate. She continues to own her own Stridhana, and the obligation of all persons who take her husband's estate to maintain her, which is an absolute obligation thrown by the Hindu Law, cannot be destroyed by her surrender thereof. She does not become a *sanyasi* because she surrenders her husband's estate. She is entitled to acquire properties, to retain her Stridhana and to bring suits, and she remains competent to enter into contractual and other obligations.(v) But so far as her husband's estate is concerned, she has no existence in law, so that on the death of the next heir who takes the estate on her surrender, the estate cannot revert to her even though she happens to be the nearest heir then alive.(w)

553. Surrender and prior alienations.—On the question how far the prior alienations by a widow in excess of her powers are affected by her subsequent surrender, three different views have been expressed by the Courts. One view is that the reversioner who obtains the estate through the widow's surrender is not entitled to set aside her antecedent alienations during her life-time, but must wait till her death to do so.(x) The second view is that the surrender itself is inoperative inasmuch as by her prior invalid alienations which she cannot question during her life-time, she has made it impossible for her to make a valid surrender which must comprise her whole estate.(y) The third view was that expressed by Page J. in *Prafulla v. Bhabani*,(z) that the prior alienations became extinguished by the surrender and the reversioner is entitled on surrender, to recover possession of the property improperly alienated.(a) Of these three, the first seems to be the most reasonable and equitable view to take having regard to the respective rights of the widow, the alienee and the reversioners. The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has been evolved by Courts of justice on general principles of jurisprudence and the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract. So far as reversioners are concerned, their position

(v) *Chinnaswami* v. *Appaswami*, 42 M. 25=8 L.W. 512=35 M.L.J. 512=1918 M.W.N. 756=48 I.C. 147.

(w) *Sartaji* v. *Ramjas*, 46 A. 59=1924 A. 166=21 A.L.J. 796; But see *Chengapa* v. *Baradagunta*, 43 M. 855=12 L.W. 656=1921 M. 246=39 M.L.J. 567=1921 M.W.N. 29.

(x) *Sundarasiva Rao* v. *Vijyamma*, 48 M. 933=22 L.W. 398=49 M.L.J. 266=1925 M.W.N. 643=1925 M. 1267; *Lachmi Chand* v. *Lachho*, 49 A. 334=1927 A. 258=25 A.L.J. 161; *Ramayya* v. *Narayya*, 1927 M. 530=52 M.L.J. 634; *Subbamma* v. *Subramanyam*, 39 M. 1035=30 M.L.J. 260=32 I.C. 813; *Gopal Das* v. *Sri Thakurji*, 1936 A. 422; *Basudeo* v. *Baidyanath*, 1935 Pat 175; *Jeka Dola* v. *Bai Jivi*, 39 Bom. L.R 1072=1938 B. 37; *Krishnavenamma* v *Hanumantha*, 1933 M. 860.

(y) *Vijaraghavacharier* v. *Ramanujacharier*, 114 I C. 233=29 L.W. 95=55 M.L.J. 859=1928 M.W.N. 510=1929 M. 37; *Sakharam* v. *Thanu*, 51 B. 1019=1928 B. 26=29 Bom. L.R. 1571.

(z) 52 C. 1018=1926 C. 121.

(a) *Ram Krishna* v. *Kousalya*, 40 C.W N. 208=1935 C. 689.

is quite different from that of an adopted son as laid down in *Vaidyanatha Sastri* v. *Savithri Ammal.*[b] The widow cannot by making a surrender in favour of the reversioners defeat rights created by herself in third parties and it is unjust to allow them during the widow's life-time to defeat those rights. But for the surrender, the prior alienations would be good for her life-time and the accrual of the right to the reversioners prematurely by the action of the widow ought not, on principles of justice and equity, to be held to defeat the alienee's rights during her life-time. As regards the view that the surrender itself is invalid, the whole thing seems to rest on false premises. The dictum of the Privy Council that the surrender should be of the totality of her estate cannot be construed to mean the totality of the estate as it descended to her when the succession opened in her favour. If this reason is sound then a widow cannot effect a surrender even when she has made alienations for proper and accredited necessity. Totality of the estate can only mean the whole of the estate which vests in her at the time of the surrender. In this view the prior alienations, though in excess of her powers, cannot be held to be invalid during her life-time and the estate which she possesses at the time of the surrender being only that which has been left untouched by those alienations, the surrender of that estate must be held to be valid. To deny the right of surrender to a widow under such circumstances will have the result not infrequently of tying her to an estate which she is either not willing to manage or is incapable of managing. To force her to such a position by denying her the right to surrender is a course beneficial neither to the widow nor to the actual reversioners.[c] No doubt, if the prior alienation and the following surrender are parts of a scheme by which the widow, the alience and the reversioners have conspired to divide the estate between themselves so as to defeat the actual reversioners when the succession is to open on her death, the surrender falls within the rule against the validity of a device to divide the inheritance and hence should be declared void against the reversioners existing at the time of her death if such reversioners have not been a party to the scheme.[d]

554. Surrender and subsequent adoption.—The effect of a valid surrender by a widow is that the then reversioner takes an absolute estate and as the surrender is an act which is by Hindu Law within the competence of the widow, her son adopted after the surrender cannot question it.[e]

(b) 41 M. 75=6 L.W. 542=42 I.C. 245=33 M.L.J. 387=1917 M.W.N. 653.

(c) See *Ramayya* v. *Bapanamma*, 42 M.L.W. 790=1936 M. 16 confirmed in 44 M.L.W. 610=1937 M. 146=71 M.L.J. 700=1936 M.W.N. 1201.

(d) *Jeka Dula* v. *Bai Jivi*, 39 Bom. L.R. 1072.

(e) *Rama Nana Babur* v. *Dhondi Murari*, 47 B. 678=1923 B. 432=25 Bom.

555. Rights and remedies of reversioners.—A reversionary heir, although having only those contingent interests which are differentiated little if at all from a *spes successionis*, is recognised by Courts of law as having a right to demand that the estate be kept free from waste and free from danger, during its enjoyment by the widow or other owner for life.(f) He is entitled to institute a suit in the life-time of the female owner, for a declaration that an alienation made by her is not binding on the reversioners, the object of the suit being to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent.(g) A reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion.(g) A reversioner during the widow's life-time can institute a suit to restrain the widow from committing waste,(h) or for a declaration that an alienation by her is not binding on the reversioner; and if the widow dies, he is entitled to bring a suit for possession of the property improperly alienated.

556. Persons entitled to sue for injunction or declaration.—It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit for injunction or declaration above mentioned, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must therefore be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumptive reversioner would be entitled to sue.(i) Again, if the nearest reverrioner is not, on account of poverty, in a position to institute a suit,(j) or is a female

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L.R. 361 : *Anlu* v. *Yeshwant*, 1932 B. 430, affirmed in *Yeshwant* v. *Antu*, 36 Bom. L.R. 671 : *Pandurang* v. *Ishwar*, 40 Bom. L.R. 1270.

(f) *Janaki Ammal* v. *Narayanasami*, 39 M. 634=43 I.A. 207=14 A.L.J. 997=18 Bom. L.R. 856=20 C.W.N. 1323=31 M.L.J. 225=4 L.W. 53=(1916) 2 M.W.N. 188=1916 P.C. 117.

(g) *Venkatanarayana Pillai* v. *Subbammal*, 38 M. 406=42 I.A. 125=17 Bom. L.R. 468=19 C.W.N. 641=28 M.L.J. 535=2 L.W. 596=1915 M.W.N. 535=1915 P.C. 124.

(h) *Kailash Chandra* v. *Kanchani Dasya*, 58 C.L.J. 240=1934 C. 136.

(i) *Rani Anand Kunwar* v. *Court of Wards*, 6 C. 764=8 I.A. 14; *Venkatanarayana Pillai* v. *Subbammal*, 38 M. 406=42 I.A. 125=17 Bom. L.R. 468=19 C.W.N. 641=28 M.L.J. 535=2 L.W. 596=1915 M.W.N. 555=1915 P.C. 124; *Jaimala* v. *Collector of Saharanpur*, 55 A. 825=1933 A.L.J. 1512=1934 A. 4; *Bandhan* v *Daulata*, 1932 A.L.J. 384=1933 A. 152. *Jhandu* v. *Tariff*, 37 A. 45=17 Bom. L.R 44=19 C.W.N. 197=28 M.L.J. 453=2 L.W. 113=1915 M.W.N. 394=1914 P.C. 34; *Shankar* v. *Raghoba*, 1938 N. 97.

(j) *Mata Prasad* v. *Nageshar Sahai*, 47 A. 883=52 I.A. 398=24 A.L.J. 1=50 M.L.J. 18=1926 M.W.N. 83=28 Bom. L.R. 1110=30 C.W.N. 626=1925 P.C. 272.

who will be entitled only to a limited interest,[k] the remoter reversioner can maintain the action. This rule of law that the suit should ordinarily be filed by the next presumptive reversioner is based on principles of expediency and to prevent multiplicity of suits rather than on a negation of the rights of the remoter reversioner to impeach the transaction. The cause of action for all the reversioners, whether presumptive or remote, is the same.[l] It is the common injury to the reversionary right which entitles the reversioners to sue, and there is nothing to preclude a remoter reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned.[m] Though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may allow the suit to go on, taking care to safeguard the interests of the nearer reversioners by making them parties to the suit.[n]

557. Suit for declaration.—Suits for declaration may be of two kinds: (1) Suits for declaration of the plaintiff's reversionary right and (2) Suits for declaration that the widow's alienation is not binding upon the reversion. It is now well settled that a mere presumptive reversionary heir, who has a mere possibility of succession or *spes successionis* upon the death of the limited owner, is not entitled to maintain a suit for a declaration of his presumptive reversionary right, the reason being that, as the actual succession will depend upon the state of things existing when the widow dies, it is impossible to predicate before that event who would be the actual reversionary heir on the death of the limited owner.[o] But

(k) *Abinash* v. *Harinath*, 32 C. 62 9 C.W.N. 25; *Ramnad* v. *Rambihara*, 4 P.L.J. 734=52 I.C. 219; *Chidambara* v *Nallammal*, 33 M. 410=5 I.C. 161; *Deoki* v. *Jwala Prasad*, 50 A 678 1928 A. 216=26 A.L.J. 449; See contra in *Gumanan* v. *Jahangira*, 40 A 518=46 I.C. 186=16 A.L.J. 465.

(l) *Annapurnamma* v. *Appayya Sastri*, 52 M. 620=29 L.W. 858=1929 M 577=56 M.L.J. 760.

(m) *Venkatanarayana Pillai* v. *Subbammal*, 38 M. 406=42 I.A. 125=17 Bom. L.R. 468=19 C.W.N. 641=28 M.L.J. 535=2 L.W. 596 -1915 M.W.N. 555=1915 P.C. 124.

(n) *Rani Anand Kunwar* v. *Court of Wards*, 6 C. 784=8 I.A. 14; *Deoki* v. *Jwala Prasad*, 50 A. 678=1928 A. 216=26 A.L.J. 449; *Subba Rao* v. *Venkayya*, 1936 M.W.N. 1111; *Sita Saran* v. *Jagat*, 49 A 815 1927 A. 811=25 A.L.J. 636; *Lakshmi Ammal* v. *Anantharama*, 46 M L W. 37 -1937 M W.N 587—(1937) 2 M L J. 209—I L R. 1937 M. 948—1937 M. 699.

(o) *Deoki* v. *Jwala Prasad*, 50 A. 678 1928 A. 216 .26 A.L.J. 449; *Janaki Ammal* v. *Narayanesami*, 39 M. 634=43 I.A. 207=14 A.L.J. 997=18 Bom. L.R. 856=20 C.W.N. 1323=31 M.L.J. 225=4 L.W. 53=(1916) 2 M.W.N. 188=1916 P.C. 117; *Sheoparsan* v. *Ramnandan*, 43 C. 894=43 I.A. 91=14 A.L.J. 466=18 Bom. L.R. 397 —20 C.W.N. 738=31 M.L.J. 77=(1916) 1 M.W.N. 419=1916 P.C. 78; *Mt. Guda* v. *Adnath*, 1938 A. 546; But see *Desu* v. *Srinivasa*, 43 M.L.W. 764=1936 M. 605=59 M. 1052 where it was held that an issue whether the plaintiff is the nearest reversioner is held proper in a suit for declaration of the invalidity of the widow's alienation.

the second class of suits above mentioned, though not obligatory upon the reversioners in the sense that their failure to bring such suits would deprive them of their right to recover possession of the property alienated after the widow's death,[p] are still maintainable despite the fact that the reversioners' right is only a *spes successionis*.[q] If the plaintiff in such a declaratory suit dies during the pendency thereof, the right to continue the suit survives not to his personal heirs but to the next presumptive heirs.[r] This right of the reversioners to challenge the validity of the widow's alienation is, however, not one which a third party who has obtained a decree against them can take advantage of.[s] A decree favourable or otherwise in such a suit is in the absence of fraud or collusion, binding upon the actual reversioners when the succession opens after the widow's death.[t] No suit, however, lies for a declaration that a will executed by a widow is invalid and not binding on the reversion, since it is not an alienation[u] and is at any time revocable.[v] Nor is a suit for a declaration that a surrender by the widow is invalid sustainable at the instance of a reversioner in whose favour it was made and who was a consenting party to it. Undoubtedly when the reversion falls in, the actual reversioner other than the person in whose favour the surrender was made, may impeach the validity of the surrender on any of the invalidating grounds. The principle is that a reversioner can question the acts of the widow without waiting for her death because evidence to show that the act was unauthorised may by lapse of time be not available for that purpose. But it is obvious that the reversioner who complains of such acts must be a stranger to the acts themselves and not a party thereto.[w]

558. Reversioner's suit for injunction against waste.—In order to sustain an action by a reversioner for an injunction to restrain the widow from committing acts alleged to be injurious to

(p) *Bijoy Gopal* v. *Krishna*, 34 C 329 =34 I.A. 87 .9 Bom. L.R. 602=11 C.W.N. 424=17 M.L.J. 154=4 A.L.J. 329 (P.C.); *Baldeo* v. *Raghunandan*, 17 Pat. L.T. 16.

(q) *Sandaqar Singh* v. *Pardip Narayanan*, 45 C. 510=45 I.A. 21=16 A.L.J. 61 =20 Bom. L.R. 509=22 C.W.N. 436=34 M.L.J. 67=7 L.W. 146=1918 M.W.N 323= 1917 P.C. 196; *Golab Singh* v. *Kurun Singh*, 14 M.I.A. 176; *Kondama Naicker* v. *Kandasami Gounder*, 51 I.A. 145=47 M. 181=19 L.W. 107=22 A.L.J. 16=46 M.L.J. 172=1924 M.W.N. 86=26 Bom. L.R. 198= 28 C.W.N. 1050=1924 P.C. 56; *Sitabai* v. *Hari*, 1938 N. 401.

(r) *Rameshwar* v. *Mt. Ganpati*, 1936 L. 652; *Venkatanarayana* v. *Subbammal*, 38 M. 406=42 I.A. 125.

(s) *Sarojendra* v. *Binapani*, 1938 C. 468.

(t) *Bansidhar* v. *Dulhatia*, 47 A. 505= 23 A.L.J. 329=1925 A. 483; *Hussain Reddy* v. *Venkata Reddy*, 83 I.C. 140=20 L.W. 552=47 M.L.J. 515 1924 M.W.N. 720=1925 M. 86; *Mata Prasad* v. *Nageshar Sahai*, 47 A. 883=52 I.A. 398 24 A.L.J. 1 =50 M.L.J. 18=1926 M.W.N. 83 28 Bom. L.R 1110=30 C.W.N. 626=1925 P.C. 272; *Sandagar Singh* v. *Pardip Narayan*, 45 C. 510 =45 I.A. 21=16 A.L.J 61 =20 Bom. L.R 509=22 C.W.N. 436=34 M.L.J. 67=7 L.W. 146 1918 M.W.N. 323 =1917 P.C. 196.

(u) *Jaipal Kunwar* v. *Indar Bahadur*, 26 A. 238=31 I.A 67=8 C.W.N. 465=6 Bom. L.R. 495=14 M.L.J. 149.

(v) *Tehl Kuar* v. *Amar Nath*, 79 I.C. 670=1925 Lah. 2.

(w) *Jeka Dula* v. *Bai Jivi*, 39 Bom. L.R. 1072.

the reversion, the plaintiff must show some case approaching spoliation, must enable the Court to see that there is probable ground for apprehending that unless an injunction be granted to restrain some threatened or a pending act, ultimate loss to the heirs, who may succeed after the widow, will ensue. It is not enough to make out that some gift has been made, or some disposition has taken place, or that such is about to be made or to take place, which the law would not support.(x) It is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case and in such case only, the Court will interfere.(y) Mere possibility of prejudice to the reversion does not entitle the reversioner to rush to Court. There must be such waste or spoliation as endangers the inheritance, a danger to the property establishable not as a mere matter of speculation but as one of reasonable certainty to the satisfaction of the Court.(z) Mere alienation is not waste of the property and no injunction can be granted against a limited owner making an unauthorised alienation.

559. Appointment of Receiver.—If the widow's management shows reckless dealing with the property and lavish expenditure of large sums for purposes which afford no satisfactory explanation, a receiver can be justifiably appointed.(a) Where a third party is managing the property trying for a long number of years to obtain property by fair means or foul and is likely to make as much profit as he can prejudicing the reversion and wasting the property, the third party may be ousted by the appointment of a receiver to the estate.(b)

560. Reversioner's suit and res judicata.—A suit brought by the presumptive reversioner against the widow and the alienee from her for a declaration that the alienation is not binding upon the reversion is one in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the relief sought is for their common benefit. Hence a decree passed in that suit which is not vitiated by any fraud or collusion between the parties thereto will have the effect of *res judicata* between the alience and his representatives on the one hand and the whole body of reversioners on the other.(c)

(x) *Hurry Doss* v. *Dossee*, 2 Tay. and B 279.

(y) *Hurrydoss* v. *Uppoornah Dossee*, 6 M.I.A. 433.

(z) *Biswanath* v. *Khontomony*, 6 Beng. L.R 747.

(a) *Jijai Amba* (ex parte), 13 M. 290 (P.C.); *Venkanna* v. *Narasimhan*, 44 M. 984=14 L.W. 193=1921 M. 234 (2)=41 M.L.J. 279=1921 M.W.N. 590; *Shankarbhai* v. *Bai Shiv*, 54 B. 837.

(b) *Jamna Prasad* v. *Mt. Durga*, 1933 A. 133=144 I.C. 33.

(c) *Kesho Prasad* v. *Sheo Pragash*, 46 A. 831=51 I.A. 381=23 A.L.J. 168=27 Bom. L.R. 130=47 M.L.J. 824=21 L.W. 295=29 C.W.N. 606=1924 P.C. 247; *Mata Prasad* v. *Nageshar*, 47 A. 883=52 I.A. 398=24 A.L.J. 1=50 M.L.J. 18=1926 M.W.N. 83=28 Bom. L.R. 1110=30 C.W.N. 626=1925

561. Reversioner's suit for possession.—The nearest reversioners who succeed to the estate after the death of the limited holder are entitled to recover possession of the property of the last full owner from all those in possession thereof under alienations not binding upon them. They are entitled to bring a single suit against any number of such persons who may be holding different portions of the estate under different title deeds executed by the limited owner at the same or different dates.(d) These principles apply even when the reversioners are entitled to the estate on the remarriage of the widow,(e) though in the case of a surrender by her, the reversioners have got to wait till the death of the widow before they can file suits for possession of properties improperly alienated by her.(f) In a suit for possession against the alienee from the widow, the reversioner is not bound to ask for a declaration that the alienation is not binding on him,(g) and if the plaint in such a suit embodies a prayer also for a declaration, that prayer can be ignored for purposes of Court-fee.(g) The fact that no suit was brought during the widow's life-time to get the alienation declared invalid is no bar to the maintainability of the subsequent suit for possession against the alienee on the death of the limited holder.(h) Nor does the fact that a suit for a declaration of the invalidity of the widow's alienation is withdrawn without the leave of Court, on the death of the widow, operate as a bar to a subsequent suit for possession under O. 23, R. 3 of the Civil Procedure Code, since the causes of action and the subject-matters of the two suits are not the same.(i) A reversioner's suit for possession cannot be resisted by a person squatting on the property under a claim that he is entitled to remain in possession till the expenses incurred by him for the medical treatment and funeral ceremonies of the mother of the last holder are paid by the reversioners. Such expenses are no doubt legal charges which are recoverable out of the estate from the reversioners but the person who was obliged to incur them is not entitled to a lien over the estate in respect of those charges and hence his claim to resist the reversioners' suit

P.C. 272 ; *Pramatha* v. *Bhuban*, 49 C. 45=25 C.W.N. 585=1922 C. 321 ; *Varamma* v. *Gopaladasayya*, 41 M. 659—8 L.W. 62=46 I.C. 202=35 M.L.J. 57=1918 M.W.N. 461 (F.B.); *Janaki* v. *Narayanasami*, 39 M. 634=43 I.A. 207=14 A.L.J. 997=18 Bom. L.R. 856—20 C.W.N. 1323—31 M.L.J. 225 —4 L.W. 53 = (1916) 2 M.W.N. 188=1916 P.C. 117 ; *Venkatanarayana* v. *Subbammal*, 38 M. 406=42 I.A. 125 ; *Manmatha* v. *Gobindalall*, 1939 C. 135=68 C.L.J. 173.

(d) *Darbari Lal* v. *Gobind Saran*, 48 A. 822=1924 A. 902—22 A.L.J. 753.

(e) *Vijiaraghava* v *Ponnammal*, 62 M.L.J. 131=1932 M. 120=1931 M.W.N. 1257 ; See also S. 512.

(f) See S. 553.

(g) *Bijoy Gopal* v. *Krishna*, 34 C. 329 —34 I.A. 87—9 Bom. L.R. 602· 11 C.W.N. 424—17 M.L.J. 154=4 A.L.J. 329 ; *Ram Sumran* v. *Gobind Das*, 2 P. 125=1922 P. 615 (F.B.).

(h) *Bijoy Gopal* v. *Krishna*, 34 C. 329 =34 I.A. 87—9 Bom. L.R. 602—11 C.W.N. 424=17 M.L.J. 154=4 A.L.J. 329 ; *Raghubir Singh* v. *Jethu*, 2 P. 171—1923 P. 130.

(i) *Ali Mahomed* v. *Karim Baksh*, 15 L. 1—1933 L. 948.

for possession till the amount is paid is untenable.[j] The reversioner's right to recover property devolves on his heir, and if the reversioner dies subsequent to the widow's death, it is open to his legal heir to bring a suit for recovery of the property alienated by the widow for purposes not binding on the reversion.[k]

562. Setting aside alienations and alienee's equities.—When an alienation by a widow is set aside at the instance of the reversioners as having been in excess of her powers, the alienee is entitled to receive from the reversioners, the costs of any improvements which he has effected on the property, believing in good faith that he is absolutely entitled thereto.[l] The principle of S. 51 of the Transfer of Property Act, 1882, is applicable to such a case, whether the alience has purchased the property immediately from the widow[l] or from a donee from the widow.[m] But the Allahabad High Court is of the view that as a Hindu widow has only a limited interest in her husband's property, an alienee from her in respect of unauthorised alienation cannot be held to have made improvements believing in good faith that he is absolutely entitled to the property so as to be entitled to invoke the equitable provisions of S. 51 of the Transfer of Property Act.[n] The decisions of the Allahabad High Court, inasmuch as they are in favour of an irrebuttable presumption against alienee's good faith in all cases of widow's alienations, can hardly be sustained in view especially of the fact that a widow under stated contingencies can validly alienate the corpus of her husband's estate. The proper principle seems to be that if the alienee brings himself within the words of the section and has acted in good faith and under a *bona fide* belief that he is entitled to make the improvements as an absolute owner, he must be allowed the benefit of the section.[o] Besides the right to compensation as above mentioned, the alienee is entitled, on the sale being set aside, to a charge upon the estate for all amounts advanced by him to the widow for purposes for which, according to the Hindu Law, she would have been entitled to alienate the estate.[p] Even where a widow contracts a second marriage and sells the property of her

(j) *Mt. Nandrani* v. *Krishna*, 57 A. 997 =1935 A.L.J. 715=1935 A. 698.

(k) *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352=1931 Pat. 142.

(l) *Kidar Nath* v. *Mathu Mal*, 40 C. 555 .18 I.C. 946...25 M.L.J. 176= 15 Bom. L.R. 467=17 C.W.N. 797=1913 M.W.N. 403 (P.C.); *Bhagwat* v. *Ram*, 65 I.C. 69=15 L.W. 481 :26 C.W.N. 257=24 Bom. L.R. 336=1922 M.W.N. 102=20 A.L.J. 26=42 M.L.J. 243 (P.C.); *Mohammad Ali* v. *Kanailal*. 1935 C. 625 ; See also *Shidappa* v *Pandurang*, 47 B. 692.

(m) *Narayanaswami Ayyar* v. *Rama Ayyar*, 53 M. 692=57 I.A. 305=32 Bom. L.R. 1564=59 M.L.J. 666=32 L.W. 656= 34 C.W.N. 1045=1930 P.C. 297.

(n) *Rajrup Kunwar* v. *Gopi*, 47 A. 430 =1925 A. 261=23 A.L.J. 207 ; *Hans Raj* v. *Mt. Somni*, 44 A. 665=1922 A. 194=20 A.L.J. 524.

(o) *Shiddappa* v. *Pandurang*, 47 B. 696 =25 Bom. L.R. 395=1923 B. 385 ; *Gangadhar* v. *Rachappa*, 1929 B. 246=31 Bom. L.R. 453 ; *Singaracharlu* v. *Venkataseshamma*, 29 I.C. 289.

(p) *Collector of Masulipatam* v. *Cavaly Vencata*, 8 M.I.A. 529 ; *Deputy Commis-*

first husband for the discharge of debts due from his estate, if the purchaser has paid those debts, the reversioners can claim back the property sold only on their reimbursing the purchaser to the extent of the debts binding on the estate.[q] If the sale is found to be invalid as such, but a portion of the purchase money is found to have been advanced for legitimate purposes, the proper course is to decree possession with mesne profits to the plaintiffs, giving credit to the alienee for the amounts properly advanced by him with interest at a reasonable rate.[r] But if the alienation itself is justified by legal necessity and the alienee acts in good faith and the consideration is fair and proper, the mere fact that a considerable part of the consideration has not been proved to have been applied for necessary purposes cannot invalidate the alienation because, under the ruling of the Privy Council in *Hunooman Persaud's case*, the alience is not bound and cannot reasonably be expected to see to the application of the consideration.[s] In *Krishna Das's case*, which was a case of sale by a joint family manager, these observations were made by the Privy Council: "It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that, where the purchaser acts in good faith and after due enquiry and is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale." These observations would equally apply in the case of an alienation by a limited owner,[t] like a widow, daughter etc. The question to be considered in such cases is not one of arithmetical calculation, but whether the sale itself was justified by necessity, or if the sale exceeds the necessity then exist-

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sioner of Kheri v. *Khanjan Singh*, 29 A. 331—34 I.A. 72—17 M.L.J. 233=9 Bom. L.R. 591—11 C.W.N. 474—4 A.L.J. 232; *Mahomed Shamsool* v. *Shewakram*, 2 I.A. 7; *Indarjit Singh* v. *Jaddu*, 55 A. 157—1933 A. 169—1933 A.L.J. 42; *Santi Kumar* v. *Mukunda*, 62 C. 204=39 C.W.N. 226=1935 C. 20; *Jagarnath* v. *Damodar*, 1931 A.L.J. 603—1932 A. 37; *Paparayudu* v. *Rattamma*, 37 M. 295.

(q) *Dahnu* v. *Ajodheya*, 150 I.C. 893=1934 P. 327.

(r) *Bhagwat Dayal* v. *Debi Dayal*, 35 C. 420=35 I.A. 48=5 A.L.J. 184=10 Bom. L.R. 230—12 C.W.N. 393—18 M.L.J. 100.

(s) *Suraj Bhan Singh* v. *Sah Chain Sukh*, 105 I.C. 257=29 Bom. L.R. 1385=32 C.W.N. 117=53 M.L.J. 300 P.C., following the principle of the decision in *Krishna Das* v. *Nathu Ram*, 49 A. 149=54 I.A. 79 =25 A.L.J. 80=1927 M.W.N. 89=31 C.W.N. 462=8 P.L.T. 210—52 M.L.J. 720=29 Bom. L.R. 825—26 L.W. 856—1927 P.C. 37 (P.C.); See also *Medai* v *Nainar*, 16 L.W. 478=—1922 P.C. 307—1922 M.W.N. 804=27 C.W.N. 365=21 A.L.J. 282; See also S. 296.

(t) *Jagannadam* v. *Vighneswara*, 55 M. 216=61 M.L.J. 507=1931 M.W.N. 965—34 L.W. 551; *Mt. Alodham* v. *Naurangi*, 1938 Pat. 194; *Krishna* v. *Hira*, 41 A. 338.

ing, whether such excessive sale could have been avoided. In *Krishna Das's case*, a sale for Rs. 3,500 was upheld though necessity was proved only upto Rs. 3,000. Where a widow's alienation is set aside at the instance of the reversioners suing after her death, they are entitled to recover mesne profits for the period subsequent to her death but not for the period when the widow was alive, the reason being that a widow's alienation, whether justified by necessity or not, is always good for her life-time.[u]

563. Reversioners' suits and limitation.—A "suit during the life of a Hindu female by a Hindu who, if the female died at the date of instituting the suit, would be entitled to possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage" is governed by Art. 125 of the Limitation Act, 1908, and the period of limitation for such a suit is 12 years from the date of the alienation. There is only one cause of action for the whole body of reversioners in respect of their right to challenge the alienation by the widow and only one suit to challenge that alienation is maintainable on behalf of all the reversioners. If such a suit is not brought by the presumptive reversioners within the period of limitation, the whole body of reversioners, whether remote or newly born, are precluded from bringing a suit of the nature contemplated by Art. 125 of the Limitation Act.[v]

A suit by a Hindu reversioner entitled to the possession of immovable property on the death of a Hindu female falls under Art. 141 of the Limitation Act and the period of limitation is 12 years from the date when his estate falls into possession. If the property sought to be recovered is movable, the period of limitation is six years from that date under Art. 120 of the Limitation Act.[w] The fact that no suit was brought of the nature contemplated in Art. 125 of the Limitation Act within the time mentioned therein is no bar to the maintainability of a suit contemplated in Art. 141 of the Limitation Act. Where, however, there is a conveyance by a Hindu widow of her husband's estate in favour of her daughter, reserving only a small portion for her own maintenance, the conveyance amounts to a valid surrender of the estate by the widow

(u) *Venkataraman* v. *Krishna*, 1937 B. 453=39 Bom. L.R. 928; See also *Mohanlal* v. *Jagjivan*, 40 Bom. L.R. 394=1938 B. 298 negativing mesne profits prior to suit; *Bhagwat Dayal* v. *Debi Dayal*, 35 C. 420 =35 I.A. 48.

(v) *Deebal* v. *Moti*, 1938 Pat. 510=19 Pat. L.T. 145; *Venkatanarayana* v. *Subbamma*, 38 M. 406=42 I.A. 125=17 Bom. L.R. 468=19 C.W.N. 641=28 M.L.J. 535= 2 L.W. 596=1915 M.W.N. 555=1915 P.C. 124; *Janaki* v. *Narayanasami*, 39 M. 634= 43 I.A. 207=14 A.L.J. 997=18 Bom. L.R. 856=20 C.W.N. 1323=31 M.L.J. 225=4 L.W. 53=(1916) 2 M.W.N. 188=1916 P.C. 117; *Varamma* v. *Gopaladasayya*, 41 M. 659= 46 I.C. 202=35 M.L.J. 57=8 L.W. 62=1918 M.W.N. 461: *Chiragh* v. *Abdulla*, 6 Lah. 405=1925 Lah. 654; But see *Das* v. *Tirtha*, 51 C. 101.

(w) *Jagannadha* v. *Rama*, 28 M. 197.

so as to accelerate the succession of the husband's next heir, namely, the daughter, and a suit by the male reversioners for possession brought more than 12 years after the daughter's death, though within 12 years of the death of the widow, is barred under Art. 141 of the Limitation Act.(x)

(x) *Sitanna* v. *Viranna*, 39 L.W. 607=1934 P.C. 103=67 M.L.J. 20=61 I.A. 200=57 M. 749=36 Bom. L.R. 563=38 C.W.N. 697=1934 M.W.N. 414—15 P.L.T. 497=1934 A.L.J. 433.

CHAPTER XV.

THE LAW OF RELIGIOUS AND CHARITABLE ENDOWMENTS

564. Religious and charitable endowments.—No other country in the world can claim to excel India in the matter of grants made in the name of charity and religion. The ancient Hindu writers never tired of insisting on and commending gifts being made either for the propitiation of the Almighty or for the spiritual or temporal comfort of the public. The gigantic structures that stud the vast expanse of the Indian continent from the Cape Comorin to the Himalayas are the everlasting monuments to the instincts of charity and religion that inhere in every Hindu worthy of the name.

565. Definition of endowment.—"Endowment" is dedication of property for purposes of religion or charity having both the subject and objects certain and capable of ascertainment.[a] Endowments may be classified as (1) private or public, (2) real or illusory, (3) partial or complete, (4) religious or charitable, (5) valid or invalid.

566. Public or private endowment.—When a question arises whether an endowment made by a private individual is a public endowment or a private one, the subsequent conduct of the person who has endowed and the user of the property by the public are important factors to be considered in deciding it.[b] It would be a legitimate inference to draw that the founder of a temple had dedicated it to the public, if it is found that he had held out the temple to be a public one.[c] If the general public have always made use of a shrine for the purposes of worship and devotion in the same way as they do in other temples admittedly public, and the individuals outside the founder's family take an active part in its festivals, these circumstances are irreconcilable with any other conclusion than that of the temple being a public one.[d]

(a) *Morice* v. *Bishop of Durham*, 9 Ves. 399=10 Ves. 521; *Parmand* v. *Nihal*, I.L.R. 1938 L. 453=65 I.A. 252=1938 P.C. 195; *Chhotabhai* v. *Jnan Chandra*, 57 A. 330=62 I.A. 146=1935 P.C. 97=1935 A.L.J. 775=37 Bom. L.R. 567=39 C.W.N. 865=69 M.L.J. 1.

(b) *Chandu Lal* v. *Rampat Mal*, 1933 L. 189; *Mastrat* v. *Hossain*, 1938 C. 278.

(c) *Lakshmana Goundan* v. *Subramania Aiyar*, 81 I.C. 518=19 L.W. 253=22 A.L.J. 169=1924 M.W.N. 278=29 C.W.N. 112=1924 P.C. 44 (P.C.).

(d) *Chintamun Bajaji* v. *Dhondo Ganesh*, 15 B. 632; *Koman* v. *Achutan*, 61 I.A. 405=58 M. 91=39 C.W.N. 518=67 M.L.J. 788=1934 M.W.N. 1055=40 L.W. 428 =1934 P.C. 230; *Premo* v. *Sheo Nath*, 8 Luck. 266=9 Oudh W.N. 986=1933 Oudh 22

A private endowment, on the other hand, is one in which the public have no interest, as, for instance, an endowment for the worship of the family deity of the person endowing.[e] The importance of the distinction between a public and a private endowment lies in the extent of the power of the founder's family in respect of the endowment: thus if it is a public one, the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction.[f] If originally a temple was dedicated for the use of the founder's family and was a private trust, the fact of the admission of the public to the temple later on would not of itself necessarily affect the private character of the trust.[g]

567. Real and illusory endowments.—In order to determine the question of the *bona fide* nature of the endowment, it is necessary to see whether the proceeds have been used from the time when the endowment was made exclusively for religious or pious purposes.[h] One test of ascertaining whether the endowment is one made *bona fide* for religious purposes or merely a nominal endowment is to see how the founder himself and his descendants have since treated the property.[i] Mere execution of a deed of endowment is not enough to constitute a valid endowment, for the object may be to defraud creditors or to escape the rule against perpetuities. The mere fact that a portion of the profits of the land has been for some time used for the worship of an idol is no proof of a valid and public endowment.[j] In dealing with this question, the crucial test is the manner in which the dedicated property is held and enjoyed by the family of the founder.[k] To constitute a real endowment, the founder must divest himself of the property to the extent of the interests transferred or charged. If the gift of property to an idol was a mere scheme for making it inalienable, the dedication is void.[l] But a dedication otherwise valid is not invalidated by reason of the fact that members of the settlor's family are nominated as shebaits and given reasonable remuneration out of the endowment and also rights of residence in the dedi-

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(e) *Jugalkishore* v. *Lakshmandas*, 23 B. 659=1 Bom. L.R. 118.

(f) *Konwar Doorganath Roy* v. *Ram Chunder Sen*, 2 C. 341=4 I.A. 52; *Ram Prasad* v. *Ram Kishun*, 11 Pat. 394=1932 Pat. 177.

(g) *Venugopalaswamy* v. *H. R. E. Board*, 1938 M. 214=1937 M.W.N. 1269=(1937) 2 M.L.J. 876=46 L.W. 740; *Koman Nair* v. *Achutan*, 58 M. 91=40 L.W. 428=60 C.L.J. 344=61 I.A. 405=39 C.W.N. 518=1934 P.C. 230=67 M.L.J. 788=1934 M.W.N. 1055; see also *Prakash Chandra* v. *Subodh Chandra*, I.L.R. (1937) 1 C. 515=1937 C. 67.

(h) *Kasheshur* v. *Krishna Kaminee*, 2 Hay's Report, 557.

(i) *Ganga Narain* v. *Brindaban*, 3 W.R. 142.

(j) *Ram Pershad Doss* v. *Sreekuree*, 18 W.R. 399 cited in *Madhub Chandra* v. *Rani Sarat Kumari*, 15 C.W.N. 128=6 I.C. 26.

(k) *Ram Chandra* v. *Ranjit*, 27 C. 242=4 C.W.N. 405.

(l) *Surendro Keshub* v. *Doorga Soondery*, 19 C. 513=19 I.A. 108; *Sri Thakurji* v. *Sukhdeo*, 42 A. 395=58 I.C 583=18 A.L.J. 390.

cated property.[m] But in view of the privileges attached to dedicated property it has not infrequently happened that simulate dedications have been made, and hence a close scrutiny of any challenged deed of dedication is necessary in order to ascertain whether there has been a genuine divestiture by the settlor in favour of the idol or only a sham endowment.[m]

568. Partial and complete dedications.—An owner may either dedicate his whole interest in a particular property, in which case the property would be said to be absolutely dedicated, or he may endow a lesser interest in the property, in which case the dedication may be said to be only partial or qualified.[n] The question whether in the case of a gift to an idol with beneficial interests to the settlor's heirs, the idol itself should be considered as true beneficiary subject to a charge in favour of the heirs for their upkeep, or whether those heirs should be considered the true beneficiaries of the property subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be answered by a conspectus of the entire provisions of the instrument of endowment.[o] In a case of partial dedication there is only a charge in favour of the idol and subject to that charge the property continues to be like any other property of the family with the usual incidents of alienability and partibility.[p] If, on the other hand, the dedication is an absolute one, the manager is not able to alienate it except for purposes of legal necessity or benefit of the institution. In this connection it is important to consider the extent of the property alleged to be dedicated in relation to the expenses to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases, in which case the dedication will be held to be absolute, but if such purposes are prescribed in limiting terms so that the increasing income may be beyond what is required for the fulfilment of those purposes, the dedication is only partial, and the beneficial interest to the person in charge of the idol may not

(m) ...ari Bhul Nath, 46 L.W. 14=41 C.W.N. 968=1937 P C. 185=64 I.A. 203=I.L.R. (1937) 2 C. 447=(1937) 2 M.L.J. 527=39 Bom. L.R. 933=1937 M.W.N. 966=1937 A.L. J. 1008.

(n) *Jagadindra* v. *Hemanta*, 32 C. 129=31 I.A. 203=6 Bom. L.R. 765=8 C.W.N. 809=1 A.L.J. 585.

(o) *Har Narayan* v *Surja Kunwari*, 43 A. 291=48 I.A. 143=25 C.W.N. 961 =14 L.W. 633=1921 P.C. 20; *Krishnaswami Sastrigal* v. *Avayambal*, 1933 M. 204.

(p) *Har Narayan* v. *Suraj Kunwari*, 43 A. 291=48 I.A. 143=25 C.W.N. 961= 14 L.W. 633=1921 P.C. 20; *Gopal Lal* v. *Purna Chandra*, 49 C. 459=49 I.A. 100 =20 A.L.J. 625=43 M.L.J. 116=27 C. W.N. 174=24 Bom. L.R. 937=16 L.W. 963=1922 P.C. 253; *Jagadindra* v. *Hemanta*, 32 C. 129=31 I.A. 203=6 Bom. L.R. 765=8 C.W.N. 809=1 A.L.J. 585; *Surendrakrishna* v. *Shree Shree Ishwar Bhuboneshwari*, 60 C. 54=144 I.C. 792= 1933 C. 295; *Parshadi* v. *Brij Mohan*, 1936 Oudh 52=11 Luck. 575; *Bhekdhari* v. *Sri Ramchanderji*, 10 P. 388=13 Pat. L.T. 331=1931 P. 275; *Rikhi Kesh* v. *Mela Ram*, 32 P.L.R. 304=1931 L. 170; *Mt. Lakhna* v. *Sahu*, 1937 A. 705=1937 A.L.J. 846.

be protected by the dedication and may be alienable.[m] Where a will directed the performance of the worship of an idol out of the income of a particular property and the division of the balance of the income among the members of the family, it was held that there was no direct gift of the whole of the property to the idol and that therefore the endowment was only a partial one.[q]

569. Religious or charitable endowment.—The distinction between a charitable and a religious endowment is that the former is the outcome of benevolence, the latter is that of piety; though in some cases of endowment, both piety and benevolence may co-exist, all charitable endowments are not religious, as, for instance, an endowment to support a hospital[r] or found a university.[s] The benefit of our fellow creatures including animals is the object of a charitable endowment.[t] while a religious endowment is one for an object or purpose which is in its nature essentially spiritual.

570. Valid endowments.—Valid endowments may be either charitable or religious. Under the former class fall endowments like (1) an endowment for a hospital,[r] (2) an endowment to found a professorship.[u] (3) an endowment to support a university,[s] (4) an endowment for the establishment and management of a school and dispensary,[v] (5) an endowment for establishing and maintaining a dharmasala,[w] (6) an endowment for carrying on Sadavarths,[x] (7) an endowment for building tanks or wells,[x] (8) an endowment for the advancement of education,[y] (9) an endowment for the performance of ceremonies and giving feasts to Brahmins,[z] (10) an endowment for the protection of animals,[t] and (11) an endowment for distributing food among the poor relations, servants and dependants of the settlor.[s] Under the class of religious endowments come endowments (i) for performance of religious ceremonies like Sradh, Lakshmi Puja and Durga Puja,[a] (ii) for the establishment and worship of an idol,[b] and (iii) for building temples, and (iv) mutts.

(m) See foot-note (m) on p. 590.

(q) *Gopal Lal* v. *Purna Chandra*, 49 C. 459=49 I.A. 100=20 A.L.J. 625=43 M. L.J. 116=27 C.W.N. 174=24 Bom. L.R. 937=16 L.W. 963=1922 P.C. 253.

(r) *Fanindra* v. *Administrator-General of Bengal*, 6 C.W.N. 321.

(s) *Manorama* v. *Kali Charan*, 31 C. 166=8 C.W.N. 273.

(t) *Webb* v. *Oldfield*; *Cranston In re*, (1898) 1 Ir. R. 431.

(u) *Tagore* v. *Tagore*, 9 Beng. L.R. 377 =1 I.A. Sup. Vol. 47 (P.C.).

(v) *Hori Dasi* v. *Secretary of State*, 5 C. 228 affirmed in 7 C. 304 (P.C.).

(w) *Paramanandas Jivandas* v. *Vinayek*, 7 B. 19—9 I.A. 86 (P.C.); *Narasimha* v. *Ayyan Chetti*, 12 M. 157.

(x) *Jamnabai* v. *Khimji*, 14 B. 1; *Tricumdas Mulji* v. *Khimji Vallabhdas*, 16 B. 626.

(y) *Jitendra Nath* v. *Lokendra*, 22 C L J. 593=34 I.C. 657.

(z) *Dwarknath Byaack* v. *Burroda Persaud*, 4 C. 443; *Lakshmishankar* v. *Vaijnath*, 6 B. 24.

(a) *Lakshmishankar* v. *Vaijnath*, 6 B. 24; *Prafulla* v. *Jogendra Nath*, 9 C.W.N. 528.

(b) *Bhupati* v. *Ram Lal*, 37 C. 128—3 I.C. 642=14 C.W.N. 18 (F. B.); *Bankey Lal* v. *Peare Lal*, 53 A. 710=1932 A. 244.

571. Invalid endowment.—To constitute a valid endowment both the subject and object of the endowment must be definite and ascertainable. In other words what is given and to whom it is given must not be vague and uncertain. "As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or, if the trustee dies, the Court itself can execute the trust—a trust, therefore, which in case of maladministration could be reformed and a due administration directed, and then, unless the subject and objects can be ascertained, upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration."[c] Hence a gift to "Dharam" which term means "law, virtue, legal or moral duty" (Wilson's Dictionary) is too vague to be given effect to.[d] So also gifts (i) for purposes of popular usefulness or purposes of charity,[e] (ii) for charitable and religious purposes,[f] (iii) "for proper and just acts for my benefit,"[g] (iv) for charitable or benevolent purposes, [h] are all void for vagueness and uncertainty. Where a bequest for "dharmarth" is succeeded by several bequests in the same will, the bequest being void for uncertainty, the remaining bequests which are joined therewith are also void even though individually they would be valid.[i] Besides, a dedication must be made *bona fide* and for a purpose recognised by law as legal. Hence a dedication made by a father to spite his son,[j] or a dedication made by a Hindu to a Mahomedan mosque which is prohibited both by the Hindu and Mahomedan religious law,[k] is void.

572. Dedication to idol not in existence.—Notwithstanding the general principle of Hindu Law that a bequest cannot be made to a person not in existence either actually or in contemplation of law at the testator's death, it has been held by a Full Bench of the Calcutta High Court that a bequest to trustees for the establishment of an idol is valid on the ground that this exception to the general rule is favoured by the sacred law.[l] Recently it has been

(c) Per Lord Eldon in *Morice* v. *Bishop of Durham*, 9 Ves 399.

(d) *Ranchordas* v. *Parvatibai*, 23 B. 725 =26 I.A. 71=1 Bom. L.R. 607=3 C.W.N. 621; *Narain Das* v. *Brij Lal*, 14 Lah 827 =1933 L. 833.

(e) *Trikumdas* v. *Haridas*, 31 B. 583= 9 Bom. L.R. 560.

(f) *Vullubhdas* v. *Gordhandas*, 14 B. 360; *Bai Chadunbai* v. *Dady Nusserwanji*, 26 B. 632=3 Bom. L.R. 902.

(g) *Gokool* v. *Issur*, 14 C. 222.

(h) *Re Sidney*, 1908, 1 Ch. 488.

(i) *Narain Das* v. *Brij Lal*, 1933 L. 833 =14 Lah. 827.

(j) *Raghunath* v. *Gobind*, 8 A. 76.

(k) *Fazle Rahman* v. *Anath Bandhu*, 16 C.W.N. 114=11 I.C. 436.

(l) *Bhupati* v. *Ram Lal*, 37 C. 128=3 I.C. 642=14 C.W.N. 18 (F. B.) overruling *Upendra* v. *Hem Chandra*, 25 C. 405=2 C.W.N. 295; *Chatarbhuj* v. *Chatarjit*, 33 A. 253=8 I.C. 832=8 A.L. J. 34; See also *Lakshmi Narayan* v. *Gostha Raman*, 41 C.W.N. 759=1937 C. 327; But see *Narasimha* v. *Venkatalingam*, 50 M. 687=1927 M. 636=25 L. W. 806=1927 M.W.N. 269=53 M.L.J. 203.

held by the same High Court that there can be a valid gift to the idol itself without the interposition of trustees.(m) But a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment is to take effect is void for uncertainty and the decision of the Full Bench in *Bhupathi's case* does not cover such an endowment.(n)

573. Rules against perpetuities and accumulations.—The rule against perpetuities and the rule governing directions for accumulations which are applicable in the case of gifts and bequests in favour of private individuals do not apply in the case of religious or charitable endowments.(o) "It being assumed to be a principle of Hindu Law that a gift can be made to an idol, which is a *caput mortuum* and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English Law of perpetuities."(p)

574. Endowment to take effect in future.—A valid endowment can be made to take effect in future as an estate in remainder after the termination of a life estate.(q)

575. Dedication how made.—In order to constitute a valid dedication the execution of an instrument in writing is not necessary.(r) Nor is the performance of the religious ceremony of *Sankalp* and *Samarpan* legally essential for the validity or completion of the endowment.(s) In many cases dedication is a matter of inference from a long course of conduct, from user and from the application of the income of the property about which the endowment is claimed, though this test is not always conclusive.(r) The provisions of S. 123 of the Transfer of Property Act relating to gift of immovable property do not apply to the case of an endowment.(t) In the case of gifts to an idol, no express words of gift either directly or indirectly in the shape of a trust are required to create a valid dedication. All that is necessary is that the

(m) *Bhabatarini* v. *Ashmantara*, 1938 C. 490; *Bhupati* v. *Basanta*, 1936 C. 556 =63 C. 1068=40 C.W.N. 1320; But see *Narasimha* v. *Venkatalingam*, 50 M. 687= 1927 M. 636.

(n) *Chandi Charan* v. *Haribol Das*, 46 C. 951=51 I.C. 215=23 C.W.N 645; *Phundan* v. *Arya*, 33 A. 793=11 I.C. 260 =8 A.L.J. 944.

(o) *Prafulla* v. *Jogendra Nath*, 9 C.W N. 528; S. 18. Transfer of Property Act.

(p) *Kumara* v. *Kumara*, 2 Beng. L.R. 47; *Alami* v. *Konnu*, Appeals Nos. 80 and 105 of 1886 (Madras).

(q) *Gobind* v. *Gomti*, 30 A. 288 =5 A. L.J. 256.

(r) *Ramalinga* v. *Sivachidambara*, 42 M 440=9 L.W. 224=49 I.C. 742=1919 M.W.N. 426=36 M.L.J. 575; *Gangi Reddi* v. *Tammi Reddi*, 50 M. 421=26 L. W. 139=54 I.A. 136=52 M.L J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W. N. 799=1927 M W.N. 502=1927 P.C. 80; *Rangacharya* v. *Raman Acharya*, 1928 A. 689; *Maruti* v. *Gopal*, 34 Bom. L.R. 415 = 1932 B. 305; *Kummam* v. *Sujan*, 1938 Lah. 619.

(s) *Prem Nath* v. *Hari Ram*, 16 L. 85 =36 P.L.R. 13=1934 L. 771.

(t) *Narasimha* v. *Venkatalingam*, 50 M. 687=25 L.W. 806=1927 M.W.N. 269 =53 M.L.J. 203=1927 M. 636 (F.B.).

religious purposes or objects of the testator should be clearly specified and that the property intended for the endowment should be set apart for or dedicated to those purposes.[u] If there is a document of dedication to God it does not require registration.[v] If an endowment is created by a will governed by the Indian Succession Act, 1925, S. 57, it must be in writing and attested by at least two witnesses.[w]

576. Trust is unnecessary for valid endowment.—For the creation of a valid endowment, it is not necessary to vest the property in a trustee as is required under English law.[x] But in the absence of such trust, very strong and clear evidence is necessary to establish an endowment.[y]

577. Evidence of endowment.—In the absence of a written grant or evidence of exclusive appropriation of the profits for the purposes of a temple, the mere fact that the income of the village had been used for the temple for a long time is insufficient to make out a dedication of the village to the temple.[z] Though the mere fact of the proceeds of the land being used for the support of an idol may not be proof of dedication, it is still a fact that may well be taken into consideration, when the intention of the founder has to be gathered from an ancient document expressed in ambiguous language: *contemporanea exposition est optima.*[a] In dealing with the question whether an endowment is real or nominal only, the manner in which the dedicated property is held and enjoyed is the most important point for consideration.[b] If the profits of the property were not all applied for the charity, but they were only treated as the purse from which the expenses of the charity were met, it could not be said that there was a dedication of the property.[c] The mere execution of a deed, although it may purport

(u) *Bhuggobutty* v. *Gooroo Prosonno*, 25 C. 112; *Jai Dayal* v. *Dewan*, 1938 Lah. 686; *Nagappa* v. *O. R. M. O. M. S. P. Firm*, 48 L.W. 577=1938 M.W.N. 1017=1938 M. 999; *Lakshmi* v. *Gostha*, 1937 C. 327=41 C.W.N. 759; *Mt. Satwanti* v. *Ambica*, 1939 Pat. 45; *Sunder Singh* v. *Managing Committee*, 65 I.A. 106=42 C.W.N. 930=I.L.R. (1938) Lah. 63=(1938) P.C. 73; *See Soonram* v. *Alagu*, 42 C.W.N. 1125=1938 P.C. 259=48 L.W. 466=1938 M.W.N. 1002=40 Bom. L.R. 1236.

(v) *Narasimha* v. *Venkatalingam*, 50 M. 687=25 L.W. 806=1927 M.W.N. 269=53 M.L.J. 203=1927 M. 636 (F.B.).

(w) *Maruti* v. *Gopal*, 1932 B. 305.=34 Bom. L.R. 415; where the whole law on the point is summarised.

(x) *Maruti* v. *Gopal*, 34 Bom. L.R. 415=1932 B. 305.

der, 2 C. 341=4 I.A. 52.

(z) *Govinda Doss* v. *Raja Venkata*, 27 M.L.J. 195=26 I.C. 537; *Gangi Reddi* v. *Tammi Reddi*, 50 M. 421=26 L.W. 139=54 I.A. 136=52 M.L.J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W.N. 799=1927 M.W.N. 502=1927 P.C. 80.

(a) *Abhiram* v. *Shyama Charan*, 36 C. 1003=36 I.A. 148=4 I.C. 449=6 A.L.J. 857=11 Bom. L.R. 1234=19 M.L.J. 530=14 C.W.N. 1.

(b) *Ram Chandra* v. *Ranjit Singh*, 27 C. 242=4 C.W.N. 405; *Bhekdhari* v. *Sri Ramchanderji*, 10 P. 388=13 Pat. L.T. 33=1931 P. 275.

(c) *Gangi Reddy* v. *Tammi Reddi*, 50 M. 421=26 L.W. 139=54 I.A. 136=52 M.L.J. 524=29 Bom. L.R. 856=25 A.L.J. 593=31 C.W.N. 799=1927 M.W.N. 502=1927 P.C. 80.

on the face of it to dedicate property to an idol, is not enough to constitute a valid endowment. It is necessary that the executant should be shown to have divested himself of the property dedicated. Where the subsequent acts and conduct of the parties show that, as a matter of fact, the profits of the property have been utilised in the performance of the *deb sheba* in accordance with the rules laid down in the deed of dedication, the mere tact that the members of the settlor's family are nominated shebaits and that they are to be remunerated out of the income of the property is no ground for holding that the dedication is not real, provided that the remuneration is reasonable having regard to the income of the property.[d]

578. Operation of endowment.—An endowment becomes effective from the moment of dedication.

579. Irrevocability of endowment.—Except in the case of an endowment in favour of a family idol, which may be altered, transferred or revoked by the consensus of the whole family,[e] an endowment becomes unalterable and irrevocable from the moment of its completion[f] and the trust does not become nugatory by the subsequent conduct of the founder in not giving effect to it.[g]

580. Cy pres doctrine.—Where the original object cannot be carried out in the manner and form intended by the donor or where the literal execution of the trust is or afterwards becomes inexpedient or impracticable, the Court will execute the trust *cy pres*, that is, apply the funds to other objects of a similar character.[(h)] Where subscriptions are paid to a committee for the purpose of fulfilling a specific and well defined charitable purpose and that only, and there is no general charitable intent shown in respect thereof, a complete trust is created to apply the funds in carrying out the object mentioned. If the object has become impracticable the subscribers have a clear right to the return of the subscription *pro rata* subject only to the rights of the trustees in respect of their proper costs, charges and expenses. If, on the other hand, impracticability is not shown, they still have to carry out the trust.

(d) *Janardhan* v. *Khitish Chandra*, 1932 C. 419; *Bhubaneshwari* v. *Brojo Nath*, 46 M.L.W. 14=(1937) 2 M.L.J. 527=1937 M.W.N. 966—I.L.R. (1937) 2 C. 447=1937 P. C. 185=64 I.A. 203=41 C.W.N. 968=39 Bom. L.R. 933=1937 A.L.J. 1008.

(e) *Konwar Doorganath* v. *Ram Chunder*, 2 C. 341=4 I.A. 52; *Gobinda* v. *Debendra*, 12 C.W.N. 98; See contra in *Surendrakrishna* v. *Shree Shree Ishwar Bhubaneshwari*, 60 C. 54=1933 C. 295.

(f) *Juggutmoheenee* v. *Sokheemonee*, 14 M.I.A. 289; *Konwar Doorganath* v. *Ram Chunder*, 2 C. 341=4 I.A. 521.

(g) *Krishnaswamy* v *Kothandarama*, 27 M.L.J. 582=25 I.C. 428.

(h) *Mayor of Lyons* v. *Advocate-General of Bengal*, 1 C. 303 (P.C.)=26 W.R. 1; In the matter of *Hormasji Framji Warden*, 32 B. 214=9 Bom. L.R. 1203; *Nanu Narayan* v. *Advocate General of Bombay*, 9 Bom. L.R. 870.

If the charitable scheme has not become impracticable, the trustees cannot abandon the scheme, because that is not a matter in their power at all; nor can they, without recourse to the Court, make a *cy pres* application of the funds on the ground that there was a general charitable intent, even if that view is a correct one. In this connection it must be remembered that impracticability of carrying out a charitable purpose means impracticable from a reasonable point of view and includes not only the present lack of subscriptions and the virtual impossibility of getting sufficient subscriptions in the future, but also any other reason which may have contributed to make the scheme impracticable.[(i)]

581. Destruction of image.—The religious purpose of an endowment to an idol does not come to an end when the image has been mutilated or destroyed, and as pointed out in *Purna Chandra* v. *Gopal Lal*,[(j)] the endowment is not affected by such mutilation or destruction. The religious purpose still survives and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder.[(k)] Hindu idols are not property in the crude sense of the term, and their destruction, degradation or injury are not within the power of their custodian for the time being.[(l)]

582. Idol, a juristic entity.—A Hindu idol is a juristic entity and has a juridical status with the power of suing and being sued. Its interests are attended to by a person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. The duties of piety from the time of the consecration of the idol are duties of something existing, which, though symbolising the divinity, has in the eye of the law, a status as a separate *persona* The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the Shebait custodian of the idol and manager of its estate[(i)] and the fact that he happens to be only a *de facto* and not a *de jure* manager of the temple in which

(i) *Commissioner, Lucknow Division* v *Deputy Commissioner of Partabgarh*, 46 M.L.W. 225=41 C.W.N. 1072=39 Bom. L.R. 1012=18 P.L.T. 883=1937 M.W.N. 1297=1937 A.L.J. 1378=1937 P.C. 240.

(j) *Purna Chandra* v. *Gopal*, 8 C.L.J. 369.

(k) *Bijoychand* v. *Chatterjee*, 41 C. 57 =20 I.C. 78=17 C.W.N. 1013.

(l) *Pramatha Nath Mullick* v. *Pradyumna*, 52 C. 809=52 I.A. 245=23 A.L.J. 537=49 M.L.J. 30=1925 M.W.N. 431=27 Bom. L.R. 1064=22 L.W. 492=1925 P.C. 139; See the discussion regarding limitations to the theory of the idol being a legal person in *H.R.E. Board* v. *Veeraraghavacharlu*, 46 L.W. 668=1937 M.W.N. 708=(1937) 2 M.L.J. 368=1937 M.750; *Jagadindra* v. *Hemanta*, 32 C. 129=31 I.A. 203=8 C.W.N. 809. (Shebait's right of suit on behalf of the idol).

the idol is installed does not preclude the maintainability of a suit by him in the name of the idol.[m]

583. Competency to endow and subject-matter of endowment. —Every Hindu who is of sound mind and a major can create a valid endowment in respect of the whole or part of his separate or self-acquired property. In other words any property which can be the subject-matter of gift or will by its owner can also be the subject-matter of a valid endowment. Besides the above, a reasonably small portion of the joint family property may be dedicated for purposes of religious charity by the Karta of the family.[n] Hindu Law also recognises the validity of a dedication of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner whose estate she has inherited as a qualified owner.[o]

584. Temples and Mutts supplementary in character.—By far the most important of the religious foundations in India are the temples and the *mutts*, both supplementary in the Hindu ecclesiastical system and both conducing to spiritual welfare, the former by affording opportunities for prayer and worship, the latter by facilitating spiritual instruction and the acquisition of religious knowledge, the presiding element being the deity or idol in the one, the learned and pious ascetic in the other.[p]

585. Temples.—The temples or the devastanams have the richest and the largest endowments in India which are being daily added to by the votaries that flock to them in thousands all the year round. The presiding element is the deity or idol, a juridical person possessing the juristic capacity of receiving gifts and holding property. But it is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must, in the nature of things, be entrusted to some person known as Shebait or manager.[q]

(m) *Gopal Datt* v. *Babu Ram*, 1936 A. 653=1936 A.L.J. 515; *Mahadeo Prasad* v *Karia Bharthi*, 1935 P.C. 44=57 A. 159 =62 I.A. 47=1935 A.L.J. 678 (P.C.); *Gurupada* v. *Manmohan*, 1936 C. 215; *Sri Radha Krishnaji* v. *Rameshwar*, 1934 P. 584; *Panchkari* v. *Amode*, 41 C.W.N. 1349 =1937 C. 559; See also *Sharatchandra* v. *Dwarkanath*, 58 C. 619=1931 C. 558; See contra in *Vedakannu* v. *Ranganatha*, 48 L.W. 829=(1938) 2 M.L.J. 663=1938 M. W.N. 983=1938 M. 982.

(n) *Gangi Reddi* v. *Tammi Reddi*, 50 M. 421=26 L.W. 139=54 I.A. 136=52 M. L.J. 524=29 Bom. L.R. 856=25 A.L.J. 553=31 C.W.N. 799=1927 M.W.N. 502=1927 P.C. 80.

(o) *Sardar Singh* v. *Kunj Bihari*, 49 I.A. 383=44 A. 503—44 M.L.J. 766=27 C.W.N. 653=25 Bom. L.R. 648=16 L.W. 871=1922 P.C. 261.

(p) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435=14 M.L.J. 105.

(q) *Jagadindra* v. *Hemanta*, 32 C. 129= 31 I.A. 203=6 Bom. L.R. 765=1 A.L.J. 585=8 C.W.N. 809; *Prosunno Kumari* v. *Golab Chand*, 2 I.A. 145; *Pramatha Nath* v. *Pradyumna*, 52 C. 809=52 I.A. 245= 1925 P.C. 139=23 A.L.J. 537—49 M.L.J. 30=1925 M.W.N. 431=27 Bom. L.R. 1064 =22 L.W. 492=30 C.W.N. 25.

586. Mutts.—Next to the temples, a considerable portion of endowed property is held by *mutts* presided over by ascetics or sanyasis. A *mutt* means a place for the residence of ascetics and their pupils and devotees. The origin of these *mutts* is traceable to the times when Buddhism had a powerful hold upon the masses in India and Sankaracharya, the leader of the Brahmanical doctrines, led the opposition against the Buddhists. With a view to counteract the activities of the Buddhists and to serve as centres of religious instruction and philosophy, he started *mutts* presided over by learned and pious ascetics after the model of the Buddhistic order of monks, and these *mutts*, which in course of time became the favoured objects of pious endowments, emulated the founding and multiplication of other *mutts* throughout the length and breadth of India. These institutions whose object is the imparting of spiritual instruction and the maintenance and strengthening of the doctrines and tenets of particular schools of philosophy have become the centres of classical and religious learning exercising considerable influence over the laymen in the neighbourhood.(r) The men who were attracted by the piety of those who presided over these *mutts* were prevailed upon to make large endowments for the comfort and maintenance of the large groups of disciples that often gathered around them, and in course of time many of these institutions, which were originally centres of religion and austere piety, gradually degenerated into places of worldliness, luxury and ease. Like an idol, the *mutt* is also a juridical person capable of acquiring, holding and vindicating legal rights, though of necessity, it can only act in relation to those rights through the medium of some human agency (The Mahant) (s) and a person who, though not duly installed, is in fact managing the affairs of the math and has been treated as the Mahant by all the persons interested therein, is entitled to maintain a suit for the benefit of the math to recover property which belongs to it and which is wrongly held by persons in the position of trespassers.(t)

587. Position of Shebait.—A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus and the recognition thereof by Courts as a juristic entity. It has a juridical status with the powers of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. The person founding a deity and

(r) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435=14 M.L.J. 105.

(s) *Babajirao* v. *Laxmandas*, 28 B. 215=5 Bom. L.R. 932.

(t) *Mahadeo Prasad* v. *Kaila Bharathi*, 62 I.A. 47=57 A. 159=37 Bom. L.R. 333=39 C.W.N. 433=68 M.L.J. 499=1935 P.C. 44.

becoming responsible for these duties is *de facto*, and in common parlance called, Shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or—as in the case of Sudras—by the employment of a Brahmin priest to do them on his behalf. Or the founder, any time before his death, or his successor likewise, may confer the office of Shebait on another.(u) The Shebait is only a manager of the property which belongs to the idol and cannot claim any legal ownership therein or in its profits.(v) In no case is the property gifted to an idol or temple conveyed to or vested in its manager, nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee, in the general sense, for maladministration.(w)

588. Position of Mahant.—A *mutt* is an institution of a monastic nature established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and the disciples in the institution are known as *chelas* who may be of two classes, celibate and non-celibate. The Mahant is the head of this institution, sits upon the *gadi*, initiates candidates into the mysteries of the cult, superintends the worship of the idol and the customary spiritual rites, manages the property of the institution and administers its affairs. The whole assets of the institution are vested in him as the owner thereof in trust for the institution. The Mahant is thus not only a spiritual preceptor, but also a trustee in respect of the *mutt* over which he presides.(x) Though the property of the *mutt* is held by him as its owner, the nature of the ownership is one in trust for the *mutt* or institution itself, and this trust exists and must be respected although large administrative powers are undoubtedly vested in the Mahant for the time being.(x)

589. Debutter property.—The literal meaning of the word debutter is "belonging to a deity" and hence debutter property is that which has been dedicated to God or purposes of religion. In respect of property owned by the majority of the *mutts* the following observations of the Madras High Court are pertinent: "The

(u) *Pramatha Nath* v. *Pradyumna* 52 C. 809=52 I.A. 245=23 A.L.J. 537=49 M.L.J. 30=1925 M.W.N. 431=27 Bom. L.R. 1064=22 L.W. 492=30 C.W.N. 25 =1925 P.C. 139.

(v) *Shibessouree* v. *Mothooranath*, 13 M.I.A. 270.

(w) *Vidya Varuthi* v. *Balusami Ayyar*, 44 M. 831=48 I.A. 302=1922 P.C. 123= 15 L.W. 78=26 C.W.N. 537=24 Bom. L.R. 629=41 M.L.J. 346=1921 M.W.N 449=20 A.L.J. 497; *Monohar Mukerjee* v. *Bhupendra*, 60 C. 452=1932 C. 791.

(x) *Ram Prakash* v. *Anand Das*, 43 C. 707=43 I.A. 73=14 A.L.J. 621=18 Bom. L.R. 490=20 C.W.N. 802=31 M.L. J. 1=3 L.W. 556=(1916) 1 M.W.N. 406 =1916 P.C. 256; *Kesho Das* v. *Amar Dasji*, 14 P. 379=16 Pat. L.T. 35=1935 P. 111

property is in fact attached to the office of the head of the institution and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution."(y)

POWERS OF SHEBAIT AND MAHANT.

590. Power over income.—It is the duty of the trustee to refrain from the personal enjoyment of the surplus income and to add the same to the capital of the estate to be administered. And this rule applies also to the property of a *mutt* or asthal. Hence a Mahant cannot, apart for the dignity of his office, employ the surplus income for his own personal use.(z) A trustee is not justified in applying the produce of the endowed property to another institution which is not in any sense subsidiary to or connected with the institution for whose benefit the property has been endowed.(a)

591. Right to reimbursement.—A Shebait, or after his death, his private estate, is entitled to be reimbursed from the debutter estate all sums properly expended by him in performing the obligations imposed upon him by the founder, or in defending his title as a Shebait or in the preservation of the trust estate by paying Government Revenue and the like. The right of indemnity is incident to the position of a trustee and the liability in respect of it is the first charge on the trust estate.(b)

592. Self-acquisition.—The law does not disable a Mahant or a Shebait from acquiring and owning property of his own. But where properties are shown originally to have belonged to the trust, it is on the Mahant or the Shebait to show by clear and unimpeachable evidence the legitimacy of his acquiring the same as his private property.(c) The rule forbidding the purchase of an estate by a person standing in regard to his dealings with it in a fiduciary relationship, is general in its application and applies to

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(y) Sammantha v. Sellappa, 2 M. 175.

(z) *Arunachellam Chetty* v. *Venkatachalapathi*, 43 M. 253=46 I.A. 204=17 A.L.J. 1097=22 Bom. L.R. 457=24 C.W.N. 249=37 M.L.J. 460=10 L.W. 642=1919 M.W.N. 850=1919 P.C. 62.

(a) *Palaniappa* v. *Devasikamoney*, 40 M. 709=44 I.A. 147=15 A.L.J. 485=19 Bom. L.R. 567=21 C.W.N. 729=33 M.L.J. 1=6 L.W. 222=1917 M.W.N. 507=1917 P.C. 33.

(b) *Peary Mohun* v. *Narendra*, 37 C. 229=37 I.A. 27=7 A.L.J. 125=14 C.W.N. 261=12 Bom. L.R. 257=20 M.L.J. 171=5 I.C. 404 (P.C.).

(c) *Srinivasa Chariar* v. *Evalappa Mudaliar*, 45 M. 565=49 I.A. 237=43 M.L.J. 536=16 L.W. 247=24 Bom. L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=1922 P.C. 325.

the case of a purchase of debutter property by a Shebait.[d] In setting aside such purchase, the money that he has paid may be made a charge on the debutter estate.[d] But there is no presumption that property in the possession of a Mahant belongs to the *mutt*,[e] and where the properties acquired by a Mahant are not shown to have been treated as attached to his office, the acquisition cannot be presumed to be for the benefit of the office.[f]

593. Removal and replacement of idol.—If in the course of a proper and unassailable administration of the worship of an idol by the Shebait, it be thought that a family idol should change its location, the will of the idol itself, expressed through its guardian, the Shebait, must be given effect to.[g] But in the case of an idol in a public temple, the Shebait has no such power of removal when it is objected to by the majority of the worshippers,[h] though the Court may not interfere with such removal when it is beneficial to the whole community and is favoured by the general body of the devotees.[i] So also an image having been once consecrated cannot be replaced by another image unless it has been unfit for worship by having become cracked, mutilated or broken.[j] A destruction of the image does not put an end to the endowment,[k] and the endowment can be carried on by consecrating and installing a new image in its stead.

594. Renovation of the temple.—The essence of a building is its structural coherence and consistency, and if such coherence and consistency have been seriously impaired by time, and the temple is in a state of disrepair and dilapidation, though not in complete ruins, a complete renovation of the temple is justifiable under the religious law of the Hindus. The term "Jeerna" in the text indicating the condition of the temple which would justify renovation means simply "dilapidated" and not "reduced to ruins."[l]

(d) *Peary Mohan* v. *Manohar*, 48 C. 1019 48 I.A. 258=26 C.W.N. 133=19 A L.J. 773=23 Bom. L.R. 913 41 M.L.J. 68=14 L.W. 104=1921 M.W.N. 558=2 P.L T. 725=1922 P.C. 235.

(e) *Goshain* v. *Shiamlal*, 50 A. 485 .26 A.L.J. 193=1928 A. 257; But see *Sunil Chandra* v. *Gobind*, 1934 P. 431.

(f) *Sethuramaswamiar* v. *Meruswamiar*, 34 M. 470=4 I.C. 76=20 M.L.J. 108; *Parma Nand* v. *Nihal*, 65 I.A. 252=I.L.R. 1938 Lah. 453=1938 P.C. 195. But see *Sitaram* v. *H. R. E. Board*, I.L.R. (1937) M. 197=1936 M.W.N. 1191=44 L.W. 843=(1937) 1 M.L.J. 475=1937 M. 106.

(g) *Pramatha Nath* v. *Pradyumna*, 52 C. 809=52 I.A. 245=23 A.L.J. 537=49 M L.J. 30 1925 M.W.N. 431=27 Bom. L.R. 1064 22 L.W. 492=30 C.W.N. 25=1925 P.C. 139.

(h) *Hari* v. *Antaji*, 44 B. 468=56 I.C. 459=22 Bom. L.R. 334.

(i) *Venkatachala Mudaliar* v. *Sambasiva Mudaliar*, 25 L.W. 377=105 I.C. 711 =52 M.L.J. 288=1927 M 465.

(j) *Bijoychand* v. *Kalipada*, 41 C. 57=20 I.C. 78=17 C.W.N. 1013; *Doorga* v. *Sheo*, 7 C.L.R. 278.

(k) *Purna Chandra* v. *Gopal*, 8 C.L.J. 369.

(l) *Panchapagesa* v. *Sevugam*, 112 I.C. 65=1929 M. 118.

595. Conversion into secular property.—In *Doorganath* v. *Ram Chunder*,[m] the Privy Council laid down that "where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction." It will thus be clear that the property of a public religious endowment can never be converted into secular property by the Shebait or the members of the founder's family. Even in the case of property dedicated to a family idol, the Shebait alone by his dealings cannot give the property dedicated a different turn. It is only the consent of the members of the family interested that can convert the debutter property into secular property,[n] and such consent or consensus must be of all the members of the family, both male and female, who are interested in the worship of the deity.[o] In the recent case of *Surendrakrishna* v. *Bhubaneshwari*,[p] it was held that the proposition that a dedication can be set aside at any particular time by the consent of all parties then interested in the endowment has no warrant in Hindu Law and that such a thing can never be done by means of a bargain between the adult male members, the females and minor members not joining in it. But in view of the fact that in the case of a private endowment the public are not interested in its continuance, it appears to be sufficient if the adult male members of the family who may for all practical purposes be taken to represent the whole family including its female members and those who are still minors, consent to convert the property dedicated to a family idol into secular property. The decision of the Madras High Court in *Appu Pattar* v. *Bhagavati*[q] and that of the Calcutta High Court in *Gobinda Kumar* v. *Debendra*[r] countenance this view.[s]

596. Power to incur debts.—It is competent for the Shebait of property dedicated to the worship of an idol, in the capacity as Shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity to incur them and in this respect the authority of the Shebait would appear to be analogous to that of the manager for an infant heir as laid down in *Hunoomanpersaud's case*.[t] The Shebait

(m) 2 C. 341=4 I.A. 52.

(n) *Manmohan* v. *Sidheswar Dubey*, 76 I.C. 213=27 C.W.N. 218=1923 C. 177.

(o) *Chandi Charan* v. *Dulal Chundra*, 54 C. 30=1926 C. 1083=30 C.W.N. 930.

(p) 60 C. 54=1933 C. 295; *Panna Sundari* v. *Benares Bank*, 1938 C. 81; See also *Bhupati Nath* v. *Ram Lal*, 37 C. 128 =14 C.W.N. 18=3 I.C. 642.

(q) 21 M.L.J. 588=11 I.C. 633.

(r) 12 C.W.N. 98.

(s) See a discussion of this question in *Bhabatarini* v. *Asmantara*, 1938 C. 490.

(t) *Venkataraman* v. *Sivagurunatha*, 1933 M. 639.

being entrusted with the possession and management of the estate of the idol which can be said to hold it only in an ideal sense, it follows that he must of necessity be empowered to do whatever may be necessary for the service of the idol[u] and for the benefit and preservation of the estate, at least to as great a degree as the manager of an infant heir. Were this not so, the property of the idol might be wasted or destroyed and its worship discontinued for want of the necessary funds to preserve and maintain them.[v] The test is: is the debt in the particular instance one that a prudent owner would incur in order to benefit the estate? If the answer is in the affirmative, a *bona fide* lender is not affected by the precedent mismanagement of the Shebait. The lender cannot of course justify a charge grounded on a necessity which his own wrong has helped to cause. Where he is not shown to have acted *mala fide*, the lender ought not to suffer simply because with better management the necessity in question would not have arisen.[t] The same principle applies to the power of a Mahant to incur debts binding on the estate of the *mutt*.[w] In lending moneys to managers of religious institutions, the creditor must not only show that the purposes were necessary purposes but also that he made *bona fide* enquiries and satisfied himself that on the occasion on which he made the advance, the loan was justified by the state of the institution's finances.[x]

597. Execution of decree against debutter property.—Where a decree in respect of a debt incurred for binding purposes by the Mahant or Shebait is made, the proper procedure to be adopted in executing the decree is to appoint a Receiver for the rents and profits of the property and the proceeds from the offerings etc., and direct him to apply in discharge of the decree debt till it is paid off, the balance that remains after payment of all expenses connected with the temple or *mutt* and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the Matadhipathi.[y] It makes no difference whether the decree is a simple decree or a mortgage decree.[y]

(u) *Anania* v. *Prayag*, I.L.R. (1937) 1 C. 84; This case lays down the test for determining what is necessary for the service of an idol.

(v) *Prosunno Kumari* v. *Golab Chand*, 2 I.A. 145.

(t) *Venkataraman* v. *Sivagurunatha*, 1933 M. 639.

(w) *Venkata Balagurumurti* v. *Balakrishna*, 32 L.W. 538=1930 M.W.N. 925 =60 M.L.J. 90=1930 M. 1009; *Vibhudapriya* v. *Lakshmindra*, 50 M. 497=54 I.A. 228=29 Bom. L.R. 955=1927 M.W.N. 507 =25 A.L.J. 697=31 C.W.N. 1021=53 M.L.J. 196=1927 P.C. 131; *Sundaresan* v. *Viswanada*, 45 M. 703=16 L.W. 83=43 M.L.J. 147=1922 M.W.N. 444=1922 M. 403; *Lakshmindrathirtha* v. *Raghavendra* 43 M. 795=16 L.W. 139=39 I.C. 287=39 M.L.J. 174=1920 M.W.N. 568.

(x) *Venkatacharyulu* v. *Ramakrishna*, 121 I.C. 153=1930 M. 439.

(y) *Vibhudapriya* v. *Lakshmindra*, 50 M. 497=54 I.A. 228=29 Bom. L.R. 955= 1927 M.W.N. 507=25 A.L.J. 697=31 C. W.N. 1021=53 M.L.J. 196=1927 P.C. 131 case of a Mutt; *Niladri Sahu* v. *Mahant Chaturbuj Das*, 6 P. 139=53 I.A. 253=25 A.L.J. 8=28 Bom. L.R. 1418=31 C.W. N. 221=51 M.L.J. 822=1926 M.W.N. 857 =1926 P.C. 112.

598. Res judicata against successor.—Judgments obtained against a former Shebait or Mahant in respect of debts properly and necessarily incurred by him for the service and benefit of the idol or the *mutt* are binding upon succeeding Shebaits or Mahants, who in fact form a continuing representation of the property belonging to the idol or the *mutt*. If this were not so no Shebait or Mahant would be able to obtain assistance in times of need and when he obtains it he could defeat the creditors by transferring the property to another Shebait or Mahant. But before applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied upon are untainted by fraud or collusion and that the necessary and proper issues were raised, tried and decided in the suits which led to them.[z] If the decree is a compromise decree it must be shown to the satisfaction of the Court that the compromise was brought about *bona fide* and in the interests of the institution.[a]

599. Temple not a juridical person.—The doctrine which treats the idol and a *mutt*[b] as juridical persons for purposes of suing and being sued cannot be extended to include the building in which the idol is installed as in some way itself becoming a religious institution, since such an unwarranted extension would result in two juridical persons co-existing in the same institution.[c]

600. Powers of alienation.—The position of a Shebait of an idol[d] or that of a *Mahant of a mutt*[e] in regard to the alienation of the debutter property is analogous to that of a manager of an infant heir as defined in *Hunoomanpersaud's case*. He can doubtless sell or mortgage the lands, if there is an actual, special and unavoidable necessity of the institution to do so, but that necessity would have to be proved by those who allege that it existed. Except in a case of such unavoidable necessity, the Shebait, the manager, or the trustee of a temple or the Mahant of a *mutt*, has no power to sell or mortgage the endowed property in his custody or to impair the endowed property by creating or granting in favour of any one rights of permanent occupancy in the endowed lands[f] and it has even been held that there is no power in the

(z) *Prosunno Kumari v. Golab Chand*, 2 I.A. 145

(a) *Manikka v. Balagopalakrishna*, 29 M. 553=16 M.L.J. 415; *Nanda Lal v. Kumar*, 41 C.W.N. 464; *Ramdhan v. Prabati*, 16 Pat. 476=18 Pat. L.T. 454=1937 Pat. 519.

(b) *Babajirao v. Luxmandas*, 28 B. 215 =5 Bom. L.R. 932.

(c) *Thakardwara v. Ishan Das*, 9 Lah. 588=1928 L. 375.

(d) *Doorganath v. Ram Chunder*, 2 C. 341=4 I.A. 52.

(e) *Abhiram v. Shyama Charan*, 36 C. 1003=36 I.A. 148=4 I.C. 449=6 A.L.J. 857 =11 Bom. L.R. 1234=19 M.L.J. 530=14 C.W.N. 1 (P.C.).

(f) *Nainapillai Marakayar v. Ramanathan Chettiar*, 47 M. 337=51 I.A. 83=19 L.W. 259=22 A.L.J. 130=1924 M.W.N. 293=46 M.L.J. 546=28 C.W.N. 809=1924 P.C. 65; *Ponnambala v. Periyanan*, 44 M.L.W. 1=1936 P.C. 183=59 M. 809=63 I.A. 261=71 M.L.J. 105=38 Bomb. L.R. 702 =40 C.W.N. 901.

Court to grant an application by a Shebait asking for leave of Court to sell or mortgage the debutter property for an alleged necessity, on the ground that the point involved cannot be adjudicated on before the transaction is entered into.[g]

601. Legal necessity.—The power to incur debts of the manager of a religious endowment is to be measured by an existing necessity for incurring them;[z] in other words, in adjudicating on the binding nature or otherwise of an alienation by the Shebait or manager of a religious endowment of the debutter property, it is the immediate and not the remote cause, the *causa causans*, of the borrowing which has to be considered.[h] In *Niladri Sahu's case*, the Mahant of a *mutt* borrowed large sums of money on high rates of interest for erecting pucca buildings to accommodate the various rich and influential devotees resorting to the *mutt*, for improving the *mutt* buildings and for carrying on the worship in the *mutt*: The buildings were accordingly erected and were being utilised by the Mahant for the intended purposes. To avoid the heavy interest that had to be paid yearly on the loans, he borrowed on easy terms on the security of the *mutt* properties. The question arose whether the mortgage was binding on the *mutt* properties. Their Lordships of the Privy Council laid down that the power of a Mahant or Shebait to alienate properties belonging to the endowment must be measured by the necessity existing at the time of the alienation and that any previous mismanagement of the Shebait which made the alienation imperative was an irrelevant consideration. "The immediate cause of the borrowing was the *mutt's* need of money to carry on and pay for its services. The remote cause of the *mutt's* need was due to the profligate expenditure of the Shebait. It would have been no answer to the creditor's suit to say 'Oh your money was only borrowed because the income of the *mutt* was spent by a profligate Shebait and there was no money to carry on the services of the *mutt*.' So in the present case even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which by the way has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, was to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which those earlier loans were made imposed upon him. It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though

(z) See page 604, foot-note (z).

(g) *Iswar* v. *Henry*, 41 C.W.N. 627=I.L.R. (1937) 2 C. 133.

(h) *Niladri Sahu* v. *Mahant Chaturbhuj*, 6 P. 139=53 I.A. 253=25 A.L.J. 8=28 Bom. L.R. 1418=31 C.W.N. 221=51 M.L.J. 822—1926 M.W.N. 857=1926 P.C. 112.

the remote cause of it was the getting into debts by the building operation. In their Lordships' view the principle of the case of *Prosunno Kumari* v. *Golab Chand*[i] applies to this case." Besides a Shebait's power of alienation must be exercised for purposes of defence and not of aggrandisement, as a shield and not as a sword. Where there is an imperious necessity or an unavoidable necessity in the sense that it is impracticable duly to carry out the service and worship of the deity and matters incidental thereto or to preserve the dedicated property without incurring the expenditure to defray which the alienation is contemplated, such an alienation is clearly one for the benefit of the deity; but if there is no such necessity, the fact that the value of the estate will be increased if an alienation by sale, mortgage, exchange or otherwise is effected will not justify the transaction.[j] The following have been held to be necessities justifying an alienation by the Mahant or the Shebait; (1) defence of Mahant's title;[k] (2) customary feeding of Brahmins and rebuilding a dilapidated dining hall;[l] (3) purchase of goods necessary for the performance of the worship and the feeding of the worshippers;[m] (4) performance of the Shradh of the deceased Mahant;[n] (5) expenses of keeping up the religious worship, repairing the temples[o] and other possessions of the idol, defending hostile litigious attacks and other like objects.[p]

602. Ancient alienations.—Although the manager for the time being of a religious charity has no power to make a permanent alienation of the endowed property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. Thus where a transaction is challenged after a lapse of a long time, when every party to the transaction has passed away and it becomes completely impossible to ascertain the circumstances which caused the original grant to be made, it is only following the policy, which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the

(i) 2 I.A. 145.

(j) *Nagendra* v. *Rabindra*, 53 C. 132=1926 C. 490=30 C.W.N. 389.

(k) *Kedar Nath* v. *Jagar Nath*, 74 I.C. 134=1924 P. 355.

(l) *Vibhudapriya* v. *Lakshmindra*, 50 M. 497=54 I.A. 228=29 Bom. L.R. 955=1927 M.W.N. 507=25 A.L.J. 697=31 C.W.N. 1021 =53 M.L.J. 196=1927 P.C. 131.

(m) *Venkatabalagurumurthi* v. *Balakrishna Odayar*, 32 L.W. 538=1930 M.W.N. 925—60 M.L.J. 90=1930 M. 1009.

(n) *Ram Narayan Das* v. *Gopal Das*, 76 I.C. 68=1924 P. 611.

(o) *Doorganath* v. *Ram Chunder*, 2 C. 341=4 I.A. 52.

(p) *Prosunno Kumari* v. *Golab Chand*, 2 I.A. 145.

grant was lawfully and not unlawfully made,[q] even though the grant itself does not contain any recital as to necessity.[r]

603. Benefit.—The manager of a religious endowment can validly alienate permanently the debutter property for the benefit of the estate. It is impossible to give a precise definition of the nature of things to be included under the description "benefit to the estate." The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are to be taken as benefits and what not.[s] Attractive and lucrative as money-lending may be in India, a Shebait would not be justified in selling debutter land solely for the purpose of getting capital to embark in a money lending business. No countenance should be given to the notion that a Shebait is entitled to sell debutter land solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debutter land itself.[t]

604. Permanent lease.—It is a breach of duty on the part of a Shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debutter lands at fixed rent, however adequate that rent may be at the time of granting it, by reason of the fact that by this means the debutter estate is deprived of the chance it would have if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased.[u] This principle applies to building sites as well as to agricultural lands and to an absolute alienation of land in consideration of a premium.[u] A permanent lease granted by a Shebait or a Dharmakarta or Mahant in the absence of necessity justifying it can endure only for the grantor's lifetime, but his successor can continue it during his life in which case the receipt of rent by the

(q) ***Magniram*** **v.** ***Kasturbhai,*** 46 B. 481 =49 I.A. 54=42 M.L.J. 501=26 C.W.N. 473 =20 A.L.J. 371=24 Bom. L.R. 584=1922 M.W.N. 319=1922 P.C. 163; ***Murugesam Pillai*** **v.** ***Manickavasaka,*** 40 M. 402=44 I.A. 98=15 A.L.J. 281=19 Bom. L.R. 456=21 C.W.N. 761=32 M.L.J. 369=5 L.W. 759=1917 M.W.N. 487; ***Lakshmi Narayan*** **v** ***Jagadish,*** 1938 C. 541=42 C.W.N. 837 (a case of a shebait's deed of alienation containing recitals of necessity) following ***Banga Chandra*** **v.** ***Jagat Kishore,*** 44 C. 186 =43 I.A. 249=(1916) P.C. 110.

(r) ***Raman*** **v.** ***Karunakara,*** 38 L.W. 843 =1933 M. 852=1933 M.W.N. 79.

(s) ***Palaniappa*** **v.** ***Devastkamoney,*** 40 M. 709=44 I.A. 147=1917 P.C. 33=15 A.L.J. 485=19 Bom. L.R. 567=21 C.W.N. 729=33 M.L.J. 1=6 L.W. 222=1917 M.W.N. 507.

(t) ***Maharanee Shibessouree Debia*** **v.** ***Mothooranath Acharjo,*** 13 M.I.A. 270; ***Mayandi*** **v.** ***Chokkalingam,*** 27 M 291=31 I.A. 83=8 C.W.N. 545=14 M.L.J. 200 and ***Abhiram*** **v.** ***Shyama Charan,*** 36 C. 1003 =36 I.A. 148=6 A.L.J. 857=11 Bom. L.R. 1234=19 M.L.J. 530=14 C.W.N. 1=4 I.C. 449 (P.C.).

(u) ***Palaniappa*** **v.** ***Devastkamoney,*** 40 M. 709=44 I.A. 147=15 A.L.J. 485=19 Bom. L.R. 567=21 C.W.N. 729=33 M.L.J. 1=6 L.W. 222=1917 M.W.N. 507=1917 P.C. 33.

successor is properly referable to a new tenancy created by such successor.(v) A lease which, in spite of its being permanent, heritable and transferable, leaves to the idol the benefit of augmentation of rent, which is not fixed and which can be enhanced, cannot, however, be held to be beyond the competency of a Shebait on the ground that there was no necessity to justify it, and such a lease has been held to be binding on the succeeding Shebait.(w)

605. Alienations good for life of the alienor.—Where a Mahant alienates the debutter property either by way of a grant of a permanent lease or by way of absolute sale and there is no necessity to justify the alienation, the alienation is not *ab initio* void, but is good so long as he does not cease to be the Mahant by death or otherwise(x) so that the grantor himself cannot sue to avoid it on the ground that it was not justified by necessity.(y) The same rule applies even in the case of an unauthorised alienation by the Dharmakarta of a temple. Hence a permanent lease by the Dharmakarta of a temple, which is not justified by the necessity of the institution, is not void *ab initio* but is valid during the alienor's tenure of office, and hence the possession of the alienee does not become adverse during that period. A succeeding dharmakarta may either bring a suit for recovery of possession of the demised property, treating the possession of the lessee as having become adverse only from the date he assumed office, or he may continue the tenancy for the period of his own tenure, in which case such continuance may be referable to a new tenancy created by him and consequently the lessee's possession will not become adverse till the termination of his tenure of office. But there may be circumstances in any particular case justifying the inference that the rent received by a succeeding dharmakarta from a tenant in respect of a permanent cowle granted by a former dharmakarta was accepted as payable under a permanent right of the lessee and not as payable under a new tenancy created by such successor only for the period of his own tenure. In the recent case of *Ponnambala* v. *Periyanan*(z) a permanent lease was granted by the then

(v) *Ponnambala* v. *Periyanan*, 44 M L.W. 1=1936 P.C. 183=59 M. 809=63 I.A. 261=71 M.L.J. 105=38 Bom. L.R. 702=40 C.W.N. 901 ; *Vidya Varuthi* v. *Balusamy Ayyar*, 41 M. 831=48 I.A. 302=1922 P.C 123=15 L.W. 78=26 C.W.N. 537=24 Bom. L.R. 629 =41 M.L.J. 346=1921 M.W.N. 449=20 A.L.J. 497.

(w) *Bhabani Charan* v. *Suchitra Balanabi*, 1930 C. 270=51 C L.J. 25.

(x) *Ram Charan Das* v. *Naurangi Lal*, 12 P. 251=60 I.A. 124=1933 P.C. 75=37 L.W. 512=37 C.W.N. 541=64 M.L.J. 505= 1933 M.W.N. 272=14 P.L.T. 185=1933 A.L.J. 327=35 Bom. L.R. 530 ; *Ramalingam* v. *Nanditpat*, 1938 Pat. 143, holding that a mahant ceases to be a mahant by alienating the rest of the mutt properties so as to make limitation run from the date of such alienation and not only from the date of his death

(y) *Sivaprakasa* v. *Monickam*, 37 L.W 628=1933 M. 481=64 M.L.J. 577=1933 M.W.N. 344.

(z) *Ponnambala* v. *Periyanan*, 44 M.L.W. 1=1936 P.C. 183=59 M. 809=63 I.A. 261= 71 M.L.J. 105=38 Bom. L.R. 702=40 C.W.N. 901 ; *Vidya Varuthi* v. *Balusami Ayyar*, 44 M. 831=48 I.A. 301=1922 P.C. 123=15 L.W. 78=26 C.W.N. 537=24 Bom. L.R. 629 =41 M.L.J. 346=1921 M.W.N. 449=20 A.L.J. 497.

dharmakarta of a temple in 1865 and its validity remained unquestioned by three or four successive dharmakartas for a period of 37 years, though they were aware of the assertion by the lessee of his permanent tenancy and possession under it. The person who succeeded to the office after that period continued to accept rent from the lessee for more than 12 years. On these facts their Lordships of the Privy Council held that the proper inference to be drawn was that the last dharmakarta accepted the rent as payable in respect of a permanent right of tenancy which it was no longer in the power of the temple to repudiate, and not in respect of a new tenancy created by himself, and the adverse possession of the tenant under the permanent cowle having thus continued for more than 12 years, a suit for possession instituted subsequently on behalf of the temple on the ground that the permanent lease was not binding on the temple would be barred under Art. 144 of the Limitation Act.

606. Burden of proof of necessity on alienee.—The position of an alienee from the manager of a religious endowment is analogous to that of an alienee from the manager of an infant heir in regard to the burden of proof of necessity for the alienation.[a]

607. Powers of a Hindu widow and those of a Shebait compared.—The widow does not hold the estate in trust for the reversioners, but the Shebait, though not a trustee in the strict sense of the term, is only the manager or custodian of the debutter property. She cannot be removed from possession of the property, but a Shebait is liable to be dismissed for acts amounting to breach of trust. She is not accountable to any body in respect of the property in her charge, but a Shebait cannot spend the income except for the purposes of the institution. A Hindu widow has an estate unknown to the English law and unlike any other that may be created under the general law. But their powers are similar in respect of alienations of property in their charge under the special circumstances established by the judicial decisions.[b]

608. Position of the head of a Mutt and that of the Dharmakarta of a temple compared.—The position of a Dharmakarta is literally no better than that of the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee. His position is not that of a Shebait of a religious institution or of the Mahant of a *mutt*. These latter functionaries have a much higher right with larger powers of disposal and

(a) *Doorganath* v. *Ram Chunder*, 2 C 341=4 I.A. 52 (P.C.).

(b) *Behari Lal* v. *Murali Dhar*, 90 I.C. 567=1926 C. 287.

administration, and they have a personal interest of a beneficial character in the institution.[c] A *mutt* can have only one Mahant, while a temple may have more than one Dharmakarta. A Dharmakarta forfeits his office by reason of lunacy, while the head of the *mutt*, by reason of the religious sanctity attached to his office analogous to that attached to an idol in a temple, does not forfeit his position as such on that ground.[d]

609. Removal of Shebaits and Mahants.—The grounds for removing a Shebait from his office may not be identical with those upon which a trustee would be removed in England. The close intermingling of duties and personal interest, which together make up the office of a Shebait, may well prevent the closeness of the analogy; but as part of the office, it is indisputable that there are duties which must be performed and that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligation of his office can no longer be faithfully discharged, that is sufficient ground for his removal.[e] Thus where a hereditary trustee sets up a claim of private ownership of certain trust properties, and tries to support the claim by the concoction of accounts and resists recovery of the properties for the trust he should not be permitted to continue as trustee.[f] But nothing which falls short of fraud or dishonesty operates as a ground for his removal by Court.[g] Thus mere mistake or error of judgment[h] or a mere nonfeasance which does not seriously affect the institution, is no ground for removal[i] though in such cases the Court is entitled to give directions for better management either by appointing a committee of supervision or by framing a scheme of management.[h] A Mahant of a *mutt* is incompetent to continue as such if he marries[j] or drinks wine or visits prostitutes,[k] but mere lunacy of the Mahant is no ground

(c) *Srinivasa Chariar* v. *Evalappa Mudaliar*, 45 M. 565=49 I.A. 237=43 M.L.J. 536=16 L.W. 247=24 Bom. L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=1922 P.C. 325.

(d) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435=14 M.L.J. 105

(e) *Peary Mohan* v. *Manohar*, 48 C. 1019=48 I.A. 258=26 C.W.N. 133=19 A.L.J. 773=23 Bom. L.R. 913=41 M.L.J. 68=14 L.W. 104=1921 M.W.N. 558=2 P.L.T. 725=1922 P.C. 235; *Srinivasa Chariar* v. *Evalappa Mudaliar*, 45 M. 565=49 I.A. 237=43 M.L.J. 536=16 L.W. 247=24 Bom. L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=1922 P.C. 325.

(f) *Srinivasa Chariar* v. *Evalappa Mudaliar*, 45 M. 565=49 I.A. 237=43 M.L.J. 536=16 L.W. 247=24 Bom. L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=1922 P.C. 325.

(g) *Advocate-General of Bombay* v. *Moulvi Abdul Kadhir*, 18 B. 401.

(h) *Annaji* v. *Narayan*, 21 B. 556.

(i) *Thiruvengadath* v. *Srinivasa*, 22 M. 361; *Chotalal* v. *Manohar*, 24 B. 50=26 I.A. 199=4 C.W.N. 23=2 Bom. L.R. 516; *Nelliappa* v. *Punnaivanam*, 50 M. 567=25 L.W. 461=52 M.L.J. 415=1927 M.W.N. 233 =1927 M. 614.

(j) *Ram Parkash* v. *Anand Das*, 43 C. 707=43 I.A. 73=3 L.W. 556=14 A.L.J. 821 =18 Bom. L.R. 490=20 C.W.N. 802=31 M.L.J. 1=(1916) 1 M.W.N. 406=1916 P.C. 256.

(k) *Mohesh Chandra* v. *Gossain*, 23 C. W.N. 401=51 I.C. 884; *Kartick Chunder* v. *Rudrananda*, 25 C.W.N. 908=1921 C. 482; *Gnana Sambanda* v. *Manikkavasaka*, 40 M. 177=4 L.W. 306=34 I.C. 57=30 M.L.J. 274=(1916) 2 M.W.N. 43.

for removing him from office though a substitute may be appointed to carry on his duties till the disability lasts.[l]

610. Removal of trustee by votes.—In the case of a removal of a temple trustee[m] or a high priest of a religious brotherhood[n] by convening a meeting of persons empowered to appoint or remove him, it must be shown that he has been removed with due observance of the rules of natural justice and also for a cause which is sufficient to justify removal. The removal must be in consonance with the decision of the majority of qualified voters, the decision being determined by reference to votes given at the meeting and not by reference to views expressed outside it.[n]

611. Suit between co-trustees for account.—In the absence of an instrument of trust authorising a Shebait or trustee to call for an account from a co-trustee,[o] a mere suit for accounts by a trustee against his co-trustees is not maintainable in the absence of any allegation of any specific breach of trust or threatened breach of trust on the part of the co-trustees so as to justify an apprehension on the part of the plaintiff-trustee that he would also be liable for the breach on the ground that he has not taken proper action against them.[p]

612. General and special trustees.—The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenue by and under the management of those who hold possession. The general trustee is, after all, only a representative of the idol who is a juridical personage, and who is the true owner, and there is nothing legally incongruous in that personage having other subordinate representatives who have

(l) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435 =14 M.L.J. 105.

(m) *Sundaresa* v. *Subramania*, 13 L.W. 212=1921 M. 511.

(n) *Juro Ram* v. *Gobind*, 12 C.L.J. 497 =8 I.C. 124.

(o) *Rangacharya* v. *Raman Acharya*, 1928 A. 689.

(p) *Narayanan* v. *Mootha Poduval*, 33 M. 214=31 L.W. 24=1930 M. 295=1930 M.W.N. 199; See also *Subbiah* v. *Samiappa*, I.L.R. 1938 M. 586=47 L.W. 344=1938 M.W.N. 229=(1938), 1 M.L.J. 334=1938 M. 353 (F.B.) (Limitation).

the right to manage certain special portions of his property, and pay over the income when collected to the endowment, and even to some degree to control its use. Such rights would not be inconsistent with the existence of a general trustee, but they would be fatal to his claim to possession of the properties from which those revenues are derived.(q) A *Kattalai* of a temple falls under the category of such special trusts and is a distinct endowment under a separate trustee to which specific items of expenditure are assigned as legitimate charges to be paid therefrom. A scheme for the management of the temple which obliterates the individuality of the various *Kattalais* and pools their resources in one large fund is defective inasmuch as the incomes to the temple do not all belong to the idol and cannot be mixed up and utilised for all the purposes of the temple indiscriminately, though the idol is interested in the proper performance of the distinct duties attached to each *Kattalai*. Thus the surplus income of *Annadhana Kattalai* cannot be utilised for the repairs or other expenses in connection with the temple.(r)

613. Trusteeship by prescription.—A trusteeship with power to appoint a successor can be acquired by prescription and when title is thus acquired by statutory operation, the title of the true owner is not revived by his re-entry; in other words, even if the lawful owner should acquire possession, he is not thereby remitted to his original rights.(s)

614. Devolution of the office of Mahant.—In determining who is entitled to succeed as Mahant to the deceased head of a religious institution, the only law to be observed is to be found in custom and usage of the particular *mutt* or asthal in question. It is the usage that forms the controlling rule with regard to this right and the question cannot be settled by an appeal to the general customary law.(t) As was observed in *Greedharee Doss* v. *Nundokissore*,(u) "The only law as to those Mahants and their offices, functions and duties is to be found in custom and practice which is to be proved by testimony." The *mutts* are of three descriptions, namely, *mouroosi*, *punchaiti*, and *hakimi*. In the first the office of chief Mahant is hereditary and devolves upon the chief disciple of the existing Mahant who, moreover, usually nominates him as his successor. In the second the office is elective, the presiding Mahant

(q) *Ambalavana* v. *Meenakshi*, 43 M. 665–47 I.A. 191–1921 P.C. 97–18 A.L.J. 594–39 M.L.J 50–12 L.W. 212=25 C.W.N. 1 1921 M.W.N. 11.

(r) *Manicka Vachaka* v. *Vaithilinga*, 18 L.W. 247–74 I.C. 115–1924 M. 168.

(s) *Kassim Hassan* v. *Hazra*, 60 I.C. 165–32 C.L.J. 151.

(t) *Ram Parkash* v. *Anand Dns*. 43 C. 707 43 I.A. 73–3 L.W. 556–14 A.L.J. 621–18 Bom. L.R. 490–20 C.W.N. 802–31 M.L.J. 1=(1916) 1 M.W.N. 406–1916 P.C. 256; *Genda Puri* v. *Chhater Puri*, 9 A. 1–13 I.A. 100; *Lahar Puri* v. *Puran Nath*, 37 A. 298=42 I.A. 115=17 Bom. L.R 475=19 C.W.N. 718–29 M.L.J. 75–2 L.W. 589–1915 M.W.N. 526=1915 P.C. 4; *Satnam* v. *Bhagwan*, 1938 P.C. 216.

(u) 11 M.I.A. 405.

being selected by an assembly of Mahants. In the third the appointment of the presiding Mahant is vested in the ruling power or in the party who endowed the temple.[v] The proof of usage of the institution becomes necessary only when there is no rule of succession laid down by the founder of the institution.[w]

615. Mahant's power to appoint successor.—The power of appointing his successor cannot be delegated or transferred by the Mahant to another[x] and must be exercised *bona fide* in the interests of the *mutt* and not in furtherance of his own interests. Thus where the motive which influenced the head of a *mutt* in appointing a particular person as his successor was found to be a desire to avoid the risk of being prosecuted on charges of forgery and murder which were being made by the person so appointed, the appointment was held to be invalid on the ground that it was made solely in his own interests and not in the interests of the *mutt*.[y] Besides, the nomination of the successor must fall only on one who is competent to hold the office according to the usage of the institution.[z] For instance, the person chosen may be disqualified by reason of bodily deformity or bodily disease such as leprosy, or disease of the mind, or of the leading of a life which is immoral or inconsistent with the religious vows of the brotherhood. In all such cases the nomination would be void.[z] The nomination of the successor, unless sanctioned by the usage of the institution, cannot be made by a will.

616. Partition.—The headship of a **mutt** is not a matter of division and where the reigning Mahant appoints two successors and divides the debutter property amongst them, the transaction amounts to a partition in the office of Mahant which is, therefore, invalid.[a]

617. Election of Mahant.—For an election of a Mahant to be valid and effectual it must be by a majority of the persons qualified to elect and assembled for the purpose, and a separate election by a

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(v) *Ram Parkash* v. *Anand Das*, 43 C. 707—43 I.A. 73=3 L.W. 556=14 A.L.J. 621 —18 Bom. L.R. 490=20 C.W.N. 802=31 M.L.J. 1=(1916) 1 M.W.N. 406—1916 P.C. 256.

(w) Ibid.—*Muttu Ramalinga* v. *Perianayagam*, 1 I.A. 209; *Rajah Vurmah* v. *Ravi Vurmah*, 4 I.A. 76—1 M. 235.

(x) *Mahanth Ramji* v. *Lachhu*, 7 C.W.N. 145.

(y) *Nataraja Thambiran* v. *Kailasam Pillai*, 44 M. 283=48 I.A. 1=25 C.W.N. 145 =13 L.W. 301=18 A.L.J. 1041—39 M.L.J. 98=1920 M.W.N. 371=1921 P.C. 84 following *Ramalingam Pillai* v. *Vythialingam Pillai*, 16 M. 490=20 I.A. 150.

(z) *Ram Parkash* v. *Anand Das*, 43 C. 707—43 I.A. 73=3 L.W. 556 14 A.L.J. 621 —18 Bom. L.R. 490—20 C.W.N. 802=31 M.L.J. 1=(1916) 1 M.W.N. 406—1916 P.C. 256.

(a) *Gobinda* v. *Ram Charan Das*, 52 C. 748=29 C.W.N. 931=1925 C. 1107; *Sethuramaswamiar* v. *Meruswamiar*, 41 M. 296 =45 I.A. 1=16 A.L.J. 113=20 Bom. L.R. 514=22 C.W.N. 457=34 M.L.J. 130=7 L.W. 22=43 A.C. 806—1917 P.C. 190.

faction of the electorate alone is invalid and inoperative to confer upon the person so elected the office of the Mahant.[b]

618. Devolution of the office of Shebait.—According to Hindu Law, when the worship of a Thakur has been founded, the Shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing or some circumstances to show a different mode of devolution.[c] The founder of a Hindu debutter is competent to lay down rules to govern the succession to the office of Shebait subject to the restriction that he cannot create any estate unknown and repugnant to Hindu Law,[d] and the rule laid down in the *Tagore case* prohibiting a Hindu from creating a line of succession unknown to Hindu Law applies also to the appointment of a Shebait to a family idol.[e] If the line of succession of Shebait is laid down by the founder in the instrument of endowment, he cannot subsequently alter the line of succession so laid down in the absence of any reservation to that effect in the trust deed.[f] But if the succession prescribed in the deed of endowment entirely fails[g] or if the Shebait appointed by the founder has no power to appoint his successor[h] or if the Shebait having power to appoint his successor dies without exercising the power, then the Shebaitship or the power of appointing a shebait [subject to the condition that the devolution of shebaitship in the ordinary line of descent is not inconsistent with the purpose of the founder[i]] reverts to the founder or his heirs,[j] whether they be males or females,[k] though if they happen to be females, they have to perform the spiritual function by appointing male deputies.[l] The mere fact

(b) *Lahar Puri* v. *Puran Nath*, 37 A. 298=42 I.A. 115—17 Bom. L.R. 475=19 C.W.N. 718=29 M.L.J. 75=2 L.W. 589=1915 M.W.N. 526—1915 P.C. 4.

(c) *Pramatha Nath* v. *Pradyumna*, 52 C. 909—52 I.A. 245=23 A.L.J. 537—49 M.L.J. 30—1925 M.W.N. 431=27 Bom. L.R. 1064= 22 L.W. 492=30 C.W.N. 25=1925 P.C. 139; *Gossami Sree Gridharji* v. *Ramanlalji*, 17 C. 3=16 I.A. 137; *Gulab Dass* v. *Manohar*, 1937 Oudh 490; *Mt. Anuragi* v. *Parmanand*, 1939 Pat. 1, where the whole law is discussed; *Prakash Chandra* v. *Subodh Chandra*, I.L.R. (1937) 1 C. 515=1937 C. 67; *Ramachar* v. *Venkata*, 1938 M. 661.

(d) *Manohar* v. *Bhupendra*, 37 C.W.N 29—1932 C. 791=60 C. 452; *Ganesh* v. *Lal Behary*, 1936 P.C. 318=63 I.A. 448.

(e) Ibid.—*Kandarpamohan* v. *Akshaychandra*, 50 C. 706=1933 C. 529; *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*, 23 M. 271=27 I.A. 69=4 C.W.N. 329—10 M.L.J. 29—2 Bom. L.R. 597.

(f) *Manorama Dasi* v. *Dhirendra Nath*, 34 C.W.N. 1087=1931 C. 329; *Gaurikumari* v. *Ramanimoyi*, 50 C. 197—26 C.W.N. 320 —1923 C. 30; *Narayan* v. *Bhuban*, 1934 C. 244—38 C.W.N. 15; *Bindraban* v. *Sri Godamaji*, 1937 A.L.J. 399—1937 A. 394; *Gurupada* v. *Manmohan*, 1936 C. 215.

(g) *Sheo Prasad* v. *Aya Ram*, 29 A. 663 ..4 A.L.J. 565; *Gopal Chunder* v. *Kartick Chunder*, 29 C. 716.

(h) *Ganga Charan* v. *Ram Chandra*, 50 A. 165=1928 A. 33=25 A.L.J. 902; *Nirmal* v. *Jyoti*, 42 C.W.N. 1138 (a shebait having the power of appointing his successor can relinquish his office to the nominee even during his life-time); *Chandrika* v. *Bhola*, 1937 Oudh W.N. 745=1937 Oudh 373.

(i) *Gurupada* v. *Manmohan*, 1936 C. 215.

(j) *Ashutosh Seal* v. *Benode Behari*, 1930 C. 495=34 C.W.N. 177; *Annasami* v. *Ramakrishna*, 24 M. 219=11 M.L.J. 1.

(k) *Annaya* v. *Ammakka*, 41 M. 886= 8 L.W. 301=35 M.L.J. 196=1918 M.W.N. 569—47 I.C. 341 (F.B.).

(l) *Ramasundaram* v. *Savundratha Ammal*, 1 L. W. 900=27 I. C. 440=1914 M.W.N. 919.

that subsequent to the foundation of a Thakur by a person, some other person endows properties for the carrying on of the worship does not entitle the latter or his heir to claim the right of shebaitship which vests normally in the original founder and his heirs.[m] Nor can there be a devolution of the right of a *de facto* shebait upon his heir unless the latter succeeds in proving independently that he himself is a *de facto* shebait in the sense that he exercises all the functions of a shebait and is in possession of the debutter property, though he may be lacking in the legal title to hold the same.[n]

619. Shebait nominated by will.—In the absence of usage justifying it the shebait cannot nominate his successor by a will.[o]

620. Alienation of office.—The office of Shebait is *res extra commercium* and a sale of the trusteeship either in execution of a decree against the trustee[p] or privately for the pecuniary advantage of the trustee,[q] even when sanctioned by custom, is void and gives no title to the purchaser.[r] The rule of necessity justifying an alienation extends only to an alienation of the temporalities of the idol or the *mutt* and does not and cannot be made to apply to an alienation of the spiritual rights and duties, the fulfilment of which is the primary function of a Shebait or Mahant.[s] Even the circumstance that the office has been sold coupled with an obligation to manage the property in conformity with the existing trust does not validate the transfer.[t] The principle is that Courts ought not to allow any trafficking in sacred offices, even where it is permitted by the usage of the institution.[u] It would be contrary to public policy to allow a religious office to be transferred either by private sale or by sale in execution of a decree, for if a person professing a religion different from Hinduism were to become the purchaser, it would lead to no end of complications and disturbances detrimental to the highest degree to the interests of other Shebaits and votaries generally.[v] But no such objection exists

(m) *Prasanna* v. *Bengal Duars Bank*, 1936 C. 744; *Gangaram* v. *Dooboo*, 1936 N. 223; *Ananda* v. *Broje*, 50 C. 292.

(n) *Panchkari* v. *Amode*, 41 C.W.N. 1349 =1937 C. 559.

(o) *Sham Devi* v. *Ramnath*, 1926 Lah. 273; *Goswami* v. *Ras Bihari*, 44 A. 590= 20 A.L.J. 527=1922 A. 285; *Rajeshwar* v. *Gopeshwar*, 35 C. 226=12 C.W.N. 323; see contra in *Mancharan* v. *Pranshankar*, 6 B. 298.

(p) *Ganesh* v. *Shankar*, 10 B. 395.

(q) *Sabitri Thakurain* v. *Mrs. F. Savi*, 12 P. 359=1933 P. 306=145 I.C. 1; *Prasanna* v. *Bengal Duars Bank*, 1936 C. 744.

(r) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235=4 I.A. 76; *Gnanasambandha* v. *Velu Pandaram*, 23 M. 271=4 C.W.N. 329 =10 M.L.J. 29=2 Bom. L.R. 597=27 I.A. 69; But see *Haridas* v. *Charu*, 60 C. 1351=37 C.W.N. 978=1933 C. 757.

(s) *Nagendra Nath* v. *Rabindra Nath*, 53 C. 132=1926 C. 490=30 C.W.N. 389.

(t) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235=4 I.A. 76.

(u) *Govindaswami* v. *Appu*, 43 M.L.W. 331=1936 M. 103=69 M.L.J. 888; *Narayana* v. *Ranga*, 15 M. 182; *Kuppa* v. *Dorasami*, 6 M. 76; *Sundarammal* v. *Yogavana*, 38 M. 850=26 M.L.J. 315=1 L.W. 276=1914 M.W.N. 286; *Nallasami* v. *Sadasiva*, 40 L.W. 799=1935 M. 5 (2)=1935 M.W.N. 1342=67 M.L.J. 759.

(v) *Mallika* v. *Ratanmoni*, 1 C.W.N. 493.

in the case of a renunciation by a Shebait of his right in favour of his co-shebaits[w] or a person standing in the line of succession.[x] But a gift of the office in favour of a person outside the family of the donor, unless sanctioned by custom and is for the benefit of the institution, is void.[y]

621. Right to worship.—Except in the case of private endowments, the devotees and worshippers of an idol or sacred object are entitled to reasonable facilities to resort to it for purpose of devotion or worship. But this right of worship in the public is not an absolutely unrestricted right. If the institution is intended for and belongs to a particular sect or caste, none other than those belonging to that sect or caste is entitled to free access.[z] Even amongst persons of the sect or caste to which the temple belongs, the right of worship is subject to reasonable regulations for preventing over-crowding etc. In a temple there are two portions, the inner sanctuary and the portion of the temple outside it. In the case of the inner sanctuary or the Holy of Holies, the access may be regulated by special rules for the special right to enter and perform the worship therein. But in the case of the outer temple, every Hindu has ordinarily a right to enter it and perform his act of worship and obtain sight of the idol without any payment of fees.[a]

622. Right to offerings.—There is a fundamental distinction between offerings made to the deity and the offerings made to the Mahant personally. If the offerings are made to the deity, they belong to the endowment and must be applied by the Mahant for the purposes of the endowment. On the other hand if the offerings are made by the faithful to the Mahant personally they do not become merged in the income of the endowment. Whether a particular offering is made to the deity or to the Mahant personally depends upon the intention of the person offering it and no formulation of an inflexible rule is possible.[b]

In the absence of a custom or a declaration by the founder of the temple that all offerings made at the time of worshipping the idol should belong to the officiating priest, all such offerings belong

(w) *Nired* v. *Shibadas*, 36 C. 975=13 C.W.N. 1084=3 I.C 76; *Sabitri Thakurain* v. *Mrs. F. A. Savi*, 12 P. 359=1933 P. 306.

(x) *Mancharam* v. *Pranshankar*, 6 B. 298; *Alasinga* v. *Venkata*, 43 M.L.W. 614 =1936 M. 294—70 M.L.J. 424; *Sri Mahant* v. *Govindacharlu*, 41 L.W. 63=68 M.L.J. 295=1935 M.W.N. 59=1935 M. 220.

(y) *Rajaram* v. *Ganesh*, 23 B. 131; *Bhupati Nath* v. *Rama Lal*, 37 C. 128=14 C. W. N. 18=3 I. C. 642 (F. B.); *Raghunath* v. *Purnanand*, 47 B. 529=1923 B. 358=25 Bom. L. R. 207.

(z) *Vengamuthu* v. *Pandaveswara*, 6 M. 151; *Sankaralinga* v. *Raja Rajeswara*, 31 M. 236=35 I.A. 176=12 C.W.N. 946—10 Bom. L.R. 781=18 M.L.J. 387; *Saklat* v. *Bella*, 53 I.A. 42=3 Rang. 582=23 A.L.J. 1016= 49 M.L.J. 821=30 C.W.N. 289=28 Bom. L.R. 161=1925 P.C. 298.

(a) *Shankarlal* v. *Dakore Temple Committee*, 94 I.C. 47=28 Bom. L.R. 309=1926 B. 179.

(b) *Kamud Ban* v. *Tripura Charan*, 60 I.C. 464=1921 Cal. 763=35 C.L.J. 188.

to the temple and not to the priest.[c] This does not mean that there cannot be a valid arrangement by which the archakas in a temple are remunerated by a share of the offerings and collections at the temple[d] and where the practice whose origin is lost in antiquity is that the archaka should take the whole of the hundi collections for his own maintenance, a legal origin of such a practice is presumable for the purpose of holding that practice as valid.[e]

623. Passes and Fees for Darshan.—Every Hindu has ordinarily a right to enter a Hindu temple to obtain sight of the idol and perform his act of worship from a distance in the main body of the temple. But this right of worship is not an absolutely unrestricted right and is subject to reasonable regulations for preventing overcrowding and in the interests of safety and decorum and decency in the temple by the issue of passes to the intending worshippers. But if the trustees go further and claim a right to demand some fees for the passes, other considerations are brought to play, and it is necessary to distinguish between the levy of fees in the main body of the temple, such as the *sabha mandap*, and the levy of fees, so to speak, in the *Holy of Holies* and for special rites, as distinguished from the general worship or darshan or sight of the idol. While a demand for payment for worship from a distance in the main body of the temple is undoubtedly repugnant to Hindu ideas, the regulation of access to the Holy of Holies by the imposition of fees for the special right to enter and perform worship therein, is not open to the same objection, though even here the onus is upon the temple authorities imposing the fee to establish that such imposition is either necessary or desirable in the interests of the temple.[f]

624. Management by turns.—Where the office of the manager of a public temple which might have been originally conferred on a single individual becomes in course of time vested by descent in more than one person, it is neither unusual nor improper for the parties interested to arrange among themselves without applying to the Court, for the due execution of the functions belonging to the office in turn or in some settled order and sequence. Such an arrangement is one which will be sanctioned

(c) *Manohar* v. *Lakshmiram*, 12 B. 247 affirmed in *Chotalal* v. *Manohar*, 24 B. 50 =28 I.A. 199=4 C.W.N. 23=2 Bom. L.R. 516.

(d) *Sri Mahant* v. *Govindacharlu*, 68 M.L.J. 295=1935 M.W.N. 59=41 M.L.W. 63=1935 M. 220.

(e) *Venkataramanaswami* v. *Ramaswami*, 46 L.W. 758=1937 M.W.N. 1170=(1937) 2 M.L.J. 893; See also *Gangadhara* v. *Doraisami*, 1937 M.W.N. 975.

(f) *Shankarlal* v. *Dakore Temple Committee*, 28 Bom. L.R. 309=1926 B. 179; See also *Asharam* v. *Manager of Dakore Temple Committee*, 44 B. 150=22 Bom. L. R. 232—55 I. C. 956; *Kalidas* v. *Gor Parjaram*, 15 B. 309; *Venkataramana* v *Kasturiranga*, 40 M. 212 at 220=31 M.L.J. 777=5 L.W. 625=(1917) M.W.N. 400=38 I.C. 73.

by the Court if its authority is invoked and does not involve any breach of trust or any improper delegation of the duties of a trustee.(g) But this right of management by rotation cannot be insisted upon by the individual members of a Mitakshara joint family, since, in their case, the manager of the family represents every one of them and is entitled to manage the temple as in the case of any other property belonging to the joint family.(h)

625. Statutory provisions regarding charitable and religious endowments.—The statutory provisions regarding religious and charitable endowments are contained in the Religious Endowments Act, XX of 1863, the Charitable Endowments Act, VI of 1890, Ss. 92 and 93 of the Code of Civil Procedure, the Charitable and Religious Trusts Act, XIV of 1920, and so far as the mufassal parts of the Madras Presidency are concerned, by the Madras Hindu Religious Endowments Act, II of 1927.

THE RELIGIOUS ENDOWMENTS ACT (XX of 1863).

(AS AMENDED UP-TO-DATE)

An Act to enable the Government to divest itself of the management of Religious Endowments

Preamble.

Whereas it is expedient to relieve the Boards of Revenue, and the Local Agents, in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX, 1810, of the Bengal Code (for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples, Colleges and other purposes; for the maintenance and repair of Bridges, Sarais, Kattras and other public buildings; and for the custody and disposal of Nazul Property or Escheats), and Regulation VII, 1817, of the Madras Code (for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples and Colleges or other public purposes; for the maintenance and repair of Bridges, Choultries, or Chattrams, and other public buildings; and for the custody and disposal of Escheats), so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments; the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof; or involve any connection with the management of such religious establishments; It is enacted as follows :—

1. *Repealed by the Repealing Act, (XIV of 1870).*

(g) *Ramanathan Chetti* v. *Murugappa Chetti*, 29 M. 283=33 I.A. 139=10 C.W.N 825=3 A.L.J. 707=8 Bom. L.R. 498=16 M.L.J. 265; *Pramatha Nath Mullick* v. *Pradyumna*, 52 C. 809=52 I.A. 245=23 A L.J. 537=49 M.L.J. 30=1925 M.W.N. 431 27 Bom. L.R. 1064=22 L.W. 492=30 C.W.N. 25=1925 P.C. 139; *Alasinga* v. *Venkata*, 43 L.W. 614=1936 M. 294.

(h) *Thandavaroya* v. *Shanmugam*, 32 M. 167=2 I.C. 341=19 M.L.J. 59.

"Civil Court" and "Court".

2. [* * * *]

The words "Civil Court" and "Court" shall, save as provided in section 10, mean the principal Court of original civil jurisdiction in the district in which, the mosque, temple or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act.

Notes:—Act inapplicable to a suit in the ordinary original civil jurisdiction of the High Court.(1)

Government to make special provision respecting mosques, etc.

3. *In the case of every mosque, temple or other religious establishment to which the provisions of either of the Regulations specified in the preamble to this Act are applicable, and nomination of the trustee, manager or superintendent thereof, at the time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.*

Transfer to trustees, etc., of trust-property in charge of Revenue Board.

4. *In the case of every such mosque, temple or other religious establishment which, at the time of the passing of this Act, shall be under the management of any trustee, manager or superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager or superintendent, all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue or any local agent, and belonging to such mosque, temple or other religious establishment, except such property as is hereinafter provided;*

Cessation of Board's powers as to such property.

and the powers and responsibilities of the Board of Revenue, and the local agents, in respect to such mosque, temple or other religious establishment, and to all land and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue or any local agent, previous to such transfer, shall cease and determine.

Procedure in case of dispute as to right of succession to vacated trusteeship.

5. *Whenever from any cause a vacancy shall occur in the office of any trustee, manager or superintendent, to whom any property shall have been transferred under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple or religious establishment to which such property shall belong, or in the performance of the worship or of the service thereof, or the trusts relating thereto, to apply to the Civil Court to appoint*

(1) *Panch Cowrie* v. *Chumroolall*, 3 C. 563; *Annasami* v. *Ramakrishna*, 24 M. 219 - 11 M.L.J. 1.

a manager of such mosque, temple or other religious establishment, and thereupon such Court may appoint such manager to act until some other person shall by suit have established his right of succession to such office.

Powers of managers appointed by Court.

The manager so appointed by the Civil Court shall have and shall exercise all the powers which, under this or any other Act, the former trustee, manager or superintendent, in whose place such manager is appointed by the Court had or could exercise in relation to such mosque, temple or religious establishment, or the property belonging thereto.

Note:—An order of the District Court under S. 5 is not appealable to the High Court(j) but a revision lies to the High Court against that order.(k) This section applies only when there is a vacancy existing at the time the application is made.(l)

Rights, etc., of trustees to whom property is transferred under section 4.

6. The rights, powers and responsibilities of every trustee, manager or superintendent, to whom the land and other property of any mosque, temple or other religious establishment is transferred in the manner prescribed in section 4 of this Act, as well as the conditions of their appointment, election and removal, shall be the same as if this Act had not been passed, except in respect of the liability to be sued under this Act, and except in respect of the authority of the Board of Revenue and local agents, given by the Regulations hereby repealed, over such mosque, temple or religious establishment, and over such trustee, manager or superintendent, which authority is hereby determined and repealed.

Appointment of committees.

All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under the said section 4 of this Act, may, from the date of such transfer, be exercised by any trustee, manager or superintendent to whom such transfer is made.

Constitution and duties of committees.

7. In all cases described in section 3 of this Act the Provincial Government shall once for all appoint one or more committees in every division or district to take the place, and to exercise the powers, of the Board of Revenue and the local agents under the Regulations hereby repealed.

Such committee shall consist of three or more persons, and shall perform all the duties imposed on such Board and local agents, except in respect of any property which is specially provided for under section 21 of this Act.

Note:—The committee cannot dismiss an office-holder of the temple arbitrarily, but only on grounds justified by the interests of the institution.(m) The committee resembles a corporation and the normal way to transact its business is at a meeting and not by circulation.(n) The death of one of the members of a committee appointed by the Government does not **ipso facto** dissolve the committee and a proceeding by the committee pending at the

(j) *Narasayya* v. *Collector of Ananta-pur*, 24 M. 95.

(k) *Gopala Ayyar* v. *Arunachalam Chetty*, 26 M. 85.

(l) *Shera* v. *Bhure*, 1935 A. 273=1935 A.L.J. 311.

(m) *Seshadri* v. *Nataraja*, 21 M. 179.

(n) *Venkata Narayana* v. *Ponnusawmi*, 41 M. 357=33 M.L.J. 660=1917 M.W.N. 839 =7 L.W. 85.

time of his death can be continued by the surviving members of the committee.(o)

Qualifications of member of committee.

8. The members of the said committee shall be appointed from among persons professing the religion for the purposes of which the mosque, temple or other religious establishment was founded or is maintained, and in accordance, so far as can be ascertained, with the general wishes of those who are interested in the maintenance of such mosque, temple or other religious establishment.

The appointment of the committee shall be notified in the official Gazette.

Ascertaining wishes of persons interested.

In order to ascertain the general wishes of such persons in respect of such appointment, the Local Government may cause an election to be held, under such rules (not inconsistent with the provisions of this Act) as shall be framed by such Local Government.

Tenure of office.

9. Every member of a committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness:

Removal.

and no such member shall be removed except by an order of the Civil Court as hereinafter provided.

Note:—This section does not prevent the retirement of a member.(p)

Vacancies to be filled.

10. Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided.

Procedure.

The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested as above provided, under rules for elections which shall be framed by the Local Government;

and whoever shall be then elected, under the said rules, shall be a member of the committee to fill such vacancy.

When Court may fill vacancy.

If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and, if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy.

(o) *Gholam* v. *Syed*, 61 C. 80=38 C.W.N. (p) *Thiruvengada* v. *Ranga*, 6 M. 114, 214=1934 C. 328.

[Explanation.—In this section "Civil Court" means the principal Court of original civil jurisdiction in the district in which the mosques, temples or religious establishments for which the committee has been appointed, or any of them are situate.]

Note:—The fact that the vacancy caused by the death of one of the members remains unfilled does not bar a suit by the remaining members;(q) An election by remaining members after the three months is invalid;(r) An order of the District Court under this section is revisable;(s) but not appealable to the High Court.(r) Where a vacancy in a committee is ordered by the District Court to be filled up by the remaining members of the committee under this section, it is not necessary that all of them should be unanimous in the selection of the candidate and the ordinary rule that the opinion of the majority suffices would prevail.(t)

No member of committee to be also trustee, etc., of mosque, etc.

11. No member of a committee appointed under this Act shall be capable of being, or shall act, also as a trustee, manager or superintendent of the mosque, temple or other religious establishment for the management of which such committee shall have been appointed.

On appointment of committee, Board and local agents to transfer property.

12. Immediately on the appointment of a committee as above provided for the superintendence of any such mosque, temple or religious establishment, and for the management of its affairs, the Board of Revenue, or the local agents acting under the authority of the said Board, shall transfer to such committee all landed or other property which at the time of appointment shall be under the superintendence, or in the possession of the said Board or local agents, and belonging to the said religious establishment, except as is hereinafter provided for,

Termination of powers and responsibilities of Board and agents.

and thereupon the powers and responsibilities of the Board and the local agents in respect to such mosque, temple or religious establishment, and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or agents previous to such transfer, shall cease and determine.

Commencement of powers of committee.

All the powers which might be exercised by any Board or local agent for the recovery of the rent of land or other property transferred under this section may from the date of such transfer be exercised by such committee to whom such transfer is made.

Note:—The powers of a committee can be described in general terms as powers of superintendence and it is open to the committee to take all steps

(q) *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan*, 39 C. 304=12 I.C. 147 contra. *Santhalva* v. *Manjanna*, 34 M. 1= 1910 M.W.N. 608=20 M.L.J. 814

(r) *Balakrishna* v. *Vasudeva*, 40 M. 793 =44 I.A. 261=15 A.L.J. 645=19 Bom. L.R. 715=22 C.W.N. 50=33 M.L.J. 69=6 L.W. 501 1917 M.W.N. 628=1917 P.C. 71.

(s) *Balakrishna* v. *Vasudeva*, 40 M. 793 =44 I.A. 261=15 A.L.J. 645=19 Bom. L.R. 715. 22 C.W.N. 50=33 M.L.J. 69=6 L.W. 501 1917 M.W.N. 628=1917 P.C. 71; *Vasudeva* v. *Negapatam Devasthanam*, 38 M. 594=25 M.L.J. 536=1913 M.W.N. 842= 21 I.C 451.

(t) *Syed Muhammad* v. *Syed Sultan*, 1937 M.W.N. 410=1937 M. 597.

which may seem to them reasonably necessary for the due preservation of the properties of the institution, and in this respect the only limitation to be imposed upon their powers is that they should not unnecessarily interfere with anything that may be described as the existing scheme of management.(u) In the exercise of the power of general superintendence over endowments for the purpose of seeing that the endowments are properly appropriated, they have the power of appointing trustees or managers and of calling for accounts from them and scrutinising them.(v)

Duty of trustee, etc., as to accounts;

13. It shall be the duty of every trustee, manager and superintendent of a mosque, temple or religious establishment to which the provisions of this Act shall apply to keep regular accounts of his receipts and disbursements in respect of the endowments and expenses of such mosque, temple or other religious establishment;

and of committee.

and it shall be the duty of every committee of management, appointed or acting under the authority of this Act, to require from every trustee, manager and superintendent of such mosque, temple or other religious establishment, the production of such regular accounts of such receipts and disbursements at least once in every year; and every such committee of management shall themselves keep such accounts thereof.

Person interested may singly sue in case of breach of trust, etc.

14. Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trust relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager or superintendent of such mosque, temple or religious establishment or the member of any committee appointed under this Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent or member of such committee, in respect of the trusts vested in, or confided to them respectively;

Powers of Civil Court.

and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent or member of a committee,

and may decree damages and costs against such trustee, manager, superintendent or member of a committee,

and may also direct the removal of such trustee, manager, superintendent or member of a committee.

Note:—The section does not apply to a suit by the trustees for recovery of property from an ex-trustee or trespasser(w) or to a suit for a declaration that the appointment of the defendant trustee is invalid.(x) S. 92 C.P.C. is substantially wider than this section and provides for settling a scheme which is

(u) *Sendilvelu* v. *Venkatasubbu*, 46 L. W. 695=(1937) 2 M.L.J. 477=1937 M. 327.

(v) *Krishnaswami* v. *Kallalagar*, 46 L. W. 782=1937 M.W.N. 970=(1937) 2 M. L.J. 660=1937 M. 970; *Venkatasubbu* v. *Narayanaswami*, 1939 M. 346 (relationship between the committee and the trustee discussed).

(w) *Viraswami* v *Subba*, 6 M. 54; *Nagappa* v. *Santappa*, I.L.R. 1938 B. 362=40 Bom. L.R. 365=1938 B 311.

(x) *Subramania* v. *Krishnaswamy*, 42 M. 668=1919 M.W.N. 522=53 I.C. 605.

a jurisdiction of a very wide and beneficial nature. S. 92(2) only means that if he elects to proceed under the Religious Endowments Act, he is not prevented from so doing by S. 92.(y) The provisions of this section are inapplicable to temples for the maintenance of which no endowment has been made.(z) But they are applicable even in respect of temples which came into existence after 1863.(a) The words "appointed under this Act" refer only to the committee and not to the trustee, manager or superintendent.(b) No relief can be granted under this section in respect of an act committed **bona fide** due to an error of judgment, when the act is not shown to be clearly detrimental to the interests of the institution.(c)

Nature of interest entitling person to sue.

15. The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate, interest or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts.

Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section.

Reference to arbitrators.

16. In any suit or proceeding instituted under this Act it shall be lawful for the Court before which such suit or proceeding is pending to order any matter in difference in such suit to be referred for decision to one or more arbitrators.

Act VIII of 1859 applied (now Civ. Pro. Code, 1908 Sch. II).

Whenever any such order shall be made, the provisions of Chapter VI of the Code of Civil Procedure shall in all respects apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under section 312 of the said Code.

Note: A court cannot refer the whole suit to the arbitrators, but only the matter in difference between the parties.(d)

Reference under Act VIII of 1859.

17. Nothing in the last preceding section shall prevent the parties from applying to the Court, or the Court from making the order of reference, under the said section 312 of the said Code of Civil Procedure.

Application for leave to institute suits.

18. No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit.

(y) *Hansraj Laddashet* v. *Anant Padmanabha*, 42 B. 742=20 Bom. L.R. 954=48 I.C. 514.

(z) *Kedar* v. *Peary*, 7 Luck. 648=1932 Oudh 152 (F.B.).

(a) *Badar* v. *Badsha*, 62 C. 125=38 C. W.N. 1056=1934 C. 741; See also *Ram Prasad* v. *Ram Kishun*, 11 Pat. 594=1932 P 177.

1935 A.L.J. 311=1935 A. 273.

(c) *Gholam* v. *Syed* 1934 C. 348; *Venkatasubbu* v. *Narayanaswami*, 1939 M 346=(1939) 1 M.L.J. 9 (neglect of duty justifying removal must be of the same seriousness as misfeasance or breach of trust.)

(d) *Karedla Vijayaraghavan* v. *Vemavarapu Sitaramayya*, 26 M. 361.

The Court, on the perusal of the application, shall determine whether there are sufficient 'prima facie' grounds for the institution of a suit, and, if in the judgment of the Court there are such grounds, leave shall be given for its institution.

Costs.

If the Court shall be of opinion that the suit has been for the benefit of the trust, and that no party to the suit is in fault, the Court may order the costs or such portion as it may consider just to be paid out of the estate.

Note :—Where sanction has been given to several persons some of them alone cannot institute the suit,(e) though if the suit has been instituted by all of them, the subsequent death of one of them does not cause the suit to abate.(f) An order granting(g) or refusing(h) leave to sue is not appealable. Sanction is necessary only for a suit under the Act and a suit not governed by S. 14 does not require the sanction.(i)

Court may require accounts of trust to be filed.

19. Before giving leave for institution of a suit or after leave has been given, before any proceeding is taken, or at any time when the suit is pending, the Court may order the trustee, manager or superintendent, or any member of a committee, as the case may be, to file in Court the accounts of the trust, or such part thereof as to the Court may seem necessary.

Proceedings for criminal breach of trust.

20. No suit or proceeding before any Civil Court under the preceding sections shall in any way affect or interfere with any proceeding in a Criminal Court for criminal breach of trust.

Cases in which endowments are partly for religious and partly for secular purposes.

21. In any case in which any land or other property has been granted for the support of an establishment partly of a religious and partly of a secular character,

or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses,

the Board of Revenue, before transferring to any trustee, manager or superintendent, or to any committee of management appointed under this Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses,

and what portion shall be transferred to the superintendence of the trustee, manager or superintendent, or of the committee,

and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the

(e) *Venkatesha* v. *Ramaya*, 38 M. 1192.
(f) *Ali Begam* v. *Ali Khan*, 48 L.W. 1=65 I.A. 198=I.L.R. 1938 Lah. 383.
(g) *Protap Chandra* v. *Brojonath*, 19 C. 275.
(h) *Venkateswara*, In re. 10 M. 98; *Kazem Ali* v. *Azim Ali*, 18 C. 382.
(i) *Puddolabh Roy* v. *Ramgopal*, 9 C. 133.

trustee, manager or superintendent, or of the committee, and made payable to the said Board or to the local agents, for secular uses as aforesaid.

In every such case the provisions of this Act shall take effect only in respect to such land and other property as may be so transferred.

Government not to hold charge henceforth of property for support of any mosque, temple, etc.

22. Except as provided in this Act, it shall not be lawful for any Government in India or for any officer of any Government in his official character,

to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any mosque, temple or other religious establishment, or

to take any part in the management or appropriation of any endowment made for the maintenance of any such mosque, temple or other establishment, or

to nominate or appoint any trustee, manager or superintendent thereof, or to be in any way concerned therewith.

Effect of Act in respect of Regulations therein mentioned, and of buildings of antiquity, etc.

23. Nothing in this Act shall be held to affect the provisions of the Regulations mentioned in this Act, except in so far as they relate to mosque, Hindu temples and other religious establishment; or to prevent the Government from taking such steps as it may deem necessary, under the provisions of the said regulations, to prevent injury to and preserve buildings remarkable for their antiquity, or for their historical or architectural value or required for the convenience of the public.

"India."

24. The word "India" in this Act shall mean British India.

THE CHARITABLE ENDOWMENTS ACT (VI OF 1890).

An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.

Whereas it is expedient to provide for the vesting and administration of property held in trust for charitable purposes; It is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called the Charitable Endowments Act, 1890.

(2) It extends to the whole of British India, inclusive of British Baluchistan; and

(3) It shall come into force on the first day of October, 1890.

Definition.

2. In this Act "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

Appointment and incorporation of Treasurer of charitable endowments.

3. (1) The Central Government may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for India, and the Government of any Province may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for the Province for the territories subject to any Local Government.

(2) Such Treasurer shall, for the purposes of taking, holding and transferring moveable or immoveable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for the territories subject to the Local Government, and, as such Treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

3-A. In the subsequent provisions of this Act, "the appropriate Government" means, as respects a charitable endowment, the objects of which do not extend beyond a single Province and are not objects to which the executive authority of the Central Government extends, the Government of the Province, and as respects any other charitable endowment of the Central Government.

Orders vesting property in Treasurer.

4. (1) Where any property is held or is to be applied in trust for a charitable purpose, the appropriate Government, if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order by notification in the official Gazette, that the property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the Local Government and the person or persons making the application, and the property shall thereupon so vest accordingly

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

(4) An order under this section vesting property in a Treasurer of Charitable Endowments shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

Schemes for administration of property vested in the Treasurer.

5. (1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the appropriate Government, if it thinks fit, may settle a scheme for the administration of any property which has been or is to be vested in the Treasurer of Charitable Endowments, and may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the Local Government may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the appropriate Government in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto a decree or direction regarding the administration of the property to which the scheme relates.

(4) (2) Providing that nothing in this sub-section shall be construed as precluding a Court from enquiring whether the Government by which a scheme was made was the appropriate Government.

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the Local Government, effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of property not already vested in the Treasurer of Charitable Endowments, it shall not come into operation until the property has become so vested.

Mode of applying for vesting orders and schemes.

6. (1) The application referred to in the two last foregoing sections must be made,—

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2)—For the purposes of this section the executor or administrator of a deceased trustee of property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust.

Bare trusteeship of Treasurer.

8. (1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with

the provision made in that behalf in the vesting order under section 4 or in the scheme, if any, under section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such Treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.

Annual publication of list of properties vested in Treasurer.

9. A Treasurer of Charitable Endowments shall cause to be published annually in the local official Gazette, at such time as the Local Government may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

Limitation of functions and powers of Treasurer.

10. (1) A Treasurer of Charitable Endowments shall always be a sole trustee, and shall not, as such Treasurer, take or hold any property otherwise than under the provisions of this Act, or, subject to those provisions, transfer any property vested in him except in obedience to a decree divesting him of the property or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is mentioned in section 4, sub-section (3), clause a, b, c, d or e, or in the purchase of immoveable property.

(3) When a Treasurer of Charitable Endowments is divested, by a direction of the Local Government or the Governor-General in Council under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trusts as those on which it was held by such Treasurer.

Provision for continuance of office of Treasurer in certain contingencies.

11. If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the appropriate Government may appoint the same or another officer of the Government by the name of his office to be such Treasurer, and thereupon the holder of the latter office shall be deemed for the purposes of this Act to be the successor in office of the holder of the former office.

Transfer of property from one Treasurer to another.

12. If by reason of any alteration of areas or by reason of the appointment of a treasurer of charitable endowments for India or for any Province for which such a treasurer has not previously been appointed or for any other reason it appears to the Central Government that any property vested in a treasurer of charitable endowments should be vested in another such treasurer, that Government may direct that the property shall be so vested

and thereupon it shall vest in that other treasurer and his successors as fully and effectually for the purposes of this Act as if it had been originally vested in him under this Act.

13. * * * * *

(2) The appropriate Government may make rules consistent with this Act for—

(a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments;

(b) regulating the cases and mode in which schemes or any modification thereof are to be published before they are settled or made under section 5;

(c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments, and the mode in which such accounts are to be audited; and

(d) generally, carrying into effect the purposes of this Act.

Indemnity to Government and Treasurer.

14. No suit shall be instituted against the Crown in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereof, where the loss or misapplication has been occasioned by or through his wilful neglect or default.

Note:—Section does not apply to a suit for recovering property on the ground that the settlor had no right to create the trust.(1)

Saving with respect to Advocate-General and Official Trustee.

15. Nothing in this Act shall be construed to impair the operation of section 111 of the Statute 53 George III, Chapter 155, or of any other enactment for the time being in force, respecting the authority of an Advocate-General at a presidency to act with respect to any charity, or of sections 8, 9, 10 and 11 of Act No. XVII of 1864 (an Act to constitute an Office of Official Trustee) respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

THE CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920).

An Act to provide more effectual control over the administration of Charitable and Religious Trusts.

Whereas it is expedient to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature

(1) *Jagdeo Singh v. Dy. Commr., Partabgarh* 1926 O. 431.

and to enable the trustees of such trusts to obtain the directions of a Court on certain matters, and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts; it is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Charitable and Religious Trusts Act, 1920.

(2) It extends to the whole of British India :

Provided that the Government of any Province may, by notification in the Gazette of India, direct that this Act, or any specified part thereof, shall not extend to that Province or any specified area therein, or to any specified trust or class of trusts.

Interpretation.

2. In this Act, unless there is anything repugnant in the subject or context, "the Court" means the Court of the District Judge or any other Court empowered in that behalf by the Local Government and includes the High Court in the exercise of its ordinary original civil jurisdiction.

Power to apply to the Court in respect of trusts of a charitable or religious nature.

3. Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely :—

(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and

(2) directing that the accounts of the trust shall be examined and audited :

Provided that no person shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition.

Note :—A worshipper comes within the meaning of a person having an interest in the Gurdwara.(k) An application under this section does not cease to be maintainable merely because a question of title adverse to the trust is raised by the opposite party.(l) For the constitution of a valid trust, the purpose of the trust, the trust property and the beneficiaries must be indicated in such a way that the trust could be administered by the Court it an occasion for such administration arises.(m)

(k) *Nihal* v. *Narain*, 1934 Lah. 949.

(l) *Haidarali* v. *Satyed Gulam*, 58 B. 623=36 Bom. L.R. 687=1934 B. 343.

(m) *Chhotabhai* v. *Jnan Chandra*, 57 A. 330=62 I.A. 146=1935 A.L.J. 775= 37 Bom. L.R. 567=39 C.W.N. 865=69 M.L.J. 1=42 L.W. 188=1935 M.W.N. 625=1935 P.C. 97 ; *Parma Nand* v. *Nihal Chand*, 48 L.W. 62=I.L.R. 1938 Lah. 453=65 I.A. 252=1938 P.C. 195.

Contents and verification of petition.

4. (1) The petition shall show in what way the petitioner claims to be interested in the trust, and shall specify, as far as may be, the particulars and the audit which he seeks to obtain.

(2) The petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

Procedure on petition.

5. (1) If the Court on receipt of a petition under section 3, after taking such evidence and making such inquiry, if any, as it may consider necessary, is of opinion that the trust to which the petition relates is a trust to which this Act applies, and that the petitioner has an interest therein, it shall fix a date for the hearing of the petition, and shall cause a copy thereof, together with notice of the date so fixed, to be served on the trustee and upon any other person to whom in its opinion notice of the petition should be given.

(2) On the date fixed for the hearing of the petition, or on any subsequent date to which the hearing may be adjourned, the Court shall proceed to hear the petitioner and the trustee, if he appears, and any other person who has appeared in consequence of the notice, or who it considers ought to be heard, and shall make such further inquiries, if any, as it thinks fit. The trustee may and, if so required by the Court, shall at the time of the first hearing or within such time as the Court may permit present a written statement of his case. If he does present a written statement, the statement shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying pleadings.

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit:

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the Court which conflicts with the final decision therein.

(6) Save as provided in this section, the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

Note:—A suit that the property is not subject to any trust but is the absolute property of the alleged trustee is not barred by a decision under S. 5 on an application for examination of accounts.(n) The proceedings on an application under S. 3 are of a summary nature and a decision therein on the question of dedication is not **res judicata.**(o)

(n) *Mahadeo Bharthi* v. *Mahadeo Rai*, 1929 A. 506=1929 A.L.J. 653=51 A. 805.

(o) *Prem Nath* v. *Hari*, 16 Lah. 85= 1934 Lah. 771.

Failure of trustee to comply with order under section 5.

6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General.

Note :—A suit contemplated by this section does not become incompetent merely because one of the reliefs is not based on the trustee's failure to render accounts: the Court can entertain the suit so far as the other reliefs are concerned.(p)

Powers of trustee to apply for directions

7. (1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon:

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court, on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner as it thinks fit.

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction shall afford a reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made

Costs of petition under this Act.

8. The costs, charges and expenses of and incidental to any petition, and all proceedings in connection therewith, under the foregoing provisions of this Act shall be in the discretion of the Court, which may direct the whole or any part of any such costs, charges and expenses to be met from the property or income of the trust in respect of which the petition is made, or to be borne and paid in such manner and by such persons as it thinks fit:

Provided that no such order shall be made against any person (other than the petitioner) who has not received notice of the petition and had a reasonable opportunity of being heard thereon.

(p) *Bapiraju v. Ramcharandas*, 57 M. M.L.J. 690=1933 M. 854. 153=38 L.W. 730=1933 M.W.N. 1256=65

Savings.

9. No petition under the foregoing provision of this Act in relation to any trust shall be entertained in any of the following circumstances, namely:—

(a) if a suit instituted in accordance with the provisions of section 92 of the Code of Civil Procedure, 1908, is pending in respect of the trust in question:

(b) if the trust property is vested in the Treasurer of Charitable Endowments, the Administrator-General, the Official Trustee or any society registered under the Societies Registration Act, 1860; or

(c) if a scheme for the administration of the trust property has been settled or approved by any Court of competent jurisdiction, or by any other authority acting under the provisions of any enactment.

Power of Courts as to costs in certain suits against trustees of charitable and religious trusts.

10. (1) In any suit instituted under section 11 of the Religious Endowments Act, 1863, or under section 92 of the Code of Civil Procedure, 1908, the Court trying such suit may if, on application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish security for any expenditure incurred, or likely to be incurred, by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part.

(2) When any money has been deposited in accordance with an order made under sub-section (1), the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit. Before making over any sum to the plaintiff, the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Provisions of the Code of Civil Procedure to apply.

11. (1) The provisions of the Code of Civil Procedure, 1908, relating to

(a) the proof of facts by affidavit,

(b) the enforcing of the attendance of any person and his examination on oath,

(c) the enforcing of the production of documents, and

(d) the issuing of commissions,

shall apply to all proceedings under this Act, and the provisions relating to the service of summonses shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall, so far as they are applicable, apply to the execution of orders under this Act.

Barring of appeals.

12. No appeal shall lie from any order passed or against any opinion, advice or direction given under this Act.

THE CODE OF CIVIL PROCEDURE (V OF 1908).

Public charities.

S. 92. (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and, having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

Note:—Interest in the trust. The interest of the plaintiffs must be real and not remote, substantial and not illusory, existing and not contingent. The mere fact that plaintiffs do not habitually resort to the temple is no bar.(q)

Sanction. Where permission is given to several persons, a suit by only some of them is not maintainable.(r) Mere addition of a claim not mentioned in the sanction does not entail the dismissal of the whole suit.(s) Where the suit does not claim any such relief as is specified in sub-section 1, no sanction is necessary.(t) Omission of a material relief mentioned in the sanction entails the dismissal of the suit.(u) Cl. (h) does not include reliefs against third parties.(v)

Reservation of reliefs. Provision in a scheme decree for applying to the court for any relief coming within the section is **ultra vires.** But a provision for applications for carrying out the provisions of the scheme is not **ultra vires.**(v)

(q) *Suryanarayana v. Lakshminarasimham*, 1926 M. 267=49 M.L.J. 746=1926 M.W.N. 40.

(r) *Ali Begam v. Ali Khan*, 65 I.A. 198 =I.L.R. 1938 Lah. 383=1938 P.C. 184 (holding also that death of some of the plaintiffs after institution of suit does not make it abate).

(s) *Venkatacharyulu v. Suryanarayana*, 1928 M. 205=27 L.W. 42.

(t) *Abdur Rahim v. Mahomed Barkat Ali*, 55 C. 519 9 P. L. T. 65=32 C. W. N. 482 27 L.W 339=55 I.A. 96=26 A.L.J. 464 1928 M.W.N. 926=54 M.L.J. 609= 30 Bom. L R. 774=1928 P.C. 16.

(u) *Mohadeen v. Fakruddin*, 1925 M. 636=21 L.W 71.

(v) *Veeraraghavacharlar v. Advocate-General, Madras*, 51 M. 31=1927 M. 1073= 1927 M.W.N. 816.

Section does not apply to (i) a suit to enforce rights of worshippers;(w) (ii) a suit for declaration that the plaintiff is lawful trustee(x) or that the defendant has not been properly appointed trustee(y) or that certain property is trust property;(z) (iii) a suit to establish the plaintiff's right as hereditary trustee;(a) (iv) a suit for recovery of property from a trespasser(b) or from one to whom property has been improperly alienated by a trustee.(c)

Exercise of powers of Advocate-General outside Presidency-towns.

S. 93. The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be with the previous sanction of the Local Government exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, 1926.
(MADRAS ACT No. II of 1927)

(As modified up to the 1st August 1937)

PASSED BY THE LEGISLATIVE COUNCIL OF MADRAS.

[*Received the assent of the Governor-General on the 19th January 1927:*

The assent of the Governor-General was first published in the "Fort St. George Gazette" of 8th February 1927.]

An Act to provide for the better administration and governance of certain Hindu religious endowments and to remove certain doubts as to the legality of the action taken and things done under the Madras Hindu Religious Endowments Act, 1923.

Preamble.

Whereas it is expedient to provide for the better administration and governance of certain Hindu religious endowments described hereunder;

And whereas diverse doubts have been raised as to the validity of the action taken and things done under the Madras Hindu Religious Endowments Act, 1923;

And whereas certain legal proceedings have been commenced in the High Court of Judicature, Madras, and certain courts subordinate thereto, questioning the said action and things;

And whereas it is expedient to remove those doubts and to validate the said action and things;

(w) *Kadirvelu* v. *Nanjundaiyar*, 3 L. W. 512—35 I.C. 88.

(x) *Ganga Ram* v. *Rama Saran*, 34 I. C. 502; *Jamiat* v *Mohammad*, 1938 Lah. 869.

(y) *Nilkanth Devrao* v. *Ramakrishna Vithal*, 46 B. 101=23 Bom. L.R. 876=1922 B. 67.

(z) *Miran Baksh* v. *Alla Baksh*, 8 Lah. 111=1927 L. 350; *Abdur Rahim* v. *Mahomed Barkat Ali*, 55 C. 519=9 P. L. T. 65—32 C.W.N. 482—27 L.W. 339=55 I.A. 96 =26 A.L.J. 464=1928 M.W.N. 926=54 M.L.J. 609=30 Bom. L.R. 774=1928 P.C. 16.

(a) *Vythilinga Pandara Sannadhi* v. *Subramania Pillai*, 61 M.L.J. 815=34 L.W. 254=54 Mad. 1011=1931 M. 801.

(b) *Kashinath* v. *Gangubai*, 129 I.C. 741=32 Bom. L. R. 1687=1931 Bom. 170; *Ganga Charan* v. *Ram Chandra*, 50 A. 165=25 A. L. J. 902=1928 A. 33.

(c) *Chandukchand* v. *Vedachala Chettiar*, 55 M. 549=1932 M.W.N. 9=35 L.W. 158=62 M.L.J. 180=1932 M. 234.

And whereas the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows :—

CHAPTER I.

Short title.

1. This Act may be called the Madras Hindu Religious Endowments Act, 1926.

Extent.

2. This Act extends to the whole of the Presidency of Madras except the Presidency town and applies, save as hereinafter provided, to all Hindu public religious endowments.

Explanation.—For the purposes of this Act. Hindu public religious endowments do not include Jain religious endowments.

Power to exempt endowments.

3. (a) [Provincial Government] may, after consulting the Board, exempt any such endowment from the operation of all or any of the provisions of this Act or vary, alter or cancel such exemption.

Power to extend Act to Jain endowments.

(3) The [Provincial Government] may, by notification, extend to Jain religious endowments the provisions of this Act and of any rules framed thereunder, and may declare such extension to be subject to such restrictions and modifications as they think fit:

Provided that before issuing such notification the [Provincial Government] shall publish in the [Official Gazette] a notice of their intention to do so, fix a reasonable period for the persons interested in the endowments concerned to show cause against the issue of such notification and consider their objections, if any.

[4. * * *]

[5. * * *]

Repeal of Madras Act I of 1925.

6. The Madras Hindu Religious Endowments Act, 1923 (hereinafter referred to as 'the said Act') is hereby repealed.

Validation of action taken under Madras Act I of 1925.

7. (i) All action taken and all things done including the constitution of the Board of Commissioners for Hindu Religious Endowments, the notifications issued and orders made under and in pursuance of the said Act shall be deemed to have been validly taken, done, issued or made.

(ii) All proceedings taken under the said Act may be continued under this Act in so far as they are not inconsistent with the provisions of this Act.

(iii) Any remedy by way of application, suit or appeal which is provided by this Act shall be available in respect of proceedings under the said Act pending at the time of the commencement of this Act as if the proceedings in respect of which the remedy is sought had been instituted under this Act.

Note:—The section is not ultra vires of the legislature.(d) An application made under S. 53 (4) of Madras Act I of 1925 while that Act was in force for the modification of a temple scheme settled by the Civil Court prior to that Act can be continued even after Act II of 1927 came into force.(e)

Repeal of enactments.

8. The Religious Endowments Act, 1863, and the Madras Endowments and Escheats Regulation, 1817, so far as they apply to Hindu religious endowments to which this Act applies, are hereby repealed.

Definitions.

9. In this Act, unless there is anything repugnant in the subject or context—

Board

(1) 'Board' means the Board as constituted under section 10.

Committee.

(2) 'Committee' means a committee as constituted under section 20.

Court.

(3) 'Court' means the court of the District Judge within whose local limits a committee exercises jurisdiction or a math or temple is situated.

Electoral area.

(4) 'Electoral area' means an area containing the electors of a committee.

Excepted temple.

[(5) 'Excepted temple' means and includes a temple, the right of succession to the office of trustee or the offices of all the trustees (where there are more trustees than one) whereof has been hereditary, or the succession to the trusteeship whereof has been specially provided for by the founder.]

[Explanation.—No action taken by a Board in pursuance of the power conferred on it by clauses (a) and (b) of sub-section (1) of section 63 shall be deemed to have the effect of converting an excepted temple into a non-excepted temple.]

Note:—The mere fact that a temple was founded by a private founder would not make it an "excepted temple" if it is found that the trusteeship thereof has not in fact been devolving hereditarily from the founder.(f) But it is not necessary for the applicability of this subsection, that a provision made by the founder regarding succession to the trusteeship should continue to be in force at the time of a petition under S. 84.(g) Where the management of a temple has been exclusively in the hands of a family for four successive

(d) *Sri Vythilinga* v. *Sadasiva Aiyer*, 28 L.W. 535=55 M.L.J. 605=1928 M. 1272.

(e) *Chengayya* v. *Kotayya*, 36 L.W. 883 —63 M.L.J. 780=1933 M. 57=1932 M.W. N. 1120.

(f) *Chelapathi* v. *H. R. E. Board*, 44 L.W. 653—1936 M.W.N. 1193=71 M.L.J. 624; *Krishnamurthy* v. *H. R. E. Board*, 59 M. 245=42 L.W. 547=69 M.L.J. 384= 1935 M.W.N. 781.

(g) *Alagu* v. *H. R. E. Board*, 47 L.W. 647.

generations, the office of the trustee being held by the head of the family for the time being, the only conclusion possible is that that family possesses the hereditary right of appointing the trustee of the temple, which means that the temple is an excepted one.(h) But a temple subject to the control of the village community does not satisfy the definition of an excepted temple.(i)

Hereditary trustee.

(6) 'Hereditary trustee' means the trustee of a religious endowment, succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage or is specially provided for by the founder, so long as such scheme of succession is in force.

Math.

(7) 'Math' means an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution.

Non-hereditary trustee.

(8) 'Non-hereditary trustee' means a trustee who is not a hereditary trustee.

Notified temple.

[(8-A) 'Notified temple' means a temple notified by the [Provincial Government] under section 65-A.]

Person having interest.

(9) 'Person having interest' means—

(a) in the case of a math, a disciple of the math or a person of the religious persuasion to which the math belongs, and

(b) in the case of a temple a person who is entitled to attend at the performance of worship or service in the temple or who is in the habit of attending such performance or of partaking in the benefit of the distribution of gifts thereat.

Prescribed.

(10) 'Prescribed' means prescribed by the [Provincial Government] by rules made under this Act.

Religious endowment.

(11) 'Religious endowment' or 'Endowment' means all property belonging to, or given or endowed for the support of, maths or temples or for the performance of any service or charity connected therewith and includes the premises of maths or temples but does not include gifts of

(h) *Madana* v. *H. R. E. Board*, 46 L. W. 787=(1937) 2 M.L.J. 830=1937 M.W. N. 1073.

(i) *Kumaraswami* v. *H. R. E. Board*, 46 L.W. 528=1937 M. 940.

property made as personal gifts or offerings to the head of a math or to the archaka or other employee of a temple.

Note :—A service inam held by a temple servant falls within the definition of endowment.(j)

Temple.

(12) 'Temple' means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any section thereof, as a place of religious worship.

Notes :—Where what remains of a temple which permanently ceased to be used as a place of public worship at a time long beyond living memory is its site, its ruins and its name and there is no apparent intention of bringing it into existence again, this ancient ruin cannot be deemed to be a temple for the purposes of this Act and the mere fact that there are certain properties described as **devaswom** properties the income of which was formerly used by the members of a family now in enjoyment of the same for the performance of the worship in the temple does not give the Board jurisdiction either to direct the restoration of the temple or to invoke the doctrine of *cy pres* for the purpose of dealing with that income.(k) In considering whether a temple is a public one within the meaning of S. 9 (12), one has to consider the Hindu inhabitants of the locality in which the temple is situate, and if they are very few, the reference to the public can only signify such public as are available in that locality who can worship in the temple. Where it is expected by the founders of the temple that outsiders may worship in it and perform **Kainkaryams**, the mere fact of the existence of a prohibition in the trust deed against outsiders interfering with the management cannot take away the public character of the institution.(l)

Trustee.

(13) 'Trustee' means a person, by whatever designation known, in whom the administration of a religious endowment is vested and includes any person who is liable as if he were a trustee.

CHAPTER II.

Boards of Commissioners.

Constitution of Board.

10. (1) The [Provincial Government] may, by notification,

(a) direct the constitution of a Board for the whole Presidency or for any specified part thereof,

(b) vary the strength or territorial jurisdiction of any such Board, or

(c) abolish any such Board:

(j) *Kotayya* v. *Yellamandi*, 38 L.W. 94 = 56 M. 731=1933 M. 549=1933 M.W.N. 508=65 M.L.J. 54.

(k) *H. R. E. Board* v. *Rukmani*, 35 L. W. 588=55 M. 636=1932 M. 470=1932 M. W.N. 442=62 M.L.J. 594.

(l) *Nagireddi* v. *H. R. E. Board*, 46 L. W. 388=(1937) 2 M.L.J. 485=1937 M.W. N. 1145=1937 M. 973.

Provided that not more than one Board shall have jurisdiction over the same math or temple or the endowments connected therewith :

Provided further that, when the [Provincial Government] propose to direct the constitution of more Boards than one under this sub-section or to vary or abolish any Board, a draft of the notification proposed to be issued shall be published in the prescribed manner and laid before both the Chambers of the Provincial Legislature] and the notification shall not be issued [unless both the Chambers] by resolution [approve] such draft.

(2) The [Provincial Government] may pass such orders as they may deem fit as to the transfer or other disposal of the assets and liabilities of a Board which is varied or abolished.

Note :—A fresh notification under this section is unnecessary where a notification has already been issued under Madras Act I of 1925.(m)

Strength of the Board and its incorporation.

11. (1) A Board shall consist of a President and such number of other commissioners not being less than two nor more than four as the [Provincial Government] may fix.

(2) Every Board shall by such name as the [Provincial Government] may determine be a body corporate and shall have perpetual succession and a common seal and shall by the said name sue and be sued.

Qualifications of commissioners and their appointment.

12. (1) The Commissioners of a Board shall be persons professing the Hindu religion.

(2) The President shall be—

(a) a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland of not less than five years' standing, or

(b) a person having held judicial office not inferior to that of a subordinate judge or of a judge of a small cause court, or

(c) a person having been a pleader for a period of not less than ten years.

(3) Subject to the provisions of sub-sections (1) and (2), the President and other commissioners of a Board shall be appointed by the [Provincial Government] and shall, during their term of office, be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Tenure of office of commissioners.

13 (1) Every commissioner of a Board other than the President shall be entitled to hold office for five years from the date of his appointment.

(2) The President shall be entitled to hold office for five years from the date of his appointment :

Provided that if on the date of his appointment as President he is a commissioner he shall be entitled to hold office as President only up to the expiry of his term as commissioner.

(3) An outgoing President or commissioner shall, if otherwise qualified, be eligible for reappointment.

(m) *Sri Vythilinga* v. *Sadasiva*, 28 L. W. 535=1928 M. 1272=55 M.L.J. 605.

Remuneration of commissioners.

14. (1) Every commissioner shall devote his whole time and attention to the duties of his office and shall not, without the sanction of the [Provincial Government], engage in any other profession, trade or business, or stand for election or be appointed as a member of a local body or be a trustee of any religious endowment.

(2) The commissioners shall each receive, out of the funds of the Board, such salary as the [Provincial Government] may fix:

Provided that such salary shall not exceed one thousand and two hundred rupees per mensem for a President or eight hundred rupees per mensem for any other commissioner.

Power of Government to remove commissioners and their disqualification.

15. (1) The [Provincial Government] may suspend or remove any commissioner from his office—

(a) if he is convicted by a criminal court of any offence which in the opinion of the [Provincial Government] involves moral turpitude;

(b) if he becomes of unsound mind, or a deaf-mute or suffers from contagious leprosy;

(c) if he applies to be adjudicated or is adjudicated a bankrupt or insolvent:

(d) for corruption, misconduct or other sufficient cause.

(2) A commissioner shall cease to hold his office if he ceases to profess the Hindu religion.

Office and meetings of the Board.

16. (1) Every Board shall have an office at such place as the [Provincial Government] may fix for the transaction of business.

(2) At meetings of the Board, the President of the Board and in his absence the senior commissioner in order of appointment shall preside.

(3) No business shall be transacted at any meeting unless at least two commissioners are present

(4) In case of difference of opinion among the commissioners, the question before the Board shall be decided by a majority of votes; and where the votes are equally divided the President or senior member presiding shall have a second or casting vote.

Officers and servants of the Board, their appointment and punishment.

17. Subject to such control as may be prescribed

(a) a Board may from time to time determine the number, designations, grades and scales of salary or other remuneration of its officers and servants, and

(b) the President of the Board shall have the power to appoint and transfer such officers and servants and may fine, reduce, suspend, remove or dismiss them for breach of rules or discipline, for carelessness, unfitness, neglect of duty or misconduct or other sufficient cause.

Powers and duties of the Board in general.

18. Subject to the provisions of this Act and of any scheme settled or deemed to be a scheme settled under this Act.

(1) the general superintendence of all religious endowments within the territorial jurisdiction of a Board shall vest in such Board, and

(2) the Board may do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist.

[*Explanation.—The general powers of superintendence of the Board shall include the power to pass such interim orders as it deems necessary in the interests of the proper maintenance of a math or temple or the administration of a religious endowment.*]

Note:—Order of the Board appointing interim receiver in respect of an excepted temple pending scheme proceedings under S. 63 is **ultra vires.**(n)

Power of Board to make by-laws.

19. (1) A Board may make by-laws not inconsistent with this Act or the rules made thereunder or with any other law as to—

(a) the division of duties among the President and commissioners of the Board;

(b) the manner in which their decision shall be ascertained otherwise than at meetings;

(c) the procedure and conduct of business at meetings of the Board;

(d) the delegation of powers of the Board to individual commissioners or committees of commissioners;

(e) the security, if any, to be furnished by officers and servants of the Board;

(f) the books and accounts to be kept at the office of the Board;

(g) the custody and investment of the funds of the Board, committees and trustees;

(h) the form and manner of applications to the Board;

(i) the details which shall be included in or excluded from the budgets of committees and religious endowments; and

(j) generally the conduct of all proceedings and business under this Act.

(2) No by-law or cancellation or alteration of a by-law made by the Board shall have effect until the same shall have been published for public criticism and thereafter confirmed by the [*Provincial Government*].

(3) All by-laws when they shall have been duly confirmed shall be published in the [*Official Gazette*] *and shall thereafter have the force of law.*

(n) *Ramaswami* v. *H. R. E. Board*, 41 L.W. 199—68 M.L.J. 178=1935 M.W.N. 127.

CHAPTER III.

Temple Committees.

Constitution, variation and abolition of committees.

20 *(1) The [Provincial Government] may, by notification,*

(a) direct the constitution of a committee for any local area or any class or classes of institutions in any local area;

(b) vary the strength or the jurisdiction of any committee; or

(c) abolish any committee:

Provided as follows:—

(i) Not more than one committee shall have jurisdiction over the same temple or the endowments connected therewith.

(ii) The [Provincial Government] shall, before issuing a notification under clause (b) or clause (c), communicate to the Board and the committee concerned the grounds on which they propose to do so, fix a reasonable period for the Board or committee to show cause against the proposal and consider its explanations and objections, if any.

(2) The Board may pass such orders as it may deem fit as to the transfer or other disposal of the assets and liabilities of a committee which is varied or abolished.

Note:—Varying or interfering with the strength of a committee constituted under the Religious Endowments Act of 1863 is valid.(o)

Strength of Committee.

21. A committee shall consist of such number of elected members as may be fixed by the [Provincial Government], such number to be not less than six and not more than twelve.

Constitution of new committee.

22. Notwithstanding anything contained in section 21, where the [Provincial Government] direct the constitution of a committee for the first time or in place of a committee which has been abolished the members of such new committee shall hold office for such period not exceeding one year as the [Provincial Government] may fix and during such period may be all appointed by the [Provincial Government]:

[Provided that, if, for any reason, elections to such new committee are not held at the expiry of the period fixed under this section, the [Provincial Government] may make fresh appointments thereto for a period not exceeding one year. An outgoing member shall, if otherwise qualified, be eligible for reappointment.]

Electoral areas and circles.

23. (1) For the purpose of election of members, the [Provincial Government] shall, for each committee, notify an electoral area.

(2) A committee may, with the approval of the Board, divide its electoral area into circles and determine the number of members which each circle shall return.

(o) *Lakshmana Ayyar v. R. S. Nayudu*, 1931 M.W.N. 193=1931 M. 340.

Electoral roll.

24. (1) For every electoral area, an electoral roll showing the names of persons qualified to vote shall once in every three years be prepared and published by such authority and in such manner as may be prescribed.

(2) Where an electoral area has been divided into circles, the electoral roll shall be divided into parts and one part shall be allotted to each circle.

(3) Every person whose name appears on the electoral roll published under this section shall, so long as it remains in force, be entitled to vote at an election; and no person whose name does not appear on such roll shall vote at an election.

(4) Notwithstanding anything contained in sub-section (1) an electoral roll once published shall remain in force till the publication of a fresh electoral roll.

Qualifications and disqualifications of electors.

25. Every person shall be entitled to have his name included in the electoral roll of an electoral area if he professes the Hindu religion and possesses the qualifications prescribed for an elector of such area in part I of schedule I and if he is not subject to any of the disqualifications described in part II of schedule I.

Disqualifications of candidates and members.

26. (1) A person shall be disqualified for election or appointment as a member of a committee—

(a) if his name does not appear on the roll of the electoral area concerned;

(b) if at the date of nomination, election or appointment he is

(i) of unsound mind, a deaf-mute or suffering from contagious leprosy, or

(ii) an undischarged insolvent, or

(iii) already a member of the committee whose term of office will not expire before his fresh election or appointment can take effect, or

(iv) a trustee or an office-holder, or a servant attached to, or in receipt of any emolument or perquisite from a temple over which the committee has jurisdiction.

(2) A person who has been sentenced by a criminal court to transportation or to imprisonment for a period of more than six months (such sentence not having been cancelled or reduced to a period of not more than six months or the offence not having been pardoned) shall be disqualified for election or appointment as a member of a committee while undergoing the sentence or during the period for which such sentence may have been suspended or in abeyance and for five years from the date of expiration of the sentence:

Provided that the [Provincial Government] may direct that such sentence shall not operate as a disqualification.

(3) A member of a committee shall cease to hold his office if he—

(a) is sentenced by a court to such punishment as is described in sub-section (2):

Provided that the [Provincial Government] may direct that such sentence shall not operate as a disqualification;

(b) becomes of unsound mind, a deaf-mute or suffers from contagious leprosy;

(c) applies to be adjudicated or is adjudicated a bankrupt or insolvent;

(d) becomes trustee or an office-holder or a servant attached to, or in receipt of any emolument or perquisite from a temple over which the committee has jurisdiction;

(e) ceases to profess the Hindu religion; or

(f) absents himself from the meetings of the committee for three consecutive months, or if three consecutive meetings are not held within that period from three consecutive meetings.

(4) Where a person ceases to be a member under clause (f) of sub-section (3), the president of the committee shall report the fact to the committee at its next meeting and also intimate the same in writing to such person. If such person applies for restoration within one month of the receipt by him of such intimation from the president, the committee may, at the meeting next after the receipt of such application, restore him to his office of member of the committee:

Provided that a member of a committee shall not be so restored more than thrice during his term of office.

Term of office of members.

27. Save as otherwise expressly provided, every member of a committee shall be entitled to hold office for a term of five years from the date when his election or appointment is published in the prescribed manner.

President and vice-president.

28. (1) Every committee shall elect a president and a vice-president from among its members.

(2) A president or a vice-president shall hold office for three years from the date of his election, unless in the meanwhile he resigns his office as president or vice-president or ceases to be a member of the committee.

(3) When the office of president is vacant, the vice-president shall exercise the functions of a president until a new president assumes office.

Resignation of President, vice-president and members of committee.

29. (1) A member of a committee other than the president and a vice-president may resign his office by giving notice in writing to the president and a president may resign his office by giving notice in writing to the committee.

(2) The resignation shall take effect in the case of a member or vice-president from the date of receipt of the notice by the president, and in the case of a president from the date on which it is placed before the committee.

Filling up of vacancies.

30. (1) On the occurrence of a vacancy in the office of a member of a com-

mittee, a new member shall, subject to the provisions of section 22, be elected in the same manner as his predecessor was elected.

(2) If no member is elected at an election held under sub-section (1), a fresh election shall be held.

(3) If no member is elected at such fresh election, the [Provincial Government] may appoint a person to fill the vacancy.

(4) If the office of president is vacant and there is no vice-president, any three members of the committee may, after giving reasonable notice of not less than seven clear days to the other members, convene a meeting for the election of the president.

(5) An outgoing member, president or vice-president shall, if otherwise qualified, be eligible for re-election or reappointment.

(6) The election or appointment of a member, president or vice-president shall be notified in the prescribed manner.

Act of committee not to be invalidated by informality.

31. No act of a committee or of any person acting as president, vice-president or member of such committee shall be deemed to be invalid by reason only of a defect in the establishment or constitution of such committee or on the ground that any member of such committee was disqualified for, or had ceased to hold, such office, or by reason of such act having been done during the period of any vacancy in the office of president, vice-president or member of such committee.

Incorporation of committee.

32. Every committee shall, by such name as the [Provincial Government] may determine, be a body corporate and shall have perpetual succession and a common seal and shall, by the said name, sue and be sued.

Officers and servants of committee; their appointment and punishment.

33. (1) The committee may, from time to time, determine the number, designations, grades and scales of salary or other remuneration of its officers and servants.

(2) Subject to such control as the Board may impose, the president of the committee shall have the power to appoint and transfer such officers and servants, and may fine, reduce, suspend, remove or dismiss them for breach of rules or discipline, for carelessness, unfitness, neglect of duty or misconduct or other sufficient cause.

Powers and duties of the president.

[34. (1) The resolutions of a committee shall be carried into effect by its President in whom the entire executive power of the committee shall, save as hereinafter provided, be vested.

(2) (a) All the resolutions of a committee shall be notified to the Board within one week after they are passed.

(b) The Board may call for any record or proceedings or other document or paper from any committee for the purpose of satisfying itself as to the correctness, regularity or propriety of any order or proceedings recorded or passed by such committee.

(3) (a) The Board shall have the power of staying, for reasons to be recorded by it, the execution of any of the resolutions of the committee and remitting the same to the committee for reconsideration.

(b) If the committee upon such reconsideration confirm the said resolutions, the Board may, whenever it deems such step necessary in the interests of the temple affected or the proper management of the affairs of the committee, modify or cancel the said resolutions.]

Committee to have general superintendence over temples.

35. Subject to the powers possessed by the Board under [sections 18, 34 and 35-A] and to the provisions of any scheme settled or deemed to be a scheme settled under this Act, a committee shall be entitled to exercise general superintendence over the temples for which it is constituted.

Board's power to perform the duties of a committee at the expense of the funds of the Committee in case such committee makes defaults.

[35-A. Where the Board is satisfied that any committee has failed to perform the duties entrusted to it under this Act, the Board may, after giving reasonable notice to the committee and considering the representations it may make, undertake and perform all or any of such duties so left unperformed, the expenses if any involved therein being met from the funds of the committee concerned.]

Power of Committee to make regulations.

36. Subject to such control as may be prescribed, a committee may make regulations not inconsistent with this Act or with any rules or by-laws made thereunder in regard to the following matters:—

(a) the time and place of its meetings;

(b) the manner in which notice thereof shall be given;

(c) the quorum for the transaction of business at meetings;

(d) the preservation of order and the conduct of proceedings at meetings and the powers which a president may exercise for the purpose of enforcing his decisions;

(e) the manner in which the proceedings of meetings shall be recorded and published;

(f) the division of duties among the president, vice-president and members of the committee;

(g) the delegation of the powers, duties or functions of the committee or its president

(i) to the president or vice-president or a member, or

(ii) to a sub-committee of members;

(h) the persons by whom receipts may be granted for money paid to the committee;

(i) the accounts, returns and reports to be submitted by trustees of religious endowments;

(j) the manner in which the decisions of the committee shall be ascertained otherwise than at meetings;

(k) all other similar matters.

Committee not to exercise jurisdiction over maths or excepted temples.

37. No committee constituted under the provisions of this chapter shall be entitled to exercise any jurisdiction over maths or excepted temples or the trustees thereof.

CHAPTER IV.

Religious Endowments in general

Preparation of register of endowments.

38. (1) For every math and temple a register shall be maintained by the Board showing—

(a) the names of past and present trustees and particulars as to the custom, if any, regarding succession to the office of trustee;

(b) particulars of all endowments of the math or temple, and all title-deeds and other documents relating thereto;

(c) particulars of the scheme of administration and of the dittam or scale of expenditure;

(d) the names of all offices to which any salary, emolument or perquisite is attached and the nature, time and conditions of service in each case;

(e) the jewels, gold, silver, precious stones, all vessels and utensils and other movables belonging to the institution, with their estimated value; and

(f) such other particulars as the Board may fix.

(2) The register shall be prepared, verified and signed by the trustee of the math or temple or by his authorized agent and submitted by him to the Board within such period after the commencement of this Act as the Board may fix:

Provided that a register relating to a temple over which a committee has jurisdiction shall be submitted through the committee which may, after making such inquiry as it may consider necessary, recommend such alterations, omissions or additions in the register as it may think fit.

(3) The Board may, after receiving the register from a trustee, make such inquiry as it may consider necessary and direct that the register be approved with such alterations, omissions or additions as it thinks fit to order.

(4) A copy of the register as approved by the Board shall be furnished to the trustee and to the committee, if any, concerned.

Annual verification of the register.

39. (1) The trustee or his authorized agent shall annually scrutinize the entries in the register and shall submit to the Board for its approval a verified statement showing the alterations, omissions or additions required therein.

(2) The Board and the committee, if any, may on receipt of the statement make such inquiry as they think necessary and the Board may by order direct the alterations, omissions or additions which should be made in the register.

(3) A copy of the order under sub-section (2) shall be communicated to the trustee and the president of the committee, if any, concerned and he

shall carry out the alterations, omissions or additions ordered by the Board in the copy of the register kept by him.

Care required of trustee and his powers.

40. (1) The trustee of every religious endowment is bound to administer its affairs and to apply the funds and properties of such endowment in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof, and as carefully as a man of ordinary prudence would deal with such affairs, funds or properties if they were his own.

(2) A trustee shall, subject to the provisions of this Act, be entitled to exercise all powers incident to the provident and beneficial management of the religious endowment and to do all things necessary for the due performance of the duties imposed on him.

Power of trustee of math or temple over trustees of specific endowments.

41. The trustee of specific endowments made for the performance of any service or charity connected with a math or temple shall perform such service or charity subject to the general superintendence of the trustee of the math or temple and shall obey all lawful orders issued by him.

Hereditary trustee.

42. (1) When a vacancy occurs in the office of hereditary trustee of a religious endowment and there is a dispute respecting the right of succession to such office, or

when such vacancy cannot be filled up immediately,

or when a hereditary trustee is a minor and has no legally constituted guardian fit and willing to act as such or there is a dispute respecting the person who is entitled to act as such guardian, or

when a hereditary trustee is by reason of unsoundness of mind or other physical infirmity unable to discharge the functions of the trustee,

the Board in the case of maths and excepted temples and the committee in the case of other temples may appoint a fit person to discharge the functions of the trustee of such endowment, until another trustee succeeds to the office or the disability of the trustee ceases to exist, as the case may be.

Nothing in this sub-section shall be deemed to affect anything contained in the Madras Court of Wards Act, 1902.

(2) In making an appointment under sub-section (1), the Board or committee shall have due regard to the claims of disciples, if any, in the case of maths, and of members of the family, if any, entitled to the succession, in the case of temples

(3) The person so appointed shall be entitled to exercise all the powers which a trustee could exercise in relation to such endowment.

Appointment and punishment of servants of temples.

43. (1) All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of duty, misconduct or other sufficient cause.

Provided that the [Provincial Government] may, in respect of any specified hereditary office-holder or servant or class of hereditary office-holders or servants and subject to the provisions of section 79, by order restrict and place under such control as they may think fit the exercise by the trustee of his powers of punishment under this sub-section.

(2) Any office-holder or servant of a temple other than an excepted temple punished by a trustee under sub-section (1) may, within such time as may be prescribed, appeal to the committee whose decision shall in the case of a non-hereditary office-holder or servant be final.

(3) A hereditary office-holder or servant of a temple other than an excepted temple may, within such time as may be prescribed, prefer a further appeal to the Board against the order of a committee on an appeal under sub-section (2) and the decision of the Board shall be final.

(4) Any office-holder or servant of an excepted temple punished by a trustee under sub-section (1) may, within such time as may be prescribed, appeal to the Board whose decision shall be final.

Enforcement of service when endowment is a charge on property.

44. Where an endowment for the performance of a charity or service connected with a temple consists merely of a charge on property and there is failure in the due performance of the charity or service by the person responsible, the trustee of the temple may require the person in possession of the property on which the endowment is a charge to pay to the trustee the expenses incurred or likely to be incurred in causing the charity or service to be performed otherwise. In default of such person making the payment as required by the trustee, the court shall, on the application of the trustee, pass an order for the recovery of the amount and such order may be enforced as if it were a decree of such court:

Provided that where the person in possession of the property on which the endowment is a charge is not the person responsible in law for the performance of the charity or service, and the amount referred to in this section is recovered from the person in possession, the court shall, on the application of such person, pass an order for the recovery of the amount from the person responsible in law and such order may also be enforced as if it were a decree of such court.

Note :—It is not open to a court to make an order under this section in respect of services to a temple which are remunerated by a service inam. The phrase "merely of a charge on property" in the section necessarily connotes a liability to make a payment in some shape or form to the institution, the extent of the payment being more or less fixed or ascertainable and does not cover the case of an inam land involving no such payment.(p)

Enfranchisement or freeing of lands, etc., held by a devadasi on condition of service in a temple.

44-A. (1) (a) (i) Where the remuneration for any service to be performed by a devadasi in a temple consists of lands granted or continued in respect of, or annexed to such service by the Government, the [Provincial Government] shall enfranchise the said lands from the condition of service, by the imposition of quit-rent;

(p) *Kotayya* v. *Yellamandi*, 38 L.W. 34 56 M. 731=1933 M. 549 65 M.L.J. 54=1933 M.W.N. 508.

(ii) Where the remuneration for such service consists of an assignment of land revenue so granted or continued, the [*Provincial Government*] *shall enfranchise such assignment of revenue from the condition of service:*

Provided that where, at the time when proceedings are taken under this sub-section, the devadasi is herself the owner of the lands in respect of which the assignment of revenue has been made, enfranchisement shall be effected and quit-rent imposed in the manner laid down in sub-clause (i);

(iii) Where the remuneration for such service consists in part of lands and in part of an assignment of land revenue, enfranchisement of the lands shall be effected in the manner laid down in sub-clause (i) and of the assignment of land revenue in the manner laid down in sub-clause (ii);

Explanation.—For the purposes of this clause, a grant shall be deemed to consist of an assignment of land revenue in all cases in which the devadasi herself is not, at the time specified in the proviso to sub-clause (ii), the owner of the lands in question.

(b) Enfranchisement under clause (a) shall be effected in accordance with such rules as the [*Provincial Government*] *may make in this behalf and shall take effect as and from such date as the* [*Provincial Government*] *may fix.*

(2) Where the remuneration for such service consists in whole or in part, of lands or of produce of lands not falling under sub-section (1) the [*Provincial Government*] *shall direct the Collector to determine the amount of rent payable on the lands or the produce in question. The Collector shall thereupon, after giving notice to the parties concerned and holding such inquiry as may be prescribed by the* [*Provincial Government*], *by an order determine the amount of rent, and in doing so, he shall have due regard to*

(a) the rent payable by the tenant for lands of a similar description and with similar advantages in the same village or neighbouring villages; and

(b) the improvements, if any, effected by the devadasi, in respect of the lands.

Such order shall be communicated to the parties concerned and also published in the manner prescribed.

(3) The amount of rent fixed by the Collector under sub-section (2) may be questioned by petition presented to the Board of Revenue within three months of the date of the publication of the order under the said sub-section but subject to the result of such petition, the order of the Collector fixing the amount of rent under sub-section (2) shall be final and shall not be liable to be contested in any court of law:

Provided, however, that the Board of Revenue shall have power on sufficient grounds to entertain a petition presented after the expiration of the period of three months.

(4) While determining the rent under sub-section (2), the Collector shall fix a date from which the order shall take effect and such lands or produce shall be deemed to have been freed from the condition of service as and from the date so fixed.

(5) No obligation to render any service relating to any temple to which any devadasi may be subject by reason of any grant of land or assignment of land revenue or produce derived from land, shall be enforceable on such

land, assignment or produce being enfranchised or freed, as the case may be, in the manner herein before provided.

(6) No order passed under sub-sections (1), (2) and (3) shall operate as a bar to the trial of any suit or issue relating to the right to enjoy the land or assignment of land revenue or produce derived from land as the case may be.

(7) (a) The quit-rent imposed under sub-section (1) shall be payable to the temple concerned.

(b) The assignment of land revenue enfranchised under sub-section (1) or the rent fixed under sub-sections (2) and (3) as the case may be shall be payable to the devadasi concerned during her lifetime and after her death to the temple concerned.

(8) For the purpose of this section 'devadasi' shall mean any Hindu unmarried female, who is dedicated to a temple.

Resumption and re-grant of inam granted for the performance of any charity or service connected with a math or temple in case of alienation of the inam or of failure to perform the charity or service.

44-B. (1) Any exchange, gift, sale or mortgage, and any lease for a term exceeding five years, of the whole or any portion of any inam granted for the performance of a charity or service connected with a math or temple and made, confirmed or recognised by the British Government, shall be null and void.

(2) (a) The Collector may, on his own motion, or on the application of the trustee of the math or temple or of the Committee or of the Board or of any person having interest in the math or temple who has obtained the consent of such trustee, committee or Board, by order, resume the whole or any part of any such inam, on one or more of the following grounds, namely:—

(i) that the holder of such inam or part has made an exchange, gift, sale or mortgage of the same or any portion thereof or has granted a lease of the same or any portion thereof for term exceeding five years, or

(ii) that the holder of such inam or part has failed to perform or make the necessary arrangements for performing, in accordance with the custom or usage of such math or temple, the charity or service for performing which the inam had been made, confirmed or recognized by the British Government, or any part of the said charity or service, as the case may be, or

(iii) that the math or temple has ceased to exist or the charity or service in question has in any way become impossible of performance.

When passing an order under this clause, the Collector shall determine whether such inam or the inam comprising such part, as the case may be, is a grant of both the melvaram and the kudivaram or only of the melvaram.

(b) Before passing an order under clause (a), the Collector shall give notice to the trustee, to the committee, to the Board, to the inamdar concerned or where only a part of the inam is affected, to the holder of such part as well as to the holder or holders of the other part or parts, and to the alienee, if any, hear their objections, if any, and hold such inquiry as may be prescribed.

(c) A copy of every order passed under clause (a) shall be communicated to each of the persons and bodies mentioned in clause (b), and shall also be published in the manner prescribed.

(d) (i) Any party aggrieved by an order of the Collector under clause (a) may appeal to the District Collector within such time as may be prescribed, and on such appeal, the District Collector may, after giving notice to each of the persons and bodies mentioned in clause (b) and after holding such inquiry as may be prescribed, pass an order confirming, modifying or cancelling the order of the Collector.

(ii) The order of the District Collector on such appeal, or the order of the Collector under clause (a) where no appeal is preferred under sub-clause (i) to the District Collector within the time prescribed, shall be final:

Provided that where there has been an appeal under sub-clause (i) and it has been decided by the District Collector or where there has been no appeal to the District Collector and the time for preferring an appeal has expired, any party aggrieved by the final order of the District Collector or the Collector, as the case may be, may file a suit in a Civil Court for determining whether the inam comprises both the melvaram and the kudivaram or only the melvaram. Such a suit shall be instituted within six months—

from the date of the order of the District Collector on appeal, where there has been an appeal under sub-clause (i), or,

from the date of the expiry of the period prescribed under sub-clause (i) for an appeal to the District Collector, in a case where there has been no appeal.

(e) Except as otherwise provided in clause (d) an order of resumption passed under this section shall not be liable to be questioned in any Court by suit or otherwise.

(f) Where any inam or part of an inam is resumed under this section, the Collector or the District Collector, as the case may be, shall, by order, re-grant such inam or part-

(i) as an endowment to the math or temple concerned, or

(ii) in case of resumption on the ground that the math or temple has ceased to exist or that the charity or service in question has in any way become impossible of performance, as an endowment to the Board, for appropriation to such religious, educational or charitable purposes not inconsistent with the objects of such math or temple, as the Board may direct.

(g) The order of re-grant made under clause (f) shall, on application made to the Collector within the time prescribed, be executed by him in the manner prescribed.

(h) Nothing in this section shall affect the operation of section 44-A.

Maintenance of accounts and appointment of auditors.

45. *(1) A Board, a committee and the [trustee of any math or temple or of any religious endowment attached to any math or temple] shall keep regular accounts of receipts and disbursements.*

(2) Such accounts shall be audited annually, or at such other intervals as may be prescribed, by auditors appointed by the [Provincial Government]. Auditors so appointed shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Submission of audit report.

46. *After completing the audit the auditor shall submit a report—*

(a) to the [*Provincial Government*] *in the case of the accounts of a Board,*

(b) to the Board in the case of the accounts of a committee, math or excepted temple, and

(c) to the committee in the case of the accounts of temples over which it has jurisdiction.

Contents of the audit report.

47. *(1) The report of the auditor shall among other things specify all cases of irregular, illegal or improper expenditure, or of failure to recover moneys or other property due to the institution, or of loss or waste of money or other property of the institution caused by neglect or misconduct.*

(2) The auditor shall also report on any other matter which the Board or committee may require in respect of any specified religious endowment.

Recovery of cost of audit.

[48. *(1) Notwithstanding any provision to the contrary contained in the scheme, if any, settled or deemed to be settled under this Act, the cost of auditing the accounts of any math or temple or any religious endowment attached to any math or temple shall be payable out of the funds of such math, temple or religious endowment. Such cost shall be fixed by the Board and shall not exceed one and a half per centum of the gross income of the math, temple or religious endowment concerned and shall be paid by the trustees thereof within the time allowed, and in accordance with the directions issued, by the Board, subject to any rules which the* [*Provincial Government*] *may prescribe in this behalf.*

(2) If such cost is not paid within the time allowed, it shall be recovered in the manner provided in sub-sections (2), (3) and (4) of section 76 as if the default in such payment were a default in the payment of the amounts specified in sub-section (1) of that section. The protection conferred by sub-section (5) of the said section on the [*Crown*] *and* [*servants of the Crown*], *shall also be available to them in respect of anything in good faith done or intended to be done in pursuance of this sub-section.*

(3) The cost of auditing the accounts of a committee shall be fixed by the Board and met from the funds of the committee. It shall be paid by the president of the committee within the time allowed, and in accordance with the directions issued, by the Board.]

CHAPTER V.

Temples.

Chapter not to apply to excepted temples.

49. *The provisions of this chapter shall not apply to excepted temples or the trustees thereof.*

Trustee to be Hindu.

50. *No person may succeed, or be appointed, to the office of trustee of a temple unless he professes the Hindu religion.*

Non-hereditary trustees, their number and appointment.

51. (1) Subject to the provisions of sub-section (4) the number of non-hereditary trustees for any temple shall be fixed by the committee, but shall not exceed three.

(2) Non-hereditary trustees shall be appointed by the committee and in making such appointments the committee shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the temple concerned is chiefly maintained.

(3) A non-hereditary trustee shall hold office for five years from the date of the order appointing him, unless in the meanwhile he is removed or dismissed, or his resignation is accepted, by the committee, or he ceases otherwise to be a trustee.

(4) Every non-hereditary trustee lawfully holding office on the date of commencement of this Act shall be deemed to have been duly appointed trustee under this Act on such date, but shall be entitled to hold office only for one year from such date.

Note:—Persons in office prior to Act, though not appointed by the committee, can apply under S. 78.(q) Where a decree in a suit brought in 1933 for modification of a scheme framed in 1920 recognised as a life-trustee one of the defendants who was appointed as trustee for life under the 1920 scheme and in the appeal against that decree it was objected that the recognition of a pre-existing trusteeship for life was opposed to the provisions of S. 51 (4) of the Act, it was held that reading Ss. 51 and 75 together it was clear that the right secured to the said defendant under the original scheme was not taken away by S. 51 (4).(r)

Trustee to obey orders of committees.

52. The trustee of a temple shall be bound to obey all orders issued under the provisions of this Act by the Board or committee or the President of such Board or committee.

Removal and dismissal of trustees.

53. (1) The committee may suspend, remove or dismiss the trustee of a temple—

(a) for persistent default in the submission of budgets, accounts, reports or returns, or

(b) for wilful disobedience of lawful orders issued by the Board or committee, or the President of such Board or committee, or

(c) for any malfeasance, misfeasance, breach of trust, or neglect of duty in respect of the trusts, or

(d) for any misappropriation of, or improper dealing with, the properties of the temple of which he is trustee, or

(e) for unsoundness of mind or other physical infirmity which unfits him for discharging the functions of a trustee.

(2) When the committee proposes to take action under sub-section (1) it shall frame charges against the trustee concerned and give him an opportunity of explanation, of testing the evidence against him and of adducing evidence in his favour and may place the trustee under suspension pending

(q) *Ramireddi* v. *Sreeramulu*, 1933 M. 120.

(r) *Shanmuga* v. *Veerapa*, 45 L.W. 653=1937 M.W.N. 317=1937 M. 594.

the disposal of the charges framed. The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation and the finding of the committee on each charge with the reasons therefor

(3) A trustee suspended, removed or dismissed under this section may, within three months of the date of the communication of the order of suspension, removal or dismissal, appeal to the Board against such order:

Provided that a hereditary trustee may, in lieu of appealing to the Board, apply within the same period to the court to modify or cancel the order of the committee.

(4) The order of the committee under this section shall, when no appeal is preferred or application made under sub-section (3), be final; and when such appeal is preferred or application is made the order of the Board or the court, as the case may be, shall be final.

Disqualifications of trustees.

54. (1) A non-hereditary trustee shall cease to hold his office if he—

(a) is sentenced by a court to such punishment as is described in sub-section (2) of section 26 and subject to the proviso contained therein:

(b) applies to be adjudicated or is adjudicated a bankrupt or insolvent; or

(c) ceases to profess the Hindu religion.

(2) A hereditary trustee shall cease to hold his office if he ceases to profess the Hindu religion.

(3) If a hereditary trustee becomes subject to any of the disqualifications described in clause (a) or clause (b) of sub-section (1), the committee may supersede him and appoint a fit person to administer the temple until the disability of the trustee ceases to exist or another trustee succeeds to the office.

(4) The Board shall, in cases of dispute or doubt, determine whether a trustee is disqualified under this section and its decision shall be final.

Fixing of standard scales of expenditure in temples.

55. Subject to the provisions of any scheme settled or deemed to be a scheme settled under this Act—

(1) the trustee of a temple may from time to time submit to the committee proposals for fixing the dittam or scale of expenditure in the temple and the amounts which should be allotted to the various objects or ceremonies connected with such temple or the proportions in which the income or other property of the temple may be applied to such objects or ceremonies.

(2) The trustee shall publish such proposals at the temple and in such other manner as the committee may direct, together with a notice stating that, if within one month from the date of such publication any objection or suggestion is received from any person having interest, the committee will consider such objection or suggestion.

(3) After the expiry of the period fixed under sub-section (2), the committee shall consider the objections or suggestions that may have been received and may pass such orders as it thinks fit on the proposals.

(4) The trustee or any person having interest may within six months of the date of the order passed by the committee under sub-section (3) either

appeal to the Board against such order or institute in the court a suit to modify or set aside the same.

If such an appeal is preferred or such a suit is instituted the Board or the court shall give at the expense of the appellant or the plaintiff, as the case may be, notice of the appeal or of the institution of the suit to all persons having interest either by personal service or where from the number of persons or any other cause such service is not reasonably practicable by public advertisement as the Board or court may in each case direct.

(5) Subject to the result of such appeal or suit as is referred to in sub-section (4) the order of the committee shall be final. The order of the Board on appeal shall be final.

(6) The dittam or scale of expenditure for the time being in force in a temple shall not be altered by the trustee except in accordance with the procedure laid down in this section.

Budgets of temple.

56. (1) The trustee of every temple shall in each year submit to the committee before such date and in such form as the Board may require, a budget showing the probable receipts and disbursements of the temple and the endowments connected therewith during the following year.

(2) Every such budget shall make adequate provision for the dittam or scale of expenditure for the time being in force and the due discharge of all liabilities in respect of loans.

(3) The committee may within such time after the receipt of the budget as the Board may fix, direct the trustee to make such alterations, omissions or additions in the budget as it may think fit.

(4) The trustee may, within such time as the Board may fix, appeal against the order of the committee under sub-section (3) to the Board whose decision shall be final.

Schemes for non-excepted temples.

57. (1) When the Board is satisfied that, in the interests of the proper administration of the endowments of a temple, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee, the committee, if any, and the persons having interest, by order settle a scheme of administration for the endowments of such temple.

[A scheme settled by the Board under this sub-section may contain provision for—

(a) fixing the number of non-hereditary trustees;

(b) removing any existing trustee or trustees whether hereditary or non-hereditary;

(c) appointing a new trustee or trustees in addition to or in the place of any existing trustee or trustees, whether hereditary or non-hereditary:

Provided that where provision is made in the scheme for the removal of a hereditary trustee provision shall also be made therein for the person next in succession who is qualified being appointed as trustee.

(d) appointing or directing the appointment of a paid executive officer, who shall be a person professing the Hindu religion, on

such salary as may be fixed by the Board, to be paid out of the trust funds, and defining the powers and duties of such officer; or

(e) defining the powers and duties of the trustee or trustees.

Explanation.—The power to settle a scheme under this sub-section shall be deemed to include a power to settle a scheme in any specific endowment or endowments attached to a temple.]

[(1-A) The Board may, for good and sufficient cause, suspend, remove or dismiss any executive officer appointed in pursuance of a scheme settled under sub-section (1) or direct the removal of such officer.]

(2) The Board may by order and in the manner provided in sub-section (1) modify or cancel a scheme settled under that sub-section.

(3) Every order of the Board under this section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the court to modify or set aside such order. Subject to the result of such suit every order of the Board shall be final and binding on the committee, the trustee and all persons having interest.

(4) Any scheme of administration which has been settled by a court under this section or which under section 75 is deemed to be a scheme settled under this Act may, at any time, for sufficient cause be modified or cancelled by the court in a suit instituted by the Board or the trustee or any person having interest, but not otherwise.

Filling up of vacancies among office holders or servants.

58. (1) Vacancies amongst the office-holders or servants of a temple shall be filled up by the trustee in cases where the office or service is not hereditary.

(2) In cases where the office or service is hereditary, the next in the line of succession shall be entitled to succeed:

Provided that, if there is a dispute respecting the right of succession to such office or service, or in cases where such vacancy cannot be filled up immediately, or where the person entitled to succeed is a minor without a legally constituted guardian fit and willing to act as such, or where the hereditary office-holder or servant is by reason of unsoundness of mind or other physical infirmity unable to discharge the functions of the office or perform the service, the trustee may appoint a fit person to discharge the duties of the office or perform the service, until another person succeeds to the office or service or the disability of the office-holder or servant ceases to exist, as the case may be.

(3) In making an appointment under the proviso to sub-section (2), the trustee shall have due regard to the claims of members of the family, if any, entitled to the succession.

Trustees to furnish accounts, etc., to committee or Board.

59. The trustee of every temple shall furnish such accounts, returns, reports or other information relating to the administration of the temple in his charge and at such time and in such form as the committee or Board may require.

Inspection by president or member of endowments.

60. *The president or any member of the committee deputed by him in this behalf may inspect all movable and immovable property belonging to, and all records, correspondence, plans, accounts and other documents relating to any temple, and the trustee of such temple and all officers and servants working under him shall afford to the president or such member such assistance as may be necessary.*

Exercise of the rights and powers and discharge of the duties of a committee by the Board in certain cases.

[*60-A. (1) Where for any local area or any class or classes of institutions in any local area, a committee has not been constituted or is not in existence, the Board and its President may, notwithstanding anything contained in this Act, exercise all or any of the powers and perform all or any of the duties of the committee and its president respectively, until a committee is constituted or comes into existence.*

(2) The provisions of this Act relating to appeal from the orders of a committee to the Board or the approval of the actions of a committee by the Board shall not apply to the orders or actions of the Board acting under sub-section (1).]

CHAPTER VI.

Maths and excepted temples.

Submission of budgets and annual accounts.

61. *The trustee of every math and excepted temple shall in each year submit to the Board before such date and in such form as the Board may require—*

(a) a budget showing the probable receipts and disbursements of the following year, and

(b) a statement of the actual receipts and disbursements of the previous year.

Inquiry by Board into mismanagement by trustees.

62. *When the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments of such math or temple or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of the proper administration of such endowments a scheme of administration should be settled, the Board may hold an inquiry which shall be conducted in such manner as may be prescribed.*

Schemes for maths and excepted temples.

63. *(1) If after making the inquiry referred to in section 62 the Board is satisfied that the trustee concerned has mismanaged the endowments of such math or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple.*

[A scheme settled by the Board under this sub-section may contain provision for—

(a) fixing the number of non-hereditary trustees;

(b) appointing a new trustee or trustees in addition to the existing trustee or trustees;

(c) associating one or more persons with the trustee or trustees or constituting a separate body, for the purpose of participating or assisting in the whole or any part of the administration of the endowments connected with such math or temple:

Provided that where the Board considers it necessary to associate any person or persons with the trustee or trustees of a math or to constitute any separate body for participating or assisting in the administration of a math, such person or persons or the members of such body shall be chosen from persons having interest in such math.

(d) appointing or directing the appointment of a paid executive officer, who shall be a person professing the Hindu religion, on such salary as may be fixed by the Board, to be paid out of the trust funds, and defining the powers and duties of such officer; or

(e) defining the powers and duties of the trustee or trustees.

Explanation.—The power to settle a scheme under this sub-section shall be deemed to include a power to settle a scheme for any specific endowment or endowments attached to a math or temple.]

[(1-A) The Board may, for good and sufficient cause, suspend, remove or dismiss any executive officer appointed in pursuance of a scheme settled under sub-section (1) or direct the removal of such officer.]

[* * * *]

(3) The Board may at any time by order and in the manner provided in sub-section (1) modify or cancel a scheme settled under that sub-section.

(4) Every order of the Board under this section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the court to modify or set aside such order.

Note:—The policy of the Act is to place maths and excepted temples in normal conditions under much less direct and detailed interference from the board in matters of internal management than ordinary temples. This does not mean that in cases of proved mismanagement or incapacity or the imperative interests of future good government, such interference may not have to be provided for in a scheme. But in the absence of such special grounds, the proper aim in a scheme of management of an excepted temple is to leave the internal management as much as possible to the trustees providing only such safeguards as are sufficient to prevent grave misgovernment and to make the superintendence of the Board effective.(s) Under this sec-

(s) *Zamorin of Calicut* v. *Krishna*, 35 L.W. 617=54 M. 532=1931 M. 328; See also *Garudachar* v. *H. R. E. Board*, 1939, M. 208 regarding procedure in framing a scheme for an excepted temple.

tion, the Board has power to frame a scheme for the management of a mutt, such power carrying with it a power to determine what properties are the mutt properties so that they may be governed by the scheme.(t) But the section does not contemplate the supersession of the Mahant by an associate trustee by the insertion of a provision in the scheme for the latter acting independently of the Mahant.(t) An order by the Board rejecting a petition under S. 62 for framing a scheme in respect of an excepted temple is not an order falling under or contemplated by S. 63 (4) and a Court has no jurisdiction to entertain a suit to set aside that order and for framing a scheme in respect of that temple.(u)

Finality of Board's order.

64. *Every order of the Board, under section 63 shall subject to the result of any suit which may be instituted under sub-section (4) of that section, be final and binding on the trustee and all persons having interest.*

Modification or cancellation of schemes.

65. *Any scheme of administration which has been settled by a court under section 63 or which under section 75 is deemed to be a scheme settled under this Act may, at any time, for sufficient cause be modified or cancelled by he court in a suit instituted by the Board or the trustee or any person having interest but not otherwise.*

[CHAPTER VI-A.

Notified temples.

Power of Provincial Government to notify temple or endowment to be subject to the provisions of this chapter.

65-A. *(1) (a) The Board may, by notice published in the prescribed manner, call upon the trustee and all other persons having interest in a temple or in any specific endowment attached to a temple to show cause why such temple or endowment should not be notified to be subject to the provisions of this Chapter.*

(b) Such notice shall state the reasons for the action proposed, and specify a reasonable time, not being less than one month from the date of the issue thereof, for showing such cause.

(2) (a) The trustee or any person having interest in the temple or endowment may thereupon prefer any objection he may wish to make to the issue of a notification as proposed.

(b) Such objection shall be in writing and shall reach the Board before the expiry of the time specified in the notice aforesaid o within such further time as may be granted by the Board in that behalf.

(3) Where no such objection has been received within the time specified in the notice issued under sub-section (1) or within such further time as may be granted by the Board, the [Provincial Government] may, by

(t) *Sri Mahant Sitaram* v. H. R. E. Board, 44 L W 843=1936 M. W. N. 1191; See also *H. R. E. Board* v. *Veeraraghavacharlu*, 46 L.W. 668 (1937) 2 M.L.J. 368 =1937 M.W.N. 708=1937 M. 750.

(u) *Ramanuja* v. *Pichu*, 45 L.W. 475= I.L.R. (1937) M. 1023=1937 M.W.N. 199= (1937) 1 M.L.J. 559=1937 M. 481.

notification published in the [Official Gazette], declare the temple or endowment to be subject to the provisions of this Chapter.

(4) Where any such objection or objections has or have been received within the time specified in the notice issued under sub-section (1) or within such further time as may be granted by the Board, the Board shall hold an enquiry into the objection or objections in the manner prescribed, and decide whether the temple or endowment concerned should be notified to be subject to the provisions of this Chapter or not.

Explanation.—The powers conferred on the Board by this sub-section shall be exercised by a Committee of the Board consisting of not less than three commissioners of whom the president shall be one.

(5) (a) If a committee of the Board decides that the temple or endowment should be notified as aforesaid, the Board shall publish its decision in the [Official Gazette].

(b) The trustee or any person having interest may appeal against such decision to the Board within two months from such publication and such appeal shall be heard and decided by the president and all the other commissioners of the Board sitting together. If no such appeal is preferred or if such an appeal is preferred and dismissed, then the [Provincial Government] may, by notification published in the [Official Gazette], declare the temple or endowment to be subject to the provisions of this Chapter.

Schemes to cease to apply to notified temple or endowment.

65-B. On the publication of a notification in respect of any temple or endowment under section 65-A, the scheme of administration, if any, settled for such temple or endowment by any Court or by the Board, as the case may be, and all rules, if any, framed under such a scheme shall cease to apply to such temple or endowment.

Appointment of executive officer for notified temple or endowment and his powers and duties.

65-C. (1)For every notified temple or endowment, the Board shall appoint a salaried executive officer, who shall be a person professing the Hindu religion, as soon as may be after the publication of the notification under section 65-A in respect of such temple or endowment.

(2) The executive officer shall hold office for such period as may be fixed by the Board in that behalf and he shall exercise such powers and perform such duties as may be vested in or assigned to him by the Board.

Explanation.—The Board shall define the powers and duties which may be exercised and performed respectively by the executive officer and the trustee, if any, of the notified temple or endowment. The executive officer shall for purposes of section 78 be deemed to be a person appointed to discharge the functions of a trustee under the Act.

(3) The executive officer shall be paid such salary and allowances as may be determined by the Board from the funds of the notified temple or endowment.

(4) The Board may, for good and sufficient cause, suspend, remove or dismiss the executive officer.

Jurisdiction over notified temple or endowment.

65-D. (1) Notwithstanding anything contained in this Act—

(i) no temple committee shall be entitled to exercise any jurisdiction over a notified temple or endowment; and

(ii) the Board and its President may, in respect of any notified temple other than an excepted temple and in respect of any notified endowment other than an endowment attached to an excepted temple, exercise all or any of the powers and perform all or any of the duties of the committee and its President, respectively.

(2) The provisions of this Act relating to appeals from the orders of the committee to the Board or the approval of the actions of a committee by the Board shall not apply to the orders or actions of the Board acting under clause (ii) of sub-section (1).

Sections 57, 62 and 63 not to apply to notified temple or endowment.

65-E.—Sections 57, 62 and 63 shall cease to apply to such temples and endowments as are notified under section 65-A.]

CHAPTER VII.

Application of endowment funds

Authority of trustee to incur expenditure on health, etc of pilgrims and worshippers.

66. The trustee of a math or temple may, out of the funds of the endowments in his charge, after satisfying adequately the purposes of the endowments, incur expenditure on arrangements for securing the health, safety, or convenience of disciples, pilgrims or worshippers resorting to such math or temple:

Provided that the Board in the case of maths and excepted temples and the committee in the case of other temples may, for reasons to be set forth in writing, restrict and place under such control as they may think fit the exercise by the trustee of his discretion under this section.

Cypres application of endowment or surplus.

67. (1) The Board may, after holding an enquiry in such manner as may be prescribed, by order, declare that the purpose of a religious endowment has from the beginning been, or has subsequently become, impossible of realization or that the machinery for effectuating the original purposes of the endowment has failed or no longer exists, or that after satisfying adequately the purposes of the endowment and after setting apart a sufficient sum for the repair and renovation of the buildings connected with the math or temple or the endowments attached thereto there is a surplus which is not required for such purposes; and may, by such order, direct that the amount of the endowment or such surplus as is declared to be available, as the case may be, be appropriated to religious, educational or charitable purposes not inconsistent with the objects of such math or temple:

Provided that in the case of a temple founded and maintained by a community the amount of the endowment or the surplus shall, as far as possible, be utilized for the benefit of the community for the purposes mentioned above.

(2) It shall be competent to the Board when giving a direction under sub-section (1) to determine what portion of such amount or surplus shall be retained as a reserve fund for the math or temple and to direct the remainder to be appropriated to the purposes specified in that sub-section.

(3) The Board may at any time by order and in the manner provided in sub-section (1) modify or cancel an order passed under that sub-section.

(4) The order of the Board under this section shall be published in the prescribed manner. The trustee or any other person having interest may within six months of the date of such publication institute a suit in the court to modify or set aside such order.

Subject to the result of such suit the order of the Board shall be final and binding on the committee, if any, the trustee and all persons having interest.

(5) Any decision of the court under this section may, at any time, for sufficient cause be modified or cancelled by the court in a suit instituted by the Board or the trustee or any person having interest but not otherwise.

CHAPTER VIII

Finance

Recovery from endowment of expenses incurred by the Board or committee on legal proceedings.

68. All costs and expenses incurred in connexion with legal proceedings in respect of any religious endowment to which a Board or committee is a party shall, notwithstanding anything contained in section 74, be payable out of the funds of such endowment.

Note :—This section covers also amounts which the Board has to spend in defending legal proceedings and which it has to pay to others as costs.(v)

Annual contribution from endowments to the Board and committee.

69. [(1) Every math or temple and every specific endowment attached to a math or temple shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per centum of its income as the Board may determine :

Provided that every notified temple other than an excepted temple, and every notified endowment other than an endowment attached to an excepted temple shall pay annually to the Board such contribution not exceeding three per centum of its income as the Board may determine.]

(2) [Every temple other than an excepted or notified temple and every specific endowment attached to a temple other than excepted or notified temple] shall pay annually for meeting the expenses of the committee such contribution not exceeding one and a half per centum of its income as the committee may with the approval of the Board determine.

(3) Religious endowments the administration of which is governed by a scheme settled under section 92 of the Code of Civil Procedure, 1908, shall, notwithstanding anything to the contrary contained in such scheme, be liable to pay the contribution under this section.

(v) *Sri Mariamman Koil* v. *H. R. E. Board*, 71 M.L.J. 594=1936 M.W.N. 1186.

Note :—It is only from the income of the temple property that contribution may be levied and yeomiah allowance granted by the Government to the temple cannot come within the term "income." Hence where an amount is paid by the Government for a specific purpose, for instance, for meeting the Deeparthanai and Naivedyam expenses, the said amount cannot be utilised by the trustees for paying the contribution.(w)

Assessment and recovery of costs, expenses and contributions.

70. *(1) The costs, expenses and contributions payable under sections 68 and 69 shall be assessed on and notified to the trustee of [the math, temple or specific endowment concerned] in the prescribed manner.*

[* * * *]

[(2) (a) Such trustee shall, within one month of the date of his receipt of such notice or within such further time as may be granted by the Board or committee, pay out of the funds of the math, temple or endowment concerned, the amount so demanded to the President of the Board or of the committee, as the case may be, or to any person authorised by him; and in default of such payment, the Collector of the district in which any property of the math, temple or endowment is situated shall, on a requisition made to him in the prescribed form by the President of the Board or of the committee, as the case may be, and subject to the provisions of this section, recover such amount as if it were an arrear of land revenue and the amount so recovered shall, after deduction therefrom of such percentage on account of the cost of recovery as the [Provincial Government] may by general or special order from time to time determine, be paid to such president.

(b) On receipt of a requisition under clause (a), the Collector shall issue a notice to the trustee concerned—

(i) requiring him, within fifteen days from the service of such notice, either to pay the amount mentioned in the requisition and specified in the notice or to state in writing his objections, if any, thereto, and

(ii) stating that such amount or the amount found due from the trustee after his objections, if any, have been considered will be recovered as if it were an arrear of land revenue.

(c) If, within the period of fifteen days aforesaid, no objection in writing is received by the Collector from the trustee, the Collector shall proceed to recover the amount specified in the notice as if it were an arrear of land revenue.

(d) If, within the said period, an objection in writing is received by the Collector from the trustee with regard either to his liability or to the amount specified in the notice, the Collector shall transmit such objection to the President of the Board.

(e) The President of the Board shall consider the objection so transmitted and communicate to the Collector his decision confirming, withdrawing or modifying the original demand.

(f) The Collector shall then proceed to recover the amount, if any, due from the trustee under the decision so communicated as if it were an arrear of land revenue.

(w) *Krishnavenamma* v. *Krishna Sastrulu*, 35 L.W. 748=1932 M 310=1932 M.W.N. 1062.

(3) The Collector may, on receipt of a requisition under clause (a) of sub-section (2), withhold the amount mentioned therein out of the tasdik or other allowance payable by the [Provincial Government] to the math or temple concerned and pay to the President of the Board or of the committee, as the case may be, the said amount after the expiry of the period of fifteen days referred to in clause (b) of sub-section (2) or in case an objection is received under clause (d) of that sub-section the amount, if any, due under the decision referred to in clause (e) thereof. Where the tasdik or other allowance is insufficient for the purpose, the Collector may withhold and pay as aforesaid the amount available and recover the balance as if it were an arrear of land revenue.

(4) Places of worship including temples and tanks where utsavams are performed, idols, vahanams and jewels and such vessels and other articles of a math or temple as, in accordance with the usage of the temple or math concerned, are necessary for purposes of worship or ceremonial processions shall not be liable to be proceeded against in pursuance of sub-sections (2) and (3).

(5) No suit, prosecution or other legal proceeding shall be entertained in any Court against the [Crown] or any [servant of the Crown] for anything in good faith done or intended to be done in pursuance of this section.

Note :—Where by usage one of several trustees of an endowment acts as the managing or executive trustee, a notice served on such trustee under this section is a proper notice as against the institution.(x) When an archaka of a temple takes possession of the property of the temple and conducts himself for all practical purposes as if he were a trustee, his position is that of a trustee **de son tort** or **de facto** trustee, especially when there is no properly constituted or **de jure** trustee, and a notice of assessment in respect of the temple served on such **archaka** is sufficient.(y)

CHAPTER IX

Miscellaneous

Power of Provincial Government to make rules.

71. (1) The [Provincial Government] may make rules to carry out all or any of the purposes of this Act not inconsistent therewith.

(2) In particular, and without prejudice to the generality of the foregoing power, they shall have power to make rules with reference to the following matters:—

(a) all matters expressly required or allowed by this Act to be prescribed;

(b) the registration of electors;

(c) the nominations of candidates, the times of election, the mode of recording and counting votes and the declaration and publication of the results of elections;

(d) the conduct of inquiries and the decision of disputes relating to elections;

(x) **Lakshmindra v. President, H. R. E. Board, 37 L.W. 207=56 M. 712=1933 M. 305=1933 M.W.N. 213=65 M.L.J. 364.**

(y) **H. R. E. Board v. Koteswara, 46 L. W. 587=(1937) 2 M.L.J. 413=(1937) M. W.N. 1032=1937 M. 852.**

(e) the powers of the President and commissioners of a Board to hold inquiries, to summon and examine witnesses and to compel the production of documents;

(f) the grant of leave, leave allowances and travelling allowances to the President and commissioners of a Board and generally the conditions of service of such President and commissioners;

(g) the budgets, reports, accounts, returns or other information to be submitted by Boards;

(h) the qualifications for officers and servants of a Board, the grant of leave, leave allowances and travelling allowances to them, the establishment of provident funds for them and generally the conditions of their service;

(i) the organisation of a staff of auditors, their salaries and allowances, the control of such staff, its relations with Boards, committees and trustees and generally the conditions of service of auditors;

(j) the calculation of the cost of audit and its apportionment among Boards and committees;

(k) the manner in which the accounts of Boards, committees or endowments shall be audited and published, the time and place of audit and the form and contents of the auditor's report; and

(l) the method of calculating the income of a religious endowment.

(3) The power to make rules under this section shall be subject to the condition of previous publication.

Power to alter schedules.

72. (1) The [Provincial Government] may make rules altering, adding to, or cancelling any of the schedules to this Act.

(2) All references made in this Act to any of the aforesaid schedules shall be construed as referring to such schedules as amended in exercise of the powers conferred by sub-section (1).

(3) A draft of the rules proposed to be made under this section shall be laid [before both the Chambers of the Provincial Legislature] and the rules shall not be made [unless both Chambers] by resolution [approve] the draft either without modification or addition or with modifications or additions [to which both the Chambers agree]; but upon such approval being given, the rules may be made in the form in which they have been approved, and such rules on being so made shall be notified and shall thereafter be of full force and effect.

Suits.

73. (1) The Board [* * *] or any person having interest and having obtained the consent of the Board may institute a suit in the Court to obtain a decree —*

(a) appointing or removing the trustee of a math or excepted temple [or of a specific endowment attached to a math or excepted temple],

(b) vesting any property in a trustee,

(c) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment [* *],*

[(d) directing accounts and inquiries, or],

[(e)] granting such further or other relief as the nature of the case may require.

Note:—S. 73 is confined to cases in which the main relief falls under any of the clauses (a) to (d) and Cl. (e) covers reliefs only incidental to or *ejusdem generis* with the main reliefs. In other words, beyond the reliefs expressly mentioned in (a) to (d) of S. 73 and any relief incidental to them, no further relief can be prayed for in a suit under S. 73. Prior to the introduction of the present cl. (*d*) to the section, it was held that it was not intended by the Legislature to permit a suit to recover properties and recover money as the result of taking accounts of gross mismanagement or as damages for some act or default on the part of the trustees.(*a*)

A suit for recovery of possession by a trustee against a *de facto* trustee who ceased to be that by date of suit does not require the Board's Consent. Such a suit cannot be regarded as one for vesting property in a trustee. Nor can the relief of recovery of possession be treated as one under Cl. (*e*).(*a*)

[*(2) The provisions of sub-section (1) shall apply as well to suits and appeals pending in civil courts on the date of the commencement of the Madras Hindu Religious Endowments (Amendment) Act, 1935, as to suits and appeals instituted after the commencement of that Act.*]

Note:—Where a person sues to establish his personal right as the hereditary trustee of a temple, the suit does not fall under this sub-section.(*b*) The words "or of a specific endowment attached to a math or excepted temple" were added in S. 73 (1) (a) to obviate the effect of the decision that the section does not apply to a suit for removal of a trustee of a Kattalai.(*c*)

[*(3) Sections 92 and 93 and rule 8 of Order I of the first schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act.*]

S. 73 does not apply to a suit by the trustee for recovery of property from strangers to whom they have been alienated through the maladministration of previous trustees.(*d*) A suit by some of the worshippers of an excepted temple for a declaration that a certain article in the temple is a sacred article the sale of which would be a breach of trust and for an injunction restraining such sale is not prohibited by S. 73, since such a suit is not one in respect of the administration or management of the trust within the meaning of that section.(*e*) So also a suit by some worshippers for a declaration that certain strangers to the trust are not entitled to certain allowances in the temple, does not relate to the administration or management of the temple and hence not barred by the section.(*f*)

Cost of suits etc.

74. The costs, charges and expenses of and incidental to any suit or application under this Act or to any appeal from a decree or order passed in such suit or on such application shall be in the discretion of the court, which may

(*a*) *Vasudevan* v. *Bhawadasan*, 38 L. W. 902=1933 M.W.N. 1433=57 Mad. 315 =1934 M. 115.

(*a*) 39 L.W. Short Notes p. 8.

(*b*) *Vythilinga* v. *Subramma*, 34 L.W. 254=54 M. 1011=61 M.L.J. 815=1931 M. 801.

(*c*) *Vythilinga* v. *Ranganatha*, 39 L.W. 205=66 M.L.J. 96=1933 M.W.N. 1235= 57 M. 363=1934 M. 126.

(*d*) *Hazarimull* v. *Vedachala*, 35 L.W. 156=55 M. 549=1932 M. 234=1932 M.W. N. 9=62 M.L.J. 180.

(*e*) *Gurusamayya* v. *H. R. E. Board*, 43 L.W. 424=1936 M.W.N. 204=70 M.L. J. 315=1936 M. 352.

(*f*) *Singam Aiyangar* v. *Kasturi Ranga*, 47 L.W. 94=(1937) 2 M.L.J. 931=1938 M.W.N. 58. See also *Ramanatha* v. *Arunachalam*, 48 L.W. 419=(1938) 2 M.L.J. 516.

subject to the provisions of section 68 direct the whole or any part of such costs, charges and expenses to be met from the property or income of the endowment concerned or to be borne and paid in such manner and by such persons as it thinks fit.

Cost of proceedings, etc.

[*74-A. The costs of and incidental to all proceedings before the Board shall be in the discretion of the Board, which shall have full power to determine by whom or out of what funds and to what extent such costs are to be paid; and the order passed in this regard may be transferred for execution to the court and shall be executed by the court as if the order had been passed by itself.*]

Schemes settled under section 92 of the Civil Procedure Code.

75. Where the administration of a religious endowment is governed by any scheme settled under section 92 of the Code of Civil Procedure, 1908, such scheme shall, notwithstanding any provisions of this Act which may be inconsistent with the provisions of such scheme, be deemed to be a scheme settled under this Act; and such scheme may be modified or cancelled in the manner provided by this Act.

Note :—The section does not retrospectively affect any scheme settled before this Act under S. 92. C.P.C.(*g*)

Alienation of immovable trust property.

76. (1) No exchange, sale or mortgage and no lease for a term exceeding five years of any immoveable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples.

(2) The trustee of the math or temple or any person having interest may, within one year of the date of the order of the Board or committee under sub-section (1), apply to the court for modifying or cancelling such order.

(3) The order of the Board or committee under sub-section (1) when no application is made under sub-section (2) and the order of the court when such application is made shall be final.

Note :—An alienation by one of the trustees of the temple without the consent of the others is invalid and cannot be validated by the authorisation of the Board.(*h*)

Application of the Act to endowments partly religious and partly secular.

77. (1) Where an endowment has been made or property given for the support of an institution which is partly of a religious and partly of a secular character or for the performance of any service or charity connected therewith, or

where an endowment made or property given is appropriated partly to religious and partly to secular uses, the Board may notwithstanding anything contained in the Madras Endowments and Escheats Regulation, 1817, determine

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(*g*) *Chinnan Chettiar* v. *Sundaresa Iyer*, 1929 M 322.

326=(1937) 2 M.L.J. 358=1937 M.W.N. 692.

(*h*) *Unnikanna* v. *Kesavan*, 46 L.W.

what portion of such endowment or property or of the income therefrom shall be allocated to religious uses. Such portion shall thereafter be deemed to be a religious endowment and its administration shall be governed by the provisions of this Act.

(2) Any party affected by an order under sub-section (1) may within such time as may be prescribed apply to the court to modify or set aside such order but, subject to the result of such application, the order of the Board shall be final.

Note :—An endowment partly religious and partly secular in respect of which the Board has not made any allocation in respect of religious uses is outside the operation of this Act.(i)

Putting trustee in possession.

[78. Where a person has been appointed as trustee of a math or temple or a religious endowment connected therewith or has been appointed to discharge the functions of a trustee by the committee or the Board, in accordance with the provisions of this Act and such person is resisted in, or prevented from obtaining possession of the math, temple or religious endowment concerned and the records, accounts and properties thereof, the court may on application by the person so appointed and on production of the order of appointment, direct the delivery to such person of the possession of the math, temple or religious endowment and of the records, accounts and properties thereof.]

Note :—An order passed without notice directing one of the trustees to hand over charge of the trust properties is illegal.(j) On an objection by a person prejudicially affected by an ex parte order directing delivery of certain alleged trust property, it is open to the court to reconsider its ex parte order since it carries with it an implication that it will be subject to any objections to which the act of delivery may give rise.(k) The Legislature in giving the court jurisdiction under S. 78 to make orders for delivery of possession has impliedly granted it the power of doing all acts necessary to the execution of its order.(l) Court can enquire into claims against strangers. But interference is however discretionary and in cases where difficult questions of title requiring elaborate investigation arise the court may order the institution of a separate suit.(m)

Saving of established customs and usages.

79. Save as otherwise expressly provided in or under this Act nothing herein contained shall affect any established usage of a math or temple or the rights, honours, emoluments and perquisites to which any person may by custom or otherwise be entitled in such math or temple

Note :—This section is merely a saving clause which does not add to or take away existing rights or remedies and the mere fact that the Board observed some judicial forms in determining rival claims to mere honors and precedence in the temple would not convert those claims into legal rights; such determination is in essence only of an administrative nature.(n)

(i) *Ranganayaki* v. *Shivarama*, 58 M. L.J. 104=1930 M. 216=31 L.W. 849.

(j) *Kallasanatha Ayyar* v. *Nallasivam Pillai*, 1928 M. 361.

(k) *Guruswammal* v. *Arumuga*, 34 L.W. 989=1932 M. 164=61 M.L.J. 894=1931 M. W.N. 1204.

(l) *Narayana Ayyangar* v. *Desikachariar*, 38 L.W. 399=65 M.L.J. 315=1933 M. 689=1933 M.W.N. 363.

(m) *Ramireddi* v. *Sreeramulu*, 1933 M. 120=140 I.C. 826.

(n) *Sri Emberumanar* v. *H. R. E. Board*, 44 L.W. 539=71 M.L.J. 568=1936 M.W.N. 954=1936 M. 973.

Government not to interfere with religious endowments except as provided by this Act.

80. Save as provided in this or any other Act, it shall not be lawful for the [Provincial Government] or for any executive officer of the [Provincial Government] in his official capacity to undertake or assume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any math or temple, to take any part in the management or appropriation of any endowment made for its maintenance, or to nominate or appoint the trustee of any religious endowment or to be concerned in any way with any religious endowment.

Court-fees leviable on documents under this Act.

81. (1) Notwithstanding anything contained in the first or second schedule to the Madras Court Fees Amendment Act, 1922, the proper fees for the document described in columns (1) and (2) of Schedule II shall be the fees indicated in column (3) thereof.

(2) The provisions of the Madras Court Fees Amendment Act, 1922, shall otherwise, so far as may be, apply to the documents mentioned in Schedule II.

Grant of copies of proceedings, etc.

[82. The President of a Board or committee may grant copies of proceedings or other records of his office on payment of such fees and subject to such conditions as may be determined by the Board. Copies shall be certified by the President of the Board or committee or by such officer as may be authorised in this behalf by the President of such Board or committee, in the manner provided in section 76 of the Indian Evidence Act, 1872.]

Transitory provisions to govern existing committees.

83. (1) Every committee established under the Religious Endowments Act, 1863, which is in existence at the commencement of this Act shall be deemed to have been duly constituted under the provisions of this Act.

(2) In their application to the members and presidents of committee in office at the commencement of this Act and the first reconstitution of such committee in accordance with this Act, the provisions of this Act shall be read subject to the rules contained in Schedule III.

Settlement of dispute as to whether an institution is a math or temple as defined in this Act.

[84. (1) If any dispute arises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board.

Note : –S. 84 says that the question as to the public or private nature of a temple shall be decided by the Board and the party affected by the decision can apply to a Civil Court to get the order of the Board set aside. Even if the Board had, before any suit was filed against it, said that in its opinion the plaint temple was a public temple and called on the plaintiff to contribute and the plaintiff denied it, it is the Board that would be the tribunal to decide the question. Its power to decide the question is not taken away if that statement is made by it in its written statement, in a suit filed against

it questioning its jurisdiction.(o) The proper remedy against an adverse decision of the Board being an application to the District Judge, the original side of the High Court cannot by injunction restrain the Board from giving such decision (Ibid.). The mode of redress open to a person in respect of interference with his rights by the Board's order under S. 84 (1) is definitely provided by S. 84 (2) viz., an application to the District Court and hence it is not open to him to seek redress by means of a suit.(p) An application under section 84(2) cannot be regarded as in the nature of an appeal or revision petition which must be disposed of on the evidence taken by the Board, but is really, so far as the court is concerned, an original proceeding or application to which the ordinary procedure of the Court will apply and on which the parties have the right to produce such evidence as they wish.(q) The proper court fee payable in respect of an application under S. 84 (2) is the court-fee leviable under Art. 17 (1) of Sch. II of Madras Court-fees Amendment Act of 1922, that is Rs. 15.(r) An order passed by the District Judge under S. 84 (2) on an application against the decision of the Board under S. 84 (1) is not appealable to the High Court.(s) Nor does an appeal lie against an order refusing to set aside a dismissal for default of an application under S. 84 (2).(t) A District Court has no authority under S. 84 (2) to direct a remand and rehearing of the case The powers conferred on the court by that section are only to modify or set aside the decision of the Board or to dismiss the application and not all the normal powers of an Appellate Court.(u)

(2) Any person affected by a decision under sub-section (1) may, within one year, apply to the court to modify or set aside such decision; but, subject to the result of such application, the order of the Board shall be final.]

Note:—O. 9 of the Civil Procedure Code applies to an application made to the District Court, so that on such an application being dismissed for default the applicant can apply for setting aside the dismissal and restoration of the dismissed application.(v) Persons who opposed the trustee's application before the Board under S. 84 (1) are proper parties to his application under S. 84 (2).(w) In the case of a communal temple under the management of a village community, any member of that community can maintain an application for setting aside the Board's order that the temple is an excepted one.(x) In proceedings before the Court, the materials such as affidavits which were placed before the Board, should be treated as part of the enquiry.(y)

(o) *Unnikanta* v. *Board of Commissioners*, 28 L. W. 964=1929 M. 85=55 M. L.J. 679.

(p) *Iswarananda* v. H. R. E. Board. 34 L.W. 209=54 M. 928=61 M.L.J. 117 1931 M. 574.

(q) *Iswarananda* v. *Board of Commissioners*, 36 L.W. 673=56 M. 40=63 M.L. J. 254=1932 M. 593=1932 M.W.N. 729.

(r) *Damodaran* v. *Board of Commissioners*, 31 L.W. 428=53 M. 266=58 M.L.J. 494=1930 M. 392=1930 M.W.N. 404.

(s) *Rajagopalan* v. *H. R. E. Board*, 39 L.W. 4=66 M.L.J. 43=1933 M.W.N. 1385 =57 M. 271=1934 M. 103 (2) (F.B.).

(t) *Srinivasa* v. *H. R. E. Board*, 39 L. W. 197=66 M.L.J. 247=57 M. 297=1934 M.W.N. 671=1934 M. 258 (1).

(u) *Chengazhisseri* v. *Board of Commissioner*, 34 L.W. 848=55 M. 201=61 M. L.J. 862=1932 M. 108=1931 M.W.N. 764.

(v) *Marudamuthu* v. *H. R. E. Board*, (1937) 2 M.L.J. 175=45 L.W. 695=1937 M.W.N. 604=(1937) M. 653.

(w) *Sangayya* v. *Narayana*, 47 L.W. 739 =(1938) 1 M.L.J. 685.

(x) *Kumarasami* v. *H. R. E. Board*, 46 L.W. 528=1937 M.W.N. 1117=1937 M. 940.

(y) *Nagireddi* v. *H. R. E. Board*, 46 L.W. 388=1937 M. 973.

Removal of difficulties in working Act.

85. If any difficulty arises as to first constitution or re-constitution of any committee after the commencement of this Act, or otherwise in first giving effect to the provisions of this Act, the [*Provincial Government*], *as occasion may require, may by order do anything which appears to them necessary for the purpose of removing the difficulty.*

SCHEDULE I.

[See *section* 25.]

Part I—Qualifications of electors.

A person shall be qualified as an elector for an electoral area who has resided in such area for not less than 120 days in the previous year and who—

(a) was in the previous year assessed by a municipal council or local board to an aggregate amount of not less than twenty rupees in respect of one or more of the following taxes, viz.—

property tax
tax on companies, or
profession tax, or

(b) was in the previous year assessed to income-tax, or

(c) is registered as a ryotwari pattadar or as an inamdar of land of which the annual rent value is not less than fifty rupees, or

(d) holds on a registered lease under a ryotwari pattadar or inamdar land the annual rent value of which is not less than fifty rupees, or

(e) is registered jointly with the proprietor under section 14 of the Malabar Land Registration Act, 1895, as the occupant of land, the annual rent value of which is not less than fifty rupees, or

(f) is a landholder holding an estate of which the annual rent value is not less than fifty rupees, or

(g) holds, as a ryot or tenant under a landholder, land the annual rent value of which is not less than fifty rupees.

Part II—Disqualifications of electors.

No person shall be entitled to have his name registered on the electoral roll of an electoral area who is subject to any of the following disqualifications:

(a) is not a British subject;

(b) has been adjudged to be of unsound mind by a competent court; or

(c) is under twenty-one years of age.

SCHEDULE II.

[See section 81.]

Section.	Description of the document.	Proper fee.
(1)	(2)	(3)
		Rs.
43 (2)	Appeal to the committee by any office-holder or servant against an order of punishment by a trustee under sub-section (1).	2
43 (3)	Further appeal to the Board by a hereditary office-holder or servant against an order of the committee on appeal under sub-section (2) ..	2
43 (4)	Appeal to the Board by an office-holder or servant of an excepted temple ..	2
44	Application to court by the trustee to recover the amount from the person in possession or by the person in possession from the person responsible in law ..	The fee leviable on a plaint for the amount claimed under the Madras Court Fees Amendment Act, 1922.
53 (3)	Appeal to the Board or application to court against an order of suspension, dismissal or removal by the committee of a trustee ..	25
55 (4)	Appeal to the Board by a trustee or person having interest against the order of a committee under sub-section (3) fixing standard scales of expenditure.	20
55 (4)	Suit under the sub-section ..	50
57 (3)	Suit under the sub-section ..	50
57 (4)	Suit under the sub-section ..	50
62	Application to the Board by not less than 20 persons having interest for framing a scheme of administration for a math or excepted temple ..	50
63 (4)	Suit under the sub-section ..	50
65	Suit under the section ..	50
67 (4)	Suit under the sub-section ..	50
67 (5)	Suit under the sub-section ..	50
[	* * *]	
73	Suits under the section ..	50

Section.	Description of the document.	Proper fee.
(1)	(2)	(3)
76 (2)	Application to the court by the trustee of a math or temple or any person having interest for modifying or cancelling any order of the Board sanctioning alienation of immovable property under sub-section (1).	The fee leviable on a plaint under article 17, Schedule II, of the Madras Court Fees Amendment Act, 1922.
77 (2)	Application to a court to modify or set aside an order of the Board under sub-section (1) allocating any endowment, property or the income therefrom to religious and secular purposes ..	20
78	Application to the court for delivery of possession of endowments to a trustee appointed by the committee	2
84 (2)	Application to modify or set aside the decision of the Board under sub-section (1) ..	The fee leviable on a plaint under article 17, Schedule II, of the Madras Court Fees Amendment Act, 1922.

SCHEDULE III.

[*See section* 83.]

Transitory Provisions.

1. The [*Provincial Government*] *shall fix a date, not being later than one year from the commencement of this Act on which the term of office of members of committees holding office at the commencement of this Act shall expire*.

Provided that a member who is also the president of a committee shall continue to exercise the functions of a president until a new president is elected under rule 4.

2. *Any vacancy in the office of president of a committee which is in existence at the commencement of this Act or which occurs before the date on which a new president is elected under rule* 4 *shall be filled up under the provisions of this Act*; *and any vacancy in the office of member of a committee which is in existence at the commencement of this Act or which occurs before the date fixed under rule* 1 *shall be filled up by appointment by the* [*Provincial Government*] :

Provided that any person elected or appointed as president or member under this rule shall hold office only up to the date referred to in rule 1.

3. The president of the committee shall cause arrangements to be made for election of members, so that the newly-elected members may come into office on the date fixed under rule 1 for the expiry of the terms of office of members holding office at the commencement of this Act.

4. On or as soon as may be after such date, a meeting shall be held on a day and at a time fixed by the president for the election of a new president.

Nonstatutory remedies. In cases not covered by the above statutory provisions prescribing the respective remedies open to the persons interested in the proper maintenance and control of a public charitable or religious endowment, the common law remedy by suit is always available to an interested or aggrieved party and is not and cannot be taken away except by an express statutory enactment to that effect.

626. Suits and Limitation.—Before the Indian Limitation Act of 1908 was amended by Act I of 1928 which came into force on the 1st January, 1929, the law relating to limitation of actions in respect of religious endowments stood like this:

(1) An invalid sale by a hereditary trustee of his hereditary right to manage the religious endowment is void and gives no title to the purchaser and the possession which is taken by the purchaser is adverse to the vendor in whom the title remains from the date of sale and a suit to recover possession of the office thus alienated must be brought within 12 years from the date when the purchaser took possession.[z]

(2) In the case of a Mahant's alienation of the property appertaining to the Math without legal necessity, the alienee's adverse possession of the property commences when the alienating Mahant ceases to be Mahant by death or otherwise since the alienation is not void but is good for the lifetime of the grantor. In this respect there is no distinction in principle between a disposition by way of a permanent lease and a grant by way of absolute sale. Hence a suit to recover possession must be brought within 12 years from the date when the alienating Mahant ceased to be the Mahant by death or otherwise[a] except that in the case of a permanent lease, the adverse possession of the lessee commences only from the date of death of the alienating Mahant's successor if he (the successor) has consented to the possession of the lessee.[b]

(z) *Gnanasambanda* v. *Velu Pandaram*, 23 M. 271=4 C.W.N. 329=10 M.L.J. 29 =2 Bom. L.R. 597=27 I.A. 69; *Ram Charan Das* v. *Naurangi Lal*, 12 P. 251= 60 I.A. 124=1933 M.W.N. 272=14 P.L. T. 185=1933 A.L.J. 327=37 L.W. 512= 64 M.L.J. 505= 37 C.W.N. 541=35 Bom. L.R. 530=1933 P.C. 75;

(a) *Ram Charan Das* v. *Naurangi Lal*, 12 P. 251=60 I.A. 124=1933 M.W.N. 272 =14 P.L.T. 185=1933 A.L.J. 327=37 L. W. 512 ·64 M.L.J. 505=37 C.W.N. 541= 35 Bom. L.R. 530=1933 P.C. 75; *Sivaprakasa* v. *Manickam Pillai*, 146 I.C. 52= 37 L.W. 628=1933 M.W.N. 344=64 M.L. J 577=1933 M. 481.

(b) *Vidya Varuthi* v. *Balusami* 44 M. 831 48 I.A. 302 =1922 P.C. 123=15 L.W. 78=26 C W.N. 537=24 Bom. L.R. 629=41 M.L.J. 346=1921 M.W.N. 449=20 A.L. J. 497. See also the case in foot-note (e) on page 678.

(3) In the case of a Court sale of the debutter property in execution of a decree against the manager of a religious institution for a debt not binding on the institution, adverse possession of the purchaser commences on the date of such Court sale and a suit for recovery of possession must be brought within 12 years from that date.[c]

(4) In the case of a sale or permanent lease of the debutter property by a Dharmakarta of a temple for a purpose not binding on the Devasthanam the adverse possession runs from the date of the alienor ceasing to be in office and the rule in *Vidya Varuthi's case*[d] as to the commencement of adverse possession of the alienee must not be confined to the case of a mutt property alienated by a Mahant.[e]

(5) Since an idol acts through its shebait, an exclusion of the shebait from worship and from the endowed properties for a period of 12 years may have the effect of extinguishing only the shebait's right to the office or it may have even the effect of extinguishing the idol's right to the properties. The answer would depend upon the intention with which the acts of dispossession are done. In all cases of adverse possession, the extent of the interest acquired by the adverse possession depends upon the assertion of intention, expressed or necessarily implied, of the wrongdoer when dispossessing and keeping out of possession the real owner. When, for example, the shebait is turned out and kept out of the endowed properties by a person who has no title on the assertion that the properties are his and not the idol's, the adverse possession is against the idol also, and if its duration is sufficiently long, the idol will lose its right to the properties themselves, and neither the physical presence of the idol on the property nor the fact that the pujas are performed by the wrongdoer would be material. But where the exclusion of the shebait is made under an assertion of title to the office in the excluder, then the exclusion for the requisite period operates only as an extinction of the lawful shebait's right to the office.[f]

(6) Where the shebait or the trustee alienates the trust property, not in his capacity as shebait or trustee, but in his own

(c) *Subbaiya* v. *Maracayar*, 46 M. 751=50 I.A. 295=21 A.L.J. 730=25 Bom. L.R. 1275 28 C.W.N. 493=45 M.L.J. 588=1924 M W.N. 26=18 L.W. 903=1923 P.C. 175.

(d) *Vidya Varuthi* v. *Baluswami* 44 M. 831=48 I.A. 302=15 L.W. 78=26 C.W.N. 537=24 Bom. L.R. 629=41 M.L.J. 346=1921 M.W.N. 449=20 A.L.J. 497=1922 P. C. 123.

(e) *Ponnambala* v. *Perianan*, 59 M. 809 =63 I.A. 261=38 Bom. L.R. 702=40 C.W.N. 901=71 M.L.J. 105=44 L.W. 1=1936 P.C. 183; *Rama Reddy* v. *Rangadasan*, 49 M. 543=23 L.W. 657=50 M.L.J. 589=1926 M. 769; *Govinda Rao* v. *Chinnathurai*, 24 L.W. 329=1926 M. 193=49 M.L.J. 640=1925 M.W.N. 871.

(f) *Panna Sundari* v. *Benares Bank*, 1938 C. 81.

personal capacity on the ground that the property is his own absolute property, then the adverse possession of the alienee commences from the date of the alienation.(g)

Under the Limitation Act of 1908 as amended by Act I of 1928, S. 10 of the Limitation Act was amended and five new articles were introduced into the First Schedule. The amendment of S. 10 consists in the insertion of the following paragraph:

'For the purposes of this section, any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

The following are the new Articles inserted in the First Schedule of the Limitation Act of 1908:

Description of Suit.	Period of limitation.	Time from which period runs
48-A. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depository or pawnee for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.
48-B. To set aside a sale of movable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment made by a manager thereof for a valuable consideration.	Three years	Do.
134-A. To set aside a transfer of immovable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment made by a manager thereof for valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
134-B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Do.	The death, resignation or removal of the transferor.
134-C. Similar suit to recover possession of movable property.	Do.	Do.

(g) *Alam Khan* v. *Karuppannaswami*, (1938) 1 M.L.J. 113=1938 M.W.N. 105= 47 L.W. 165; *Debendra* v. *Nahar*, 1930 C. 673=34 C.W.N. 498.

CHAPTER XVI

LAW OF IMPARTIBLE ESTATES

627. Creation of Impartible estates.—An impartible estate might have been created by grant, by custom or by family arrangement. The power to create an impartible estate by a grant is the prerogative of the Sovereign and a subject has no such power.[a] As regards custom creating impartibility, it must be ancient and invariable and must be established to be so by clear and unambiguous evidence.[b] An impartible estate might also have had its origin in a family arrangement followed up in practice for many generations, whereby it was agreed that the family property should be held by a single person at a time in a certain order of succession, the other members being entitled only to maintenance.[c] The onus of proving that an estate is impartible is upon the person pleading it.[d]

628. Impartible estate whether can be joint family property.—The mere fact that a raj is impartible does not make it the separate or the self-acquired property of the holder. It may be his separate property[e] or it may be the property of a joint undivided family of which he is a member.[f] If it is the latter, succession to it will be regulated according to the rule of survivorship, although, according to the custom of impartibility, the person designated will hold the raj without the others sharing it.[g] "Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible

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(a) *Rajendra* v. *Raghubans*, 40 A. 470 =45 I.A. 134=20 Bom. L.R. 1075—23 C.W.N. 101=9 L.W. 570—1918 M.W.N. 831—1918 P.C 25, An estate can also be made impartible by statute as has been done in Madras: See Madras Impartible Estates Act of 1904.

(b) *Mariand Rao* v. *Malhar Rao*, 55 C 403=55 I.A. 45—30 Bom. L.R. 251=54 M L.J. 397—27 L.W. 350=32 C.W.N. 621 = 1928 M.W N. 942=1928 P.C. 10.

(c) *Rao Kishore* v. *Mt. Gahenabai*, 53 I.C. 630=12 L.W. 730=17 A.L.J. 1077=22 Bom. L R. 507=24 C.W.N. 601=37 M.L.J. 562=1920 M.W.N. 82=1919 P.C. 100.

(d) *Merangi Zemindar* v. *Satrucharla Ramabhadra Razu*, 14 M. 237=18 I.A. 45; *Bapurao* v. *Krishtappa*, 37 Bom. L.R. 599 =1935 B. 380; *Mangal Singh* v. *Mt. Sidhan*, 68 M L.J. 448 P.C.; *Mariand Rao* v. *Malhar Rao*, 55 C. 403=55 I.A. 45=30 Bom. L.R. 251=54 M.L.J. 397=27 L.W. 350=32 C.W.N. 621.

(e) *Periasami* v. *Periasami*, 1 M. 312= 6 I.A. 61.

(f) *Doorga Persad* v. *Doorga Konwari*, 4 C. 190=5 I.A. 149.

(g) *Baijnath Prashad* v. *Tej Bali*, 43 A. 228=48 I.A. 195=19 A.L.J. 317=23 Bom. L.R. 554=25 C.W.N. 564=40 M.L.J. 387= 1921 M.W.N. 309=2 P.L.T. 257=1921 P.C. 62.

with the custom of impartibility as laid down in *Sartaj Kuari* v. *Deoraj Kuari*[h] and in *Venkata Surya* v. *Court of Wards*[i]; and so also the third as held in *Raja of Pittapur* v. *Rama Rao.*[j] To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in *Baijnath Prashad* v. *Tej Bali.*[k] To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara Law as applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right, a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered."[l]

629. Burden of proof of impartibility.—The following propositions of law were laid down by the Privy Council as well settled in *Martand Rao* v. *Malhar Rao*[m] regarding proof of impartibility.

"(a) When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which custom the estate is to be held by a single member, and as such not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

(b) Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. To use the words of

(h) 15 I.A. 51=10 A. 272.

(i) 26 I.A. 83=22 M. 383=3 C.W.N. 415 =9 M.L.J. Sup. 1=1 Bom. L.R. 277.

(j) 45 I.A. 148=41 M. 778=16 A.L.J. 833 =20 Bom. L.R. 1056=23 C.W.N. 173=35 M.L.J. 392=1918 M.W.N. 922=1918 P.C. 81; That the right to maintenance is, however, not inconsistent with the incident of impartibility has been observed in the later case of *Collector of Gorakpur* v. *Ram Sundar*, 56 A. 488=61 I.A. 286 and has been expressly decided by the Madras High Court in *Maharajah of Venkatagiri* v. *Rajeswara*, 49 L.W. 717.

(k) 48 I.A. 195=43 A. 228=19 A.L.J. 317 =23 Bom. L.R. 654=25 C.W.N. 564=40 M.L.J. 387=1921 M.W.N. 300=2 P.L.T. 257 =1921 P.C. 62; See also *Krishnayya Rao* v. *Rajah of Pittapur*, 57 M. 1=60 I.A. 336 =65 M.L.J. 479=1933 P.C. 202=1933 A.L.J. 1039=1933 M.W.N. 1191=38 L.W. 409=38 C.W.N. 1=35 Bom. L.R. 1076=15 P.L.T. 1.

(l) *Shib Prasad Singh* v. *Rani Prayag Kumari Debi*, 36 L.W. 366=59 C. 1309=59 I.A. 331=1932 P.C. 216=34 Bom. L.R. 1567 =36 C.W.N. 1046=1932 M.W.N. 923=63 M.L.J. 196=1932 A.L.J. 919; *Chuni Lal* v. *Jai Gopal*, 17 Lah. 378=1936 L. 55; *Sellappa* v. *Suppan*, I.L.R. 1937 M. 906= 1937 M. 496=45 L.W. 340=(1937) 1 M.L.J. 422=1937 M.W.N. 125.

(m) 55 C. 403=55 I.A. 45=30 Bom. L.R. 251=54 M.L.J. 397=27 L.W. 350=32 C.W.N. 621=1928 M.W.N. 942=1928 P.C. 10.

Lord Justice James in the case of *Umrithnath Chowdhry* v. *Gowreenath Chowdhry* (n) 'the custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back'.

(c) That if an impartible estate existed as such from before the advent of the British Rule, any settlement or regrant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom."(o)

Though it is possible that a divisible estate may remain undivided for a long time(p) the circumstance that a zamindari had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it and gives great countenance to the supposition that a custom of indivisibility existed in respect of the estate.(q) Impartibility being essentially a creature of custom, in modern times it is not open to the members of an ordinary Hindu joint family to establish themselves as a joint family with an impartible estate descending according to the rule of primogeniture, with rights of maintenance and other privileges to the junior members.(r)

630. An impartible estate when separate property of its holder.—"When an impartible zamindari has been acquired by the last holder or his branch as a self-acquisition, the other undivided members of his family take no interest in it and it descends as the separate property of the acquirer. That was what happened in *Katama Nachiar* v. *Raja of Shivaganga*.(s) On the other hand, it is also well settled that as regards an impartible estate which was or had to be considered joint family property, a member of the joint family might become separate with regard to it so as to lose his right to succeed to it by survivorship. That is what happened in *Periasami* v. *Periasami*(t) where a member of the joint family, believing himself to be next in succession to the larger Zamindari of Shivaganga, joined in a settlement under which he was held to have

(n) 13 M.I A 542.

(o) See also *Ram Nundun Singh* v. *Janki Koer*, 29 C. 828=29 I.A. 178=4 Bom. L.R. 664=7 C.W.N. 57 (P.C.); See also *Narasimha Appa Rao* v. *Narayya*, 2 M. 128 =7 I.A. 38; *Hargovind* v. *Collector of Etah*, I.L.R. (1937) A. 292=1937 A.L.J. 610 =1937 A. 377.

(p) *Thakur Durriao* v. *Thakur Dari*, 1 I A. 1; *Thakur Nitia Pal* v. *Thakur Jai Pal*, 19 A. 1=23 I.A. 147.

(q) *Raja Deedar Hossein* v. *Rane Zuhoor*, 2 M. I.A. 441; *Thakur Nitia Pal* v. *Thakur Jai Pal*, 19 A. 1=23 I.A. 147.

(r) *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254=52 I.A. 83=48 M.L.J. 83 =6 P.L.T. 133=21 L.W. 439=1925 M.W.N. 330=27 Bom. L.R. 735=23 A.L.J. 746=29 C.W.N. 846 =1925 P.C. 49.

(s) 9 M.I.A. 539.

(t) 1 M. 312= 5 I.A. 61.

renounced all claims to the lesser Zamindari. Or, again, an impartible Zamindari might by consent be settled on a particular branch of the family as their separate property as in *Ranganayakamma* v. *Ramasiya*".[u] Besides, when the holder of an ancestral impartible estate gives it absolutely to one of his sons, that son takes it as his separate property as regards his brothers, so that on the death of the donee without leaving male issue, his widow succeeds to the estate to the exclusion of his brothers.[u-a]

631. Incidents of Impartible Estate.

1. *Primogeniture.*—It descends to a single heir and is held by only one person at a time, primogeniture being the rule of succession.[v]

2. *Alienation.*—As a general rule, the impartible estate is alienable by will as well as *inter vivos*. But this general rule may be displaced by proof of a custom or a statutory enactment, as in the Madras Presidency, to the contrary. The onus of establishing this custom rests on the person who alleges it and such custom is not established by mere proof of the absence of alienations in the past.[w]

Note.—The question of the alienability of an impartible Raj first came before the Board in the case of *Sartaj Kuari* v *Deoraj Kuari*[x] on appeal from Allahabad. The question in that case was as to the validity of a gift *inter vivos* of part of an impartible estate made by the owner for the time being in favour of his younger wife. The validity of the gift was disputed by his son by the first wife, who contended that the owner had no power to alienate any part of the Raj estate except for purposes of necessity. The Board, by its judgment, delivered by Sir Richard Couch, held that the gift in question was valid on the ground that the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, and that in the case of an impartible estate such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where that right does not exist, present co-ownership falls with it. This case was decided in 1888. The next case was the Pittapur case, *Venkata Surya* v. *Court of Wards*,[y] decided in the year 1899. The question in this case was whether the Raj was alienable by will. The judgment of the Board decided two points: (1) that the *Sartaj Kuari's* case covered by analogy the case of alienation by will and (2) that the law laid down thereby applied in Madras and was not confined to the North West Provinces in

(u) 5 C.L.R. 439; *Konammal* v. *Annadana*, 51 M. 189=55 I.A. 114=1928 P.C. 68 =54 M.L.J. 504=27 L.W. 497=1928 M.W.N 252=30 Bom. L.R. 802=9 P.L.T. 347=26 A.L.J. 642=32 C.W.N. 983.

(u-a) *Ulagalum Perumal* v. *Subbulakshmi*, 44 L.W. 168=71 M.L.J. 1= 1936 M. 721 affirmed by the Privy Council in 49 L.W. 621=43 C.W.N. 594.

(v) *Ramalakshmi* v. *Sivanantha*, I.A. Supp. 1.

(w) *Pratap Chandra* v. *Raja Jagadish Chandra*, 54 C. 955=54 I.A. 289=53 M.L.J. 30=25 A.L.J. 628=29 Bom. L.R. 1136=31 C.W.N. 943=1927 M.W.N. 513=8 P.L.T. 623 =27 L.W. 119=1927 P.C. 159; *Udaya Aditya* v. *Jadub Lal*, 8 C. 199=8 I.A. 248.

(x) 10 A. 272=15 I.A. 51.

(y) 22 M. 383=26 I.A. 83=3 C.W.N. 415 =9 M.L.J. Supp. 1=1 Bom. L.R. 277.

which the case arose. The Board, therefore, not only followed their previous decision, but extended it so as to make it apply to alienations by will as well as to alienations *inter vivos*.(z)

3. *Maintenance.*—The junior members of the family are not entitled to maintenance from an impartible estate unless such a right is established either by custom or relationship or in any other way.(a) The question whether the mere fact that a person happens to be a member of the joint family to which an ancestral impartible estate belongs entitles him to claim maintenance out of that estate from its holder is, in the present state of the authorities, not an easy one to decide.

Note.—The right of sons of the present and previous holders to maintenance in an ancestral impartible estate has been so often recognised that it would not be necessary to prove a custom in every case.(b) But there is no invariable or certain custom that any below the first generation from such holders can claim maintenance as of right.(c) Nor is this right to maintenance claimable by an adult son in respect of the estate, if the estate is not an ancestral one, because the right to maintenance which the son of the holder of an impartible estate possesses is only an incident attaching to its character as joint family property.(d) In two recent cases before the Madras High Court, a question arose whether an illegitimate son of a member of a joint Hindu family having an ancestral impartible estate is entitled to claim maintenance as a member of that family from the holder of the impartible estate. In one of them it was held that he was not entitled [(1939) 1 M.L.J. Short Notes Page 39, A.S. No. 77 of 1935] while in the other it was held that the effect of the decision of their Lordships of the Judicial Committee in *Collector of Gorakhpur* v. *Ram Sundar*, (56 A. 488=61 I.A. 286) was to extend the right to get maintenance from an ancestral impartible estate to every member of the family to which that estate belongs and the illegitimate son of a member of a family being himself a member of that family, he too is entitled to claim that right.(d-a)

4. *Improvements.*—Immovable properties in the nature of

(z) *Pratap Chandra Deo* v. *Jagadish Chandra*, 54 C. 955—54 I.A. 289=53 M.L.J 30—25 A.L.J. 628=29 Bom L.R. 1136. 31 C.W.N. 943=1927 M.W.N. 513=8 P.L.T. 623 —27 L.W. 119—1927 P.C. 159. *Shib Prasad Singh* v. *Rani Preyag Kumari*, 59 C. 1399 =36 L.W. 266—59 I.A. 331 =1932 P.C. 216 =36 C.W.N 1046=34 Bom L.R. 1567—1932 A.L.J. 919—63 M.L.J. 196—1932 M W.N. 923.

(a) Ibid. *Rama Rao* v. *Raja of Pittapur*, 41 M. 778=45 I A. 148—16 A.L J. 833 =20 Bom. L.R. 1056=23 C.W.N. 173=35 M.L.J. 392—1918 M.W.N. 922=1918 P.C. 81; *Maharaj Kumar of Vizianagaram*, In re, 56 A. 1009=1934 A.L.J. 1237=1934 A. 818. This position is, however, open to question in view of the P. C. decision in *Collector of Gorakhpur* v. *Ram Sundar*, 56 A. 488 = 61 I.A. 286; and has in fact been abandoned in a recent decision of the Madras High Court. [See case in foot-note (d-a).]

(b) *Rama Rao* v. *Raja of Pittapur*, 41 M. 778—45 I A. 148 16 A L.J. 833—20 Bom. L.R. 1056=23 C.W.N. 173—35 M L.J. 392—1918 M.W.N. 922 —1918 P.C. 81; *Maharaj Kumar of Vizianagaram*, In re, 56 A. 1009 —1934 A.L J. 1237—1934 A. 818; *Commissioner of Income-tax* v. *Zamindar of Chemudu*, 40 L.W. 487—57 M. 1023=67 M.L J. 306=1934 M. 608=1934 M.W.N. 770, *Ramachandra* v. *Sakharam*, 2 B. 346; *Himmat* v. *Ganpat*, 12 Bom. H.C. 94.

(c) Ibid.—*Maharajah of Jeypore* v. *Vikrama Deo*, 10 L.W. 436=52 I.C. 333=17 A.L.J. 1011=21 Bom. L.R. 930=24 C.W.N. 226=37 M.L.J. 188=1919 M.W.N. 824.

(d) *Subbayya* v. *Marudappa*, 44 M.L.W. 433=1936 M. 828=71 M.L.J. 568=1936 M.W.N. 1034.

(d-a) *Maharajah of Venkatagiri* v. *Rajeswara*, 49 L.W. 717.

improvements on the estate form part of the estate and go along with it to the person who is entitled to the estate.[e]

5. *Accretions.*—Where the self-acquisitions of the holder of an ancestral impartible estate consist of both movable and immovable properties, his power to make them accretions to the estate is confined only to his immovable properties and does not extend to the moveables or the income of the estate. If he desires to incorporate his self-acquired immovable properties with the impartible estate, he can do so by declaring his intention to incorporate them with the impartible estate. The crucial test in all such cases is intention, and where there is such incorporation, even immoveable properties so incorporated are inheritable by the rule of primogeniture which applies to the main estate.[f] But no presumption as to an intention to incorporate can be drawn from the blending of the income of the self-acquired property with the income of the impartible estate as in the case of ordinary joint family estate and even in the case of immovable properties acquired by the holder of an impartible estate out of the income of the estate the rule is that in the absence of proof of intention to incorporate that acquisition with the main estate, such acquisition follows the ordinary rule of succession and not the rule of primogeniture.[g]

6. *Debts.*—The successor to an impartible estate is bound to pay the debts of the last holder both secured and unsecured.[h] The High Courts of Calcutta[i] and Allahabad,[j] however, take the view that in the case of ancestral impartible estate, owing to the applicability of the rule of survivorship in matters of succession, the successor is not bound to discharge the obligations of his predecessor unless the latter happens to be the former's father[k] so as to place the successor under the pious duty to discharge them or the obligations themselves could be justified either on the ground of benefit or necessity of the estate.[l]

(e) *Shib Prasad Singh* v. *Rani Prayag Kumari*, 59 C 1399=36 L.W. 266=59 I.A. 331=1932 P.C. 216=36 C.W.N. 1046=34 Bom. L.R 1567 1932 A.L.J. 919=63 M. L.J. 196=1932 M.W.N. 923 ; *Someshwari* v *Maheshwari*, 63 I.A. 441=16 Pat. 1 ; *Balasubramanya* v. *Subbayya*, 65 I.A. 93=69 M.L.J. 632 ; *Hargovind* v. *Collector of Etah*, 1937 A. 377=I.L.R 1937 A. 292=1937 A.L.J. 610.

(f) Ibid.—*Jagadamba* v. *Narain Singh*, 50 I.A. 1=18 L.W. 555=2 P. 319=44 M.L.J. 503=4 P.L.T. 319=25 Bom. L.R. 676=1923 M.W.N. 460=28 C.W.N. 98=1923 P.C. 59.

(g) *Bai Kesarbai* v. *Shivsangji*, 56 B. 619=34 Bom. L.R. 1332=1932 B. 654 ; *Someshwari* v. *Maheshwari*, 10 P. 630=1931 P. 426

(h) *Rajah of Kalahasti* v. *Achigadu*, 30 M. 454 17 M L J 367 ; *Zamindar of Karvetnagar* v *Trustee of Tirumalai*, 32 M. 429=19 M.L.J. 401 - 2 I.C 18 ; But see *Nachiappa* v. *Chinnayasami*, 29 M 453=16 M.L.J. 339.

(i) *Gur Pershad* v. *Dhoni Bai*, 38 C 182 =7 I.C. 806 -15 C.W.N. 49

(j) *Indar Sen* v. *Harpal*, 34 A. 79=12 I C. 915=8 A.L.J 1251.

(k) *Muttayan* v *Sangili*, 6 M. 1=9 I.A. 128.

(l) See also *Nachiappa* v. *Chinnayasami*, 29 M. 453=16 M.L.J. 339 ; *Muttayan* v. *Sangili*, 6 M. 1=9 I.A. 128. Under S. 4 of the Impartible Estates Act, 1904, the powers of the proprietor of an impartible estate are restricted to those of a manager of a joint family.

632. Ancestral impartible estate when ceases to be joint.—In an ancestral impartible estate, though the other rights which a coparcener acquires by birth in joint family property do not exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a contingent right of property which is capable of being renounced and surrendered or otherwise parted with.[m] "Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship".[n] Since by separation the person separating forfeits his chance of inheriting the whole of the impartible estate by survivorship, it requires strong evidence to establish such separation.[o] The fact that the members of the joint family or of any branch of the family have exercised their right of partition over their partible property cannot divest them of their right of succession to the impartible estate over which they have no right of partition [p]; nor can the holder of an impartible Zamindari by giving a registered notice to the junior members of his intention to become divided in status as regards all the partible and impartible properties, put an end to the rights of the junior members over the Zamindari. Such a notice can affect the status only as regards partible property.[q] But when a holder of an ancestral impartible estate, in the exercise of his absolute right of alienation, gives the estate to one of his sons, that son takes the estate as his own separate property as against his brother, so that on the death of that son without male issue, the successor to the

(m) *Sellappa* v. *Suppan*, I L.R. 1937 M. 906=1937 M. 496—45 M.L.W. 340—(1937) 1 M L J. 422—1937 M.W.N. 125.

(n) *Collector of Gorakhpur* v. *Ram Sundar Mal*, 40 L.W. 217=61 I.A. 286=56 A. 468=38 C.W.N. 1101—36 Bom. L.R. 867 =1934 A.L.J. 779=67 M.L.J. 274=1934 M.W.N. 751—15 P L T. 531=1934 P.C. 157 (P.C.); *Shib Prasad Singh* v. *Rani Prayag Kumari*, 59 C. 1399=36 L.W. 266=59 I.A. 331—1932 P.C. 216=34 Bom. L.R. 1567= 1932 A.L.J. 919—13 P.L.T. 659—1932 M.W.N. 923—36 C.W.N. 1046=63 M.L.J. 196; *Konammal* v. *Annadana Jadaya Gounder*, 55 I.A. 114—54 M.L.J. 504—27 L.W. 497= 1928 M.W.N. 252=30 Bom. L.R. 802=9 P.L.T. 347=26 A.L.J. 642=32 C.W.N. 983 =51 M. 189=1928 P.C. 68; *Chowdhry Chintamun Singh* v. *Nowlukha Kunwari*, 2 I.A. 263=1 C. 153; *Chunt Lal* v. *Jai Gopal*, 17 Lah. 378=1936 Lah. 55.

(o) *Collector of Gorakhpur* v. *Ram Sundar Mal*, 40 L.W. 217=61 I.A. 286=56 A. 468=38 C.W.N. 1101—36 Bom. L.R. 867 =1934 A.L.J. 779=67 M.L.J. 274=1934 M.W.N. 751—15 P.L.T. 531=1934 P.C. 157 (P.C.); *Jagadamba* v. *Narain Singh*, 50 I.A. 1=18 L.W. 555=44 M.L.J. 503=4 P.L.T. 319—25 Bom. L.R. 676=1923 M.W.N. 460 =28 C.W.N. 98=2 P. 319=1923 P.C. 59.

(p) *Konammal* v. *Annadana*, 51 M. 189 =55 I.A. 114=54 M.L.J. 504=27 L.W. 497 =1928 M.W.N. 252=30 Bom. L.R. 802=9 P.L.T. 347=26 A.L.J. 642=32 C.W.N. 983= 1928 P.C. 68; *Saheb Gouda* v. *Basangouda*, 1931 B. 378.

(q) *Annadana* v. *Konammal*, 17 L.W. 107=71 I.C. 533=1923 M.W.N. 15=1923 M. 402.

estate must be ascertained on the footing that he held the estate as his separate property descendible to his own heirs and not as a member of the joint family consisting of himself and his brother with the result that his widow is entitled to succeed to the estate in preference to his brother.(r)

SUCCESSION TO IMPARTIBLE ESTATES

633. Rule of Succession.—In the absence of a special custom regulating the succession to an impartible estate, the customary law regulating it is to be found in the general Hindu Law prevalent in that part of India where it is situate with such qualifications only as flow from the impartible nature of the subject.(s) Consequently, in applying this law, the impartible estate under the Mitakshara, though in the sole enjoyment of the holder, is to be regarded for the purposes of succession as the joint property of the holder and his family and as passing by survivorship, unless it is shown to be the separate property of the holder or his branch, in which case it is descendible according to the rules of the Mitakshara as to separate property.(t) There are under the Mitakshara only two possible lines of devolution and the only test to be applied is, was there community or was there separation ?(u) The mere impartibility of the estate is not sufficient to make the succession to it follow the course in the case of separate estate.(v) If there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the law of primogeniture(w) and a claimant who will be entitled to succeed under the rule of lineal primogeniture is under the ordinary Mitakshara law entitled to succeed in preference to one who is nearer in degree.(x)

634. Ordinary and lineal primogeniture.—Primogeniture which means "first born" may be either general or lineal. If it

(r) *Ulagalum Perumal* v. *Subbalakshmi*, 44 M.L.W. 166=1936 M. 721=71 M.L.J. 1. affirmed by P.C. in 49 L.W. 621=43 C.W.N. 594.

(s) *Katama Natchiar* v. *Raja of Shivaganga*, 9 M.I.A. 539; *Parbati* v. *Chandrapal*, 31 A. 457=36 I.A. 125 approving *Subramanya* v. *Sivasubramanya*, 17 M. 316.

(t) *Konammal* v. *Annadana Jadaya Gounder*, 51 M. 189=54 M.L.J. 504=27 L.W. 497=1928 M.W.N. 252=30 Bom. L.R. 802=9 P.L.T. 347=26 A.L.J. 642=32 C.W.N. 983=55 I.A. 114=1928 P.C. 68.

(u) *Baijnath* v. *Tej Bali*, 43 A. 228=48 I.A. 195=19 A.L.J. 317=23 Bom. L.R. 654 =25 C.W.N. 564=40 M.L.J. 387=1921 M.W.N. 300=2 P.L.T. 257=1921 P.C. 62.

(v) *Venkayamah* v. *Boochia*, 13 M.I.A. 333; *Chowdhry Chintamun Singh* v. *Nowlukho Kunwari*, 1 C. 153=2 I.A. 263; *Baijnath* v. *Tej Bali*, 43 A. 228=48 I.A. 195 =19 A.L.J. 317=23 Bom. L.R. 654=25 C.W.N. 564=40 M.L.J 387=1921 M.W.N. 300=2 P.L.T. 257=1921 P.C. 62; *Konammal* v. *Annadana Jadaya Gounder*, 51 M 189=55 I.A. 114=54 M.L.J. 504=27 L.W. 497=1928 M.W.N. 252=30 Bom. L.R. 802= 9 P.L.T. 347=26 A.L.J. 642=32 C.W.N. 983 =1928 P.C. 68.

(w) *Ishri Singh* v. *Baldeo Singh*, 10 C. 792=11 I.A. 135.

(x) *Debi Bakhsh Singh* v. *Chandraban Singh*, 32 A. 599=37 I.A. 168=7 A.L.J. 1122 =12 Bom. L.R. 1015=14 C.W.N. 1010=1910 M.W.N. 643=20 M.L.J. 917=7 I.C. 724.

be the former, nearness in blood is the rule of preference; if it be the latter, nearness in line. If an estate is governed by the rule of general primogeniture, a relation who is nearer in degree though in a junior line will be preferred to one who is the eldest member of a senior line who will be the preferential heir under the rule of lineal primogeniture. Ordinarily an impartible estate is governed by lineal primogeniture rather than the other rule.(y) In other words, degree prevails in general primogeniture while line prevails in lineal primogeniture. Thus if a Zamindar A has two sons X and Y, and X, the elder son, predeceases his father leaving a son S, on the death of the Zamindar A, S will succeed to the estate under lineal primogeniture in preference to Y, who will be the preferential heir under the rule of ordinary primogeniture. Hence in a case where the rival claimants were the descendant of the 2nd son of the original owner and a nearer descendant of the fourth son, the former was held the preferable heir under the rule of lineal primogeniture.(z)

635. Operation of the rule of primogeniture among sons.—The term primogeniture means "first born" and denotes the preferential right of the senior-most in age to succeed to the estate. Thus among sons of the same wife or by different wives, the senior-most in age is entitled to succeed to the estate in preference to his younger brothers though born of wives senior to his mother.(a) But a custom displacing the above rule of succession can be established whereby a son of a wife married earlier excludes a son of a wife subsequently married.(b) If, however, the wives have been taken from different classes, some superior and others inferior, it is the eldest son of the senior-most wife of the most superior class that should be preferred to a son of a wife belonging to an inferior community.(c) So also as between an adopted son and an aurasa son, the latter excludes the former in spite of the former's seniority in age, the reason being that the adopted son is a substitute for the aurasa son and by the aurasa son coming into existence, he excludes the substitute.(ca) The religious factor which gives the preference to the aurasa son as against the adopted and to the son of the wife of a superior class as against that of a wife of an inferior

(y) Ibid.—*Baijnath* v. *Tej Bali*, 43 A 228=48 I.A. 195 :19 A.L.J. 317 23 Bom. L.R. 654=25 C.W.N. 564=40 M.L.J. 387= 1921 M.W.N. 300=2 P.L.T. 257=1921 P.C. 62; *Kachi Kaliyana Rengappa* v. *Kachi Yuva Rengappa*, 28 M. 508=32 I.A. 261= 2 A.L.J. 845=7 Bom. L.R. 907=10 C.W.N. 95 :15 M.L.J. 312; *Sahebgowda* v. *Basangouda*, 33 Bom. L.R 580=1931 B. 378.

(z) *Mohesh* v. *Satrughan*, 29 C. 343=29 I A. 62=4 Bom. L.R. 372=6 C.W.N. 459; *Hargovind* v. *Collector of Etah*, 1937 A. 377 =I.L.R. 1937 A. 292.

(a) *Ramalakshmi* v. *Sivananthe*, 14 M.I.A. 570; I.A. Supp. 1; *Jagadish Bahadur* v. *Sheo Pertap*, 23 A. 369=28 I.A. 100 5 C.W.N. 602=11 M.L.J. 178=3 Bom. L.R. 298.

(b) *Sundaralingaswami* v. *Ramaswami*, 22 M. 515 :26 I.A. 55=1 Bom. L.R. 850.

(c) *Ramasami* v. *Sundaralingasami*, 17 M. 422.

(c-a) *Sahebgouda* v. *Shiddangouda*, 41 Bom. L.R. 333=1939 B. 166.

class also accounts for the exclusion of an illegitimate son by the legitimate son, though when the lattter succeeds to an impartible estate, his illegitimate brother, if he remains undivided with him, will be entitled to succeed to him on his death without male issue on the principle of survivorship,[d] provided the estate was the separate estate of the father. If the estate, on the other hand, was an ancestral estate to which their father had succeeded on the rule of primogeniture, on the death without male issue of his aurasa son who had succeeded the father, the estate would go to the undivided collateral relations of the father and not to the illegitimate son.

636. Whole blood and half blood.—In a joint family impartible estate, nearness of blood is not a ground of preference, but only seniority in age, and among brothers, some of whom are of full blood and others of half blood, the senior-most among them though of the half blood will exclude the rest.[e] But if the estate is the separate property of the last holder a brother of the full blood though younger will exclude a brother of the half blood.[e]

637. Position of Females.—If an impartible estate is the property of a joint undivided family, the person entitled to succeed will be designated by survivorship and no female can succeed so long as there is a male member of the joint family qualified to take the estate.[f] Thus where the holder of such an estate dies without legitimate male issue, the succession under the Mitakshara should go to a collateral male member of the joint family in preference to the widow or daughter of the last holder.[g] A custom modifying the law in this respect so as to let in the widow or the daughter of the last holder as a preferential heir as against the male members of the joint family should be strictly proved.[h] But if the estate was held by one who is the sole surviving coparcener[i] or was his separate property, though he himself was a member of the joint family,[j] on his death without male issue, the estate, in the absence of a custom excluding females,[k] passes to the

(d) *Jogendra* v. *Nityanund*, 18 C. 151=17 I.A. 128; *Subramania* v. *Siva Subramania*, 17 M. 316=4 M.L.J. 152.

(e) *Ramasami* v. *Sunderalingasami*, 17 M. 422; *Subramania* v. *Sivasubramania*, 17 M. 316=4 M.L.J. 152.

(f) *Baijnath* v. *Tej Bali*, 43A. 228=48 I.A. 195=19 A.L.J. 317=23 Bom. L.R. 654=25 C.W.N. 564=40 M.L.J. 387=1921 M.W.N. 300=2 P.L.T. 257=1921 P.C. 62; *Rup Singh* v. *Baisni*, 7 A. 1=11 I.A. 149; *Chintamun* v. *Nowlukho*, 1 C. 153=2 I.A. 263; *Kachi Kaliyana* v. *Kachi*, 28 M. 508 =32 I.A. 261=2 A.L.J. 845=7 Bom. L.R. 907=10 C.W.N. 95=15 M.L.J. 312.

(g) *Chintamun* v. *Nowlukho*, 1 C 153 =2 I.A. 263.

(h) Ibid—*Rup Singh* v *Baisni*, 7 A. 1=11 I.A. 149; *Hiranath* v *Ram Narayan*, 9 Beng. L.R. 274=17 W.R. 316.

(i) *Amerandra* v. *Banamali*, 10 P. 1= 1930 P. 417.

(j) *Venkata* v. *Venkama*, 13 M.I.A. 113.

(k) *Ram Nundun Singh* v. *Janki Koer*, 29 C. 828=29 I.A. 178=4 Bom. L.R. 664 =7 C.W.N. 57; *Ibrahim Ali Khan* v. *Muhammad Ahsan Ullah*, 39 I.A. 85=39 C. 711=13 I.C. 695=1912 M.W.N. 316= 16 C.W.N. 625=9 A.L.J. 390=14 Bom.

widow,(l) and failing his widow, to a daughter or daughter's son following the course of succession which the law prescribes for a separate estate.(m) If a separated holder of an impartible estate dies leaving a widow and an illegitimate son, the former excludes the latter in the matter of succession to the estate.(n) And in the absence of such heirs, his estate is taken by the senior-most member of the senior-most of the collateral lines of equal degree of kinship, even though the taker may be younger than the representative of a junior branch.(o)

638. Succession to a Dayabhaga Impartible Estate.—Since an impartible estate governed by the Dayabhaga School, partakes of the nature of a separate estate of its holder, on his death without male issue, a nearer heir excludes a remoter heir. Hence a brother of the full blood, though younger, will exclude a brother of the half blood.(o) If there are more than one in the same degree of relationship, seniority determines the right of succession

L.R. 276=22 M.L.J. 478; *Raja Ajai Verma* v. *Mt. Vijai Kumari*, 43 C.W.N. 585 (P.C.).

(l) *Tara Kumari* v. *Chaturbhuj*, 42 C. 1179=42 I.A. 192=13 A.L.J. 1034=17 Bom. L.R. 1012=19 C.W.N. 1119=29 M.L.J. 371=2 L.W. 843=1915 M.W.N. 717=1915 P.C. 30; *Katama Natchiar* v. *Raja of Shivaganga*, 9 M.I.A. 539.

(m) *Katama Natchiar* v. *Raja of Shivaganga*, 9 M.I.A. 539; *Parbati Kunwar* v. *Chandarpal*, 31 A. 457=36 I.A. 125=6 A.L.J. 767=11 Bom. L.R. 890=13 C.W.N. 1073=19 M.L.J. 605=4 I.C. 25; *Thakurain Tara Kumari* v. *Chaturbuj Narain*, 42 C. 1179=42 I.A. 192=13 A.L.J. 1034 =17 Bom. L.R. 1012=19 C.W.N. 1119=29 M.L.J. 371=2 L.W. 843=1915 M.W.N. 717=1915 P.C. 30; *Muttuvaduganatha Tevar* v. *Periasami*, 19 M. 451=23 I.A. 125=6 M.L.J. 149.

(n) *Kamulammal* v. *Visvanathanvami*, 24 M.L.J. 270=18 I.C. 1008=1913 M.W.N. 192.

(o) *Guruswami* v. *Pandia Chinna Thambiar*, 44 M. 1; but see *Muttu Vadu-ganatha* v. *Dorasingha*, 3 M. 290; See also *Sivasubramania* v. *Krishnammal*, 18 M. 287.

(p) *Neel Kisto* v. *Beer Chunder*, 12 M.I.A. 523.

CHAPTER XVII

THE LAW OF THE MALABAR TARWAD

639. Constitution of a Malabar Tarwad.—Malabar, popularly associated with magic and mysteries, differs in its law of joint family and succession from the rest of India having a code of morals comparable to that of companionate marriages in the western world. Marumakkattayam and the Aliyasantana are the two kindred systems of inheritance obtaining there, in which descent is traced in the female line, both the words meaning inheritance to the sister's son. Another peculiar institution common to these systems is that of the tarwad which consists of a group of persons forming a joint family with community of property, such a group being descended in the female line from a common ancestress. The essential features of a tarwad are: (i) The impartibility of the joint estate except by the conjoint will of all its constituent members; (ii) Non-recognition of marriage as a legal institution; (iii) Descent being traced through females; (iv) The management being vested in the senior-most member, the others having only the right to maintenance; and (v) Exclusion from membership of the issue of the male members of the tarwad. Thus in the case of a woman belonging to a tarwad, all her daughters and sons and all the descendants, whether male or female, of such daughters in the female line, will belong to that tarwad, but the descendants, whether male or female, whether in the male or in the female line, of her sons cannot claim to be members of that tarwad.[a] Hence the daughter's daughters and daughter's sons of a lady are within the fold of her tarwad; her son's sons or son's daughters cannot claim to be its members, but belong to the tarwad of their mother namely the son's wife. In other words, a tarwad consists of females, their female descendants in the female line, the sons of such females and of such female descendants, and the sons of the deceased female members of the tarwad. A tarwad may consist of several tavazhis. A tavazhi means the group of persons consisting of a female, her children and all her descendants in the female line.[b] Thus some of the female members of a tarwad may each have a tavazhi of her own. Thus when a tarwad consists of a brother and his sisters, one of the sisters with her children and all her descendants in the female line constitute her tavazhi as distinct from the tavazhi of another sister, consisting of herself, her children and all her descendants in the

(a) *Pakkaran* v. *Pathumma*, 1930 M. 922.

(b) *Moithiyan* v. *Puthiapurayil*, 28 L. W. 491 at 493=51 M. 574=1928 M.W.N. 331 55 M.L.J. 208=1928 M. 870.

female line. Thus in one sense a tarwad is a larger tavazhi, because even a tarwad consists of members who trace their descent through the female line from a common ancestress. But there is one essential distinction between a tarwad and a tavazhi and that is, while possession of property is not a necessary condition of a tavazhi, the existence of community of property is an essential incident of tarwad relationship. Tarwad in other words is a distinct social unit having a corporate existence dealing as such with the outside world, but a tavazhi is only a minor member of that unit having no recognised status apart from that unit in respect of the common property of the tarwad. But a tavazhi may have its own separate property as distinct from the property of the tarwad and hold and enjoy it to the exclusion of the other members of the tarwad who do not belong to that tavazhi.[b-a] In other words, a tavazhi when it has separate property of its own is in the position of a tarwad within the tarwad in the same way as there can be a coparcenary within a coparcenary under the Mitakshara School. Like the Hindu coparcenary the tarwad or the tavazhi is a creature of law and cannot be created by act of parties.[c] There cannot be a tavazhi consisting of a woman and only some of her children and such a corporate unit being unknown to Hindu Law, it is not open to a person to create such a corporate unit.[c] Even marriage does not transplant a woman from the tarwad of her mother into the tarwad of her husband. In other words, the ordinary incident of a Hindu marriage by which a woman on marriage ceases to be a member of her parents' family and acquires the status of a member in the husband's family does not apply in the case of marriages among women governed by the Marumakkattayam law, and a woman in spite of her marriage remains a member of the tarwad of her birth with the rights of residence and maintenance therein unaffected. The only means by which strangers can be made members of a tarwad is by adoption, but this can be resorted to only when the tarwad is threatened with extinction and the consent of all the members is obtained.[d]

In the following sections only the incidents of the Marumakkattayam system are considered. the Aliyasantana system differing from it in only some very minor particulars, these being:

(i) while under the Marumakkattayam law, the eldest male is the Karnavan or manager of the tarwad, under the Aliyasantana law, the eldest member of the tarwad, whether male or female, is entitled to be the manager.

(b-a) *Ambu Nair* v. *Utha Amma*, 1937 M.W.N. 1254=1938 M. 202.

(c) *Moithiyan* v. *Puthiapurayil*, 28 L. W. 491 at 493=51 M. 574=1928 M. 870 =1928 M.W.N. 331=55 M.L.J. 208.

(d) *Thathamangaleth* v. *Krishna*, 79 L.W. 370=57 M. 725=67 M.L.J. 511= 1934 M. 286; *Vasudevan* v. *Secretary of State*, 11 M. 157; *Ramon Menon* v. *Ramon Menon*, 24 M. 73=27 I.A. 231= 4 C.W.N. 310=10 M.L.J. 245.

(ii) While under the former system, the separate property of a male member is on his death taken by his tarwad,[e] under the latter system it goes to his nearest heirs.[f]

(iii) While under the former system the females generally reside in their own tarwads, in the latter they usually reside in the tarwads of their husbands.

(iv) While inter-caste marriages in the former system are common and not disapproved, such marriages in the latter system invite an amount of disapprobation and censure as being mere illicit relationships though not involving degradation or ex-communication.

(v) and While Marumakkattayam system is followed by all castes, the Aliyasantana system is not followed by the Brahmins (P. R. Sundara Iyer's Malabar and Aliyasantana law, 1922 Edn. p. 247).

640. Management of the tarwad.—The management of the tarwad vests in the eldest male member of the tarwad except that the eldest female member may be such manager when there is a custom to that effect[g] or there is no male member of the tarwad. Such a manager, when a male is known as the Karnavan, and when a female as a Karnavathi. A Karnavan may administer the estate for the benefit of the family according to his own discretion. Large as the powers of the Karnavan appear to be, those powers are essentially powers of management. His position is fiduciary in respect of the junior members who are known as Anandravans and he has no larger right of ownership than any such member. The right of junior members is confined to maintenance, to preventing the Karnavan from wasting or improperly alienating the tarwad property and to suing for his removal for incompetence or bad management.[h]

641. Position of the Karnavan.—Like the manager of a Mitakshara joint family, the Karnavan is the representative of the tarwad, the protector of its interests[i] and the guardian of its minor members.[j] He is in a fiduciary position to the junior members, must maintain them consistent with the tarwad means, and represent their corporate interests in suits and transactions for and on behalf of the tarwad. Thus a compromise decree obtained against a Karnavan who in substance can be considered to have sued or

(e) *Govindan* v. *Sankaran*, 32 M. 351=2 I.C. 183=19 M.L.J. 350 (F.B.).

(f) *Antamma* v. *Kaveri*, 7 M. 575.

(g) *Chatti* v. *Chambaban*, 1930 M. 418=1929 M.W.N. 873.

(h) *Manavedan* v. *Sridevi*, 25 L.W. 284=50 M. 431=1927 M. 422=52 M.L.J. 277.

(i) *Kenath* v. *Kalliani*, 18 L.W. 203 at 205=1923 M. 700=45 M.L.J. 258=1923 M.W.N. 807; *Kesavan* v. *Lakshmi*, 48 L. W. 803=1938 M.W.N. 1136.

(j) *Ukkandam* v. *Unikumaran*, 6 M.L. J. 139.

have been sued as representing the tarwad is binding upon the tarwad.[k] He has larger powers of disposal in respect of movable than in the case of immovable property and in the absence of proof of fraud or collusion, an assignment for consideration of a hypothecation debt which should be treated as movable property is binding on the junior members even in the absence of tarwad necessity.[l] But as regards immovable property, his powers of disposal are very much restricted and could be validly exercised only when justified by tarwad necessity or benefit. But if he incurs debts for tarwad necessity or benefit, the creditor can proceed in execution of the decree obtained thereon to realise his dues from the tarwad properties.[m] In the absence of any proof of his having abused his position or fraudulently alienated family properties or misappropriated family funds or being a bad manager, he is not accountable to the other members.[n] The status of Karnavan being conferred on a person by law owing to his seniority in age, any delegation by him of his powers to one who is not his next senior in age amongst the male members of the tarwad is invalid and such delegate cannot be allowed to function as such.[o] Delegation is only a kind of temporary renunciation and as it is well-known that by a renunciation of Karnavanship none except the senior-most Anandravan can step into the position of the Karnavan, it seems undesirable in the interests of peace and smooth-working of the tarwad that a Karnavan should be permitted to overlook the claims of the senior-most Anandravan by delegating his powers to anybody else. When a Karnavan is guilty of fraud, misappropriation or mismanagement or becomes incompetent to manage the property by age or disease, a suit lies to remove him from the Karnavanship at the instance of the junior members.[p]

642. Karar and restriction of Karnavan's rights.—Karnavanship is a very valued right among members of a Marumakkattayam tarwad and the only means by which this right of Karnavanship can be lost to the senior-most member are (1) removal by decree of Court, (2) renunciation by act of party and (3) by death. But it is a matter of frequent occurrence in Malabar that members of a tarwad agree by means of Karars to have the rights of the existing Karnavan restricted in certain particulars either by compelling

(k) *Rayarappa* v. *Kamaran*, 8 L.W. 154 =45 I.C. 489=35 M.L.J. 51.

(l) *Govinda* v. *Karthiyayini*, 34 L.W. 365=1931 M. 726=61 M.L.J. 35.

(m) *Paramai* v. *Narayanan*, 35 L.W 452=1932 M. 701; *Narayanan* v. *Sundaram*, 43 L.W. 584=1936 M.W.N. 279=1936 M. 463 (Karnavan starting a Kuri to discharge debts).

(n) *Manavedan* v. *Sridevi*, 25 L.W. 284 =50 M. 431=1927 M. 422=52 M.L.J. 277.

(o) *Raman* v. *Beevi*, 1929 M. 266=1928 M.W.N. 713.

(p) *Kunhan* v. *Sankara*, 14 M. 78, *Chindan Nambiar* v. *Kunhi Raman*, 7 L W. 543=41 M. 577=45 I.C. 26=34 M.L.J. 400=1918 M.W.N. 283 (F.B.); *Nemanna* v. *Lechmu*, 43 M. 319=11 L.W. 49=37 M L.J. 539=1920 M.W.N. 117.

him to associate some other junior members with him in the management of the tarwad property or by putting other restrictions on his powers. It has been uniformly held that the effect of such Karars is only to limit the powers of the particular Karnavan concerned, and that persons who were only junior members at the time would not be bound by such restrictions when they become, in their turn, Karnavans of the tarwad unless by themseives being parties to the Karar they have expressed themselves to be bound by such provisions even when they become Karnavans. The same principles would apply to cases where restrictions were imposed by decree of Court on a person who was the *de jure* Karnavan on the date of the decree. Such restrictions would *prima facie* cease to have operation on the death of the particular Karnavan concerned, unless there be something specific in, or necessarily implied by, the decree to the contrary.[q] The adult members of a tarwad have it in their power with the consent of the *de jure* Karnavan to vary the terms of such a Karar by a majority vote taken in a family council.[r] Where the adult members of a tarwad enter into a family arrangement, all the minors who have been represented by their guardians would be bound by that arrangement even though claims doubtful in their nature have been admitted thereunder[s], except when the arrangement was in fraud of their rights.[t]

643. Rights of Anandravans.—Every junior member of the tarwad is entitled (i) to reasonable maintenance from the tarwad income, (ii) to restrain the Karnavan from improperly dealing with the tarwad property and (iii) to succeed to the Karnavanship in case of death, renunciation or removal of a Karnavan if there is no other Anandravan senior to him in age. Thus though there is no doubt that as a general rule the tarwad is represented by its Karnavan in all transactions with strangers, yet when the Karnavan does anything not in the interest of the tarwad but to its prejudice, the Anandravans are entitled to take necessary steps for the protection of the common interests and to reimburse themselves from the tarwad funds the expenses properly incurred by them in respect of such steps.[u]

644. Maintenance.—As an incident of a junior member's coproprietorship in the property of the tarwad, there is in him or her the right to be maintained out of the tarwad income and this right

(q) *Sankunni* v. *Krishna*, 27 L.W. 93=51 M. 320=1928 M. 465=54 M.L.J. 682.

(r) *Cheria* v. *Unnalachan*, 5 L.W. 392=38 I.C. 513=1917 M.W.N. 185=32 M L.J. 323.

(s) *Prakkateri* v. *Koram*, 1912 M.W.N. 532=14 I.C. 295.

(t) *Chirudevi* v. *Kelappan*, 31 M.L.J. 879=34 I.C. 818=1917 M.W.N 106.

(u) *Raja of Arakal* v. *Kunhi Kannan*, 29 M.L.J. 632=31 I.C. 482(2).

is not founded on any moral or quasi legal obligations or inability to maintain himself or herself.(v) This right to maintenance of the junior member cannot be denied by the Karnavan either on the ground of that member's misbehaviour or on the ground of his possession of separate property.(w) The members of a tarwad are entitled to receive maintenance out of the tarwad house when there is no room for them in that house and if the Karnavan makes an insufficient allowance, the Anandravans are entitled to apply to the Court to determine what allowance is sufficient having regard to the circumstances of the family. The circumstances of the family which may be taken into consideration on such discussion before the Court are dealt with in the case of *Thayu* v. *Shungunni*.(x) The general principle is this: *prima facie*, the junior members living out of the tarwad house should be treated equally, but the circumstances of each particular one can be taken into consideration and it is for the Karnavan to judge how much each particular one should get. He may take into consideration, no doubt, things like the health of a particular child or the education of a particularly intelligent child or a child with small intelligence; he can take into account the earning capacity of a junior member; apparently it has been laid down that he can also take into account the fact that a particular person has himself made a rich marriage; and there are many other things which the Karnavan, in exercising his discretion as, so to speak, the father of this family, can take into consideration. To some extent all these are things which can be controlled by the Court; if a junior member is aggrieved, he can come to the Court and apply for maintenance and ask the Court to say what allowance is sufficient. But on any such application to the Court, very great weight should be given to the decision of the Karnavan which ought not to be lightly interfered with.(y) But the legal claim for maintenance is not confined to the actual rice and condiments necessary for the members. What is called "Menchelavu" is also properly allowable when the tarwad income is large enough to warrant the same. Such menchelavu would no doubt differ with the status of the family and the usage obtaining in the locality. A prudent Karnavan ought to make, out of the income of the tarwad properties, provision for extraordinary expenses that may have to be incurred on auspicious or inauspicious occasions in the family. Hence the junior members are not entitled to claim that the whole of the income should be distributed amongst

(v) *Ammani* v. *Padmanabha*, 41 M. 1075=48 I.C. 104=35 M.L.J. 509; See the discussion of the nature of this right in *Govindan* v. *Kunnappu*, 71 M.L.J. 514 =1936 M.W.N. 1102=44 L.W. 612=1936

(w) *Teyan* v. *Raghavan*, 4 M. 171.

(x) 5 M. 71.

(y) *Kunhalikutty* v. *Kunhamayan*, 17 L.W. 536=44 M.L.J. 212=1923 M.W.N. 247=46 M. 567=1923 M. 280.

the members for their maintenance. But it will not be proper for the Karnavan to deduct from a particular year's income the whole of the extraordinary expenses incurred that year and to allot maintenance to the members only out of the balance. There is no definite ratio in relation to which the income has to be apportioned among the members for their maintenance. Thus a Karnavan, though entitled to something more than other members to keep up his position as the head of the tarwad, is not entitled to appropriate for himself any definite portion of the income, just as 50 per cent, nor is there a hard and fast rule that all minor members, whatever be their age and whatever be the amount of the maintenance allowed, should only get half of what is allowed to an adult. Neither is the possession of separate properties by a junior member by itself an impediment to that member claiming maintenance from the tarwad properties; it is only when the income from the tarwad properties is not sufficient for the maintenance of all the tarwad members, the circumstance that a junior member possesses separate property would become in any way relevant. If the tarwad gets an income which is more than sufficient to pay maintenance to all its members, possession of separate property by a member thereof is immaterial in considering the amount of maintenance payable to him or her from the tarwad income.(z)

645. **Separate maintenance.**—Though the general rule is that a junior member is not entitled to separate maintenance, the rule is subject to exceptions.(a) Thus a junior member of the tarwad living away from the tarwad house for a good and proper cause is entitled to claim separate maintenance out of the tarwad estate; but the onus of proving such cause is on that member. The female members of a tarwad living away from the tarwad house with their husbands employed elsewhere are entitled to claim such separate maintenance for themselves and their children living with them, since their living away is one for proper cause. So also a junior member leaving the tarwad house to live elsewhere to practise a profession for which he has qualified himself should be taken to live outside the tarwad house for a proper cause and it does not matter whether such a member practises his profession in a place near the tarwad house or far away from it. To hold otherwise would be to put a premium on idleness and to destroy the incentive to members of a tarwad to enter a profession for the purpose of getting on in the world and earning their own livelihood. Though it be a very inconvenient rule to lay down that a junior member might

(z) *Ammalu Kutti* v. *Ramunni Menon*, 40 L.W. 35=67 M.L.J. 470=1934 M. 508; See the discussion in *Sheshappa* v. *Devaraja*, 49 M. 407=1926 M. 723=24 L.W. 269=50 M.L.J. 434=1926 M.W.N. 413.

(a) *Peru* v. *Ayyappan*, 2 M. 282.

leave the tarwad house because he or she does not feel quite comfortable there, still where there is substantial inconvenience in living in the family house and the Karnavan's conduct affords a valid excuse for a member to live away, separate maintenance may be awarded to the junior member.[b] But if that member himself is responsible for the discomfort or disharmony which he puts forward as a ground for living away from the rest, he is not entitled to claim separate maintenance.[c] In addition to the above grounds which would sustain a claim for separate maintenance, there may be other grounds which on social or economical reasons may be considered proper.[d] Thus a male member of the tarwad going to live with his wife for managing her affairs (35 M.L.J. 565) or living away from the tarward house for prosecuting his studies at a distant college or university or for helping his father in his old age will be entitled to separate maintenance, though in no case can he claim it in a measure to which he will not be entitled if he resides in the tarwad house itself.

646. Maintenance arrangement subject to modification.—Mere maintenance arrangements are subject to modification if there is an appreciable or material change in the circumstances of the family. But a Karnavan is not entitled to set aside an existing arrangement unless he makes some other suitable arrangement.[e] In a suit to enforce a maintenance claim having the effect of disturbing a maintenance arrangement, the whole tarwad has to be properly represented and all the persons interested must be made parties.[f]

647. Acquisitions and presumptions.—Acquisitions may be by individuals or groups and may be by purchase or gift. Property purchased by the Karnavan either in his own name[g] or in the name of a junior member may be presumed to be the tarwad property, but if it is purchased by a junior member in his own name, this presumption does not apply.[h] But even in the latter case, if the junior member acquiring the property is the head of a tavazhi within the tarwad and is in possession of property belonging separately to that tavazhi, the presumption will be that the

(b) *Ammalu Kutti* v. *Ramunni Menon*, 40 L.W. 35=67 M.L.J. 470=1934 M. 508; *Peru* v. *Ayyappan*, 2 M. 282.

(c) *Kunchi* v. *Ammu*. 36 M. 591=24 M. L.J. 559=16 I.C. 178=1912 M.W.N. 1233.

(d) *Maradevi* v. *Panakka*, 36 M. 203= 22 M.L.J. 309=14 I.C. 383=1912 M.W. N. 109.

(e) *Krishna* v. *Razukkath*, 1936 M. 598.

(f) *Sara* v. *Kunhammad*, 23 L.W. 584= 1926 M. 810; *Makkan* v. *Kunhi*, 1938 M. 289.

(g) *Ahmad* v. *Manha*, 1926 M. 643= 23 L.W. 575; *Kunhanna* v. *Timmaju*, 27 M. L. J. 60=24 I. C. 246; *Chathu* v. *Sekharan*, 1925 M. 430.

(h) *Ahmad* v. *Manha*, 1926 M. 643=23 L.W. 575; *Narayanan* v. *Govindan*, 26 Tr. L.R. 190 (F.B.); *Subramania* v. *Krishnan*, 12 L.W. 361=60 *I.C.* 77=39 M.L.J. 590. See contra *Dharnu* v. *Dejamma*, 5 L. W. 259=38 I.C. 292=1917 M.W.N. 535; *Iswaran* v. *Vishnu*, 33 L.W. 611=1931 M. 634=60 M.L.J. 467.

property acquired is really the property of the whole tavazhi. But these are only presumptions and in any particular case it is open to the persons interested to show that the acquisition by the Karnavan or the junior member is or is not out of the tarwad assets which in certain stated circumstances were left in his hands.[i] In the same way, a gift in favour of a Karnavan, or the head of a tavazhi,[j] may be presumed to enure for the benefit of the whole tarwad or tavazhi, though by the express words contained in the instrument of gift the operation of this presumption may be avoided. But if the gift is only to a particular individual by name who does not happen to be the Karnavan of the tarwad or the head of a tavazhi, the presumption is that the property is taken by the donee as his or her absolute property. If the property is given by a person to his wife,[k] or to the wife and her children[l] or to all the children after the wife's death, or if a gift is made by a person to his daughter[m] or to all the issue of his sister after the death of that sister[n] the gift enures to the benefit of the whole tavazhi of the donee or donees. But if the gift is made only to some of the members of a tavazhi, as for instance, a gift by a husband to his wife and his children by her excluding her children by a former husband, the donees take the property as tenants-in-common as they do not exhaust the whole tavazhi in which case alone the presumption in favour of the whole tavazhi will operate.[o]

648. Debts and alienations.—In the management of a tarwad, the Karnavan will often be faced with circumstances necessitating his pledging the credit of the tarwad for running the family. Maintenance of the Anandravans,[p] their education[q] and marriage,[p] other auspicious and inauspicious ceremonies in the family,[r] the protection of the property and the necessary litigation, payment of binding debts and the interest thereon, defence

(i) *Sanku* v. *Puttumma*, 14 M. 289; *Thimmakke* v. *Akku*, 34 M. 481=7 I.C. 153 =1910 M.W.N. 293; *Iswaran* v. *Vishnu*, 33 L.W. 611=1931 M. 634=60 M.L.J. 467; *Assankutti* v. *Mammad*, 1939 M. 295 =1939 M.W.N. 4=(1939) 1 M.L.J. 308.

(j) *Koshi* v. *Narayana*, 22 Tr. L.R. 239.

(k) *Kalliani* v. *Govinda*, 35 M. 648=(1911) 2 M.W.N. 487=22 M.L.J. 23=12 I.C. 492; *Naku* v. *Raghava*, 38 M. 79=18 I.C. 1; But see *Narasamma* v. *Billa Kesu*, 25 M.L.J. 637=31 I.C. 543 and *Paru* v. *Itticheri*, 32 I.C. 459. But if the wife has no children at the time of the gift, the presumption is that she takes the property absolutely, *Kalliani* v. *Karthiyani*, 1927 M. 299=52 M.L.J. 17.

(l) *Kunhacha* v. *Kutti Mammi*, 16 M. 201=2 M.L.J. 226 (F.B.); *Chakkara* v. *Kunhi*, 39 M. 317=30 I.C. 755=29 M.L.J. 481=1915 M.W.N. 740.

(m) *Kunhammad* v. *Cheria*, 1924 M. 787=20 L.W. 41=1924 M.W.N. 480=47 M.L.J. 679.

(n) L.P.A. 19 of 1926.

(o) *Moithiyan* v. *Puthiyapurayil*, 28 L.W. 491=51 M. 574=1928 M. 870=1928 M.W.N. 331=55 M.L.J. 208.

(p) *Sheshappa* v. *Devaraja*, 49 M. 407=24 L.W. 269=1926 M. 723=50 M.L.J. 434 =1926 M.W.N. 413.

(q) *Neelakanta* v. *Ananthanarayana*, 19 M.L.J. 590=4 I.C. 724; *Krishnan* v. *Govinda*, 8 M.L.J. 294.

(r) *Ammalu* v. *Ramunni*, 40 L.W. 35=1934 M. 508=67 M.L.J. 470.

of the members in criminal proceedings,[s] arrears of revenue, medical charges,[t] residential provision for the junior members, these and a hundred other things may require the Karnavan to incur debts on behalf of the family, and such debts, being necessary for the tarwad, will be binding on the tarwad, so that the creditor who has advanced them is entitled to proceed against the tarwad assets for realising his dues after obtaining a decree against the Karnavan who has incurred them or his successor in management. But there is no presumption that a debt incurred by the Karnavan has been incurred on behalf and for the benefit or necessity of the family,[u] and the burden is on the creditor to show either that there was a real necessity for the loan or that he made reasonable and *bona fide* enquiries and satisfied himself that such necessity existed before making the loan. If the creditor is able to show that such a necessity in fact existed or that he made reasonable enquiries which made him believe that the loan was necessary under the circumstances, his interests would be protected and the debt would be binding on the whole tarwad. The same principles apply even in the case of alienations of tarwad property by the Karnavan.[v] No doubt there are a number of cases taking the view—and this is given statutory recognition by the recent Marumakkattayam Act of 1933—that in the case of permanent alienations by the Karnavan, they would be valid and binding on the tarwad only if all the adult Anandravans consented to the alienation.[w] But there are also cases taking the view, which, it is submitted, is the more reasonable view to take, that the consent of the Anandravans is necessary only for the purposes of strengthening the evidence and probabilising the case of necessity and is not really a condition precedent to the validity of the alienation if otherwise it is justified and supported by legal necessity.[x] In other words, the powers of the Karnavan having been declared by the decisions to be at least as large as those of the manager of a Mitakshara joint family,[y] it is but proper that the conditions of validity laid down by the Privy Council in

(s) *Subbu* v. *Krishnacharya*, 21 M.L.J. 159=11 I.C. 23(2).

(t) *Ravanni* v. *Thankunni* 42 M. 789=37 M.L.J 157=10 L.W. 142=1919 M.W.N. 571=52 I.C. 918; *Kelu* v. *Umala*, 17 I.C. 704=23 M.L.J. 517.

(u) *Rama* v. *Krishnan*, 1926 M. 398=23 L.W. 186; *Kesavan* v *Lakshmi*, 48 L.W. 803=1938 M.W.N. 1136.

(v) *Raman* v. *Kunhi Kolandan*, 2 L.W. 941=31 I.C. 184=1915 M.W.N. 793.

(w) *Ramon* v. *Ramon*, 27 I.A. 231=24 M. 73=4 C.W.N. 310=10 M.L.J. 245; *Varnakot* v. *Varnakot*, 2 M. 328.

(x) *Kaion* v. *Chanda* 3 M. H.C.R. 294; *Tod* v *Kunhamod*, 3 M. 174; *Krishnan* v *Govindan*, 14 L.W. 539=1921 M. 677=41 M.L.J 381=1921 M.W.N. 715.

(y) *Kenath* v. *Kalliani*, 18 L.W. 203=1923 M. 700=45 M.L.J. 258=1923 M.W.N. 807. *Chathukutti* v. *Komappan*, 35 M.L.J. 380=1918 M.W.N. 144=44 I.C. 572; *Kunhamod* v. *Kuttiath*, 3 M. 169; *Tod* v. *Kunhamod*, 3 M. 174; *Kesavan* v. *Lakshmi*, 48 L.W. 803=1938 M.W.N. 1136. See also *Anantha* v. *Padmanabha*, 1938 M.W.N. 51=(1938) 1 M.L.J. 79=47 L.W. 679 (1938 M. 468 where the test of prudential and honest exercise of discretion is laid down.

respect of an alienation by the manager of a Hindu Mitakshara family should not be added to. Even assuming that the view that for a permanent alienation like a sale or permanent lease the Anandravans must consent to the alienation is correct, cases have laid down that the consent need not be in writing[z] and a capricious or factious dissent of particular members to an alienation otherwise justified must be disregarded.[a] But where by the terms of a Karar, the Karnavan has divested himself of the powers of alienation or raising debts, he has no power to bind the tarwad by a loan raised subsequently.[b] But an unauthorised alienation by a Karnavan is not absolutely void but only voidable.[c] As regards movables, a Karnavan has absolute power to sell and convert them into money, such movables including decrees and debts and the alienee need not see to the application of the money nor need he enquire into the existence of necessity.[d] A junior member of the tarwad cannot pledge the tarwad credit or raise a loan or make an alienation which will normally bind the tarwad. The only circumstances when a loan raised by the Anandravan will bind the tarwad are: (i) when the Anandravan was refused maintenance by the Karnavan and the Anandravan has to raise the necessary moneys for his maintenance and (ii) when the Anandravan has to raise a loan for expenses of litigation for recovering the property improperly alienated by the Karnavan.

649. Preservation of property.—Though ordinarily it is the Karnavan that must look to the management and conservation of the family property, the Anandravans by virtue of their proprietary interest in the tarwad assets are entitled to see that the tarwad property is not wasted or otherwise improperly dealt with. Thus if the Karnavan is guilty of fraud,[e] or misappropriation or is grossly negligent in respect of the tarwad interests or is incompetent to manage the property[f] by age[g] or bodily[h] or mental[i] defect or disease, the Anandravans are entitled to institute a suit for his removal, and on his removal, the then senior-most Anandravan assumes the Karnavanship. Any improper alienation of the tarwad property can be set aside by a suit at the instance of the Anandravans,[j] and if the Anandravans smell collusion or fraud,

(z) *Koran* v. *Chanda*, 3 M.H.C.R. 294.

(a) *Kalliyani* v. *Narayanan*, 9 M. 266.

(b) *Mavili* v. *Komapan*, 125 I.C. 65=1930 M. 820; *Rama* v. *Krishna*, 1926 M. 398=23 L.W. 186.

(c) *Janaki* v. *Govindan*, 1925 M. 990=22 L.W. 113.

(d) *Subramania* v. *Krishna*, 12 L.W 361=60 I.C. 77=39 M.L.J. 590.

(e) *Thimmakka* v. *Akku*, 34 M. 481=7 I.C. 153=1910 M.W.N. 293; *Kunhamma* v *Thimmaju*, 27 M.L.J. 60=21 I.C. 246.

(f) *Varnakot* v. *Varnakot*, 2 M. 328.

(g) *Kunhamma* v. *Timmaju*, 27 M.L.J. 60=21 I.C. 246.

(h) *Kanoran* v. *Kunjan*, 12 M. 307.

(i) *Govindan* v. *Narayanan*, 23 M.L.J. 706=17 I.C. 473=1913 M.W.N. 79.

(j) *Mahammad* v. *Kunhikutti*, 1929 M. 451=1928 M.W.N. 867; *Soopi* v. *Upputhumma*, 33 M. 31=5 I.C. 698; *Moideen* v. *Krishnan*, 10 M. 322.

they can intervene and claim to be impleaded in legal proceedings instituted by or against the Karnavan on behalf of the tarwad.[k] The expenses incurred in connection with such proceedings can be recovered from the tarwad funds either by the Anandravans who incurred them or by the creditors who advanced the amounts, provided the litigation in which they were incurred proved successful.[l] Another means of exercising a check on an imprudent Karnavan is by imposing restraints upon his powers by a family Karar, which will be binding not only upon him but even on those who are transferees from him of the tarwad properties with notice of the Karar.[m] As incidental to their right of preserving the common property, the Anandravans can maintain a suit for injunction to restrain the Karnavan from a contemplated unauthorised alienation or any other act prejudicial to the interests of the tarwad,[n] but a suit for a mandatory injunction against the Karnavan is not maintainable.[o] Any suit instituted by the Anandravans in respect of the Karnavan's act, whether it be a suit for setting aside the Karnavan's alienation or for restraining an alienation by him, is a representative suit and must be brought on behalf of the whole tarwad making all the Anandravans,[p] except minors.[q] parties to the suit. But on the recovery of the property for the tarwad, the management of the recovered property reverts to the management of the Karnavan who has alienated it[r] unless he has been previously removed from Karnavanship. Where there are already decrees against the Karnavan, they will be binding on the tarwad if they were obtained against the Karnavan in his representative capacity[s] and there has been no fraud or collusion on the part of the Karnavan.[t] But if the decrees are the result of fraud or collusion or even wilful negligence or breach of duty of the Karnavan in respect of tarwad interests, the decrees are liable to be set aside by the Anandravans as not binding on the tarwad,[u] the onus of proving such invalidating circumstances being upon the Anandravans.[v]

(k) *Ananlan* v. *Sankaran*, 14 M. 101; *Kunju* v. *Ammu*, 34 L.W. 548=1932 M. 31=61 M.L.J. 549; *Ambi* v. *Kelan*, 46 L.W. 375=1937 M.W.N. 1001. 1937 M. 843 where an appeal filed by the anandravans against a decree given adverse to the tarwad represented by the Karnavan was held competent.

(l) *Ali Raja* v. *Kunhi Kannan*, 29 M.L.J. 633.

(m) *Kanna* v. *Kombi*, 8 M. 381; *Kombi* v. *Lakshmi*, 5 M. 201.

(n) *Puzhako* v. *Mohadeva*, 35 M.L.J. 96=47 I.C. 778.

(o) *Narayanan* v. *Narayanan*, 32 M.L.J. 489—39 I.C. 16(2) =1917 M.W.N. 222.

(p) *Byari* v *Putanna*, 14 M. 38.

(q) *Kunhan* v. *Sankaru*, 14 M. 78.

(r) *Rama* v. *Shekaru*, 21 M.L.J. 87=6 I.C. 268 1910 M.W.N. 123.

(s) *Mathu* v. *Parameswaran*. 30 M. 214 17 M.L.J. 127.

(t) *Kunhu* v. *Ammu*, 1932 M. 31=34 L.W. 548=61 M.L.J. 549.

(u) *Tenju* v. *Chimmu*, 7 M. 413; *Narayani* v. *Sankunni*, 1936 M.W.N. 937=43 L.W. 623=71 M.L.J. 545=1936 M. 861.

(v) *Rayarappa* v. *Kamaran*, 8 L.W. 154 45 I.C. 489=35 M.L.J. 51.

650. Marriage.—Independently of any legislative enactment, the law of Malabar does not recognise marriage as a legal institution, the relation being in truth not marriage, but a state of concubinage into which the woman enters of her own free choice and is at liberty to change when and as often as she pleases. The offspring of such a connection would be entitled to an order for maintenance under section 488 of the Code of Criminal Procedure only if and when the mother's tavazhi or tarwad is unable to maintain them.(w) The forms of such unions usually called sambandhams vary according to the custom of the locality or community, but owing to the general feeling against polyandry of which they are the modern survivals and considering the expediency of enabling "persons following the Marumakkattayam or the Aliyasantana law of inheritance to contract marriages which shall be recognised by Courts of law as legal marriages and to provide for the issue of such marriages" the Malabar Marriage Act (Madras Act VI of 1896) was passed allowing registration of marriages, but so far as the people following the Marumakkattayam law are concerned, the said Act has been superseded by the provisions of the Madras Marumakkattayam Act, 1933, (Sections 4 to 12 of Act XXII of 1933) printed at the end of this chapter.

THE MALABAR MARRIAGE ACT, 1896.

Act No. VI of 1896.

An Act to provide a form of marriage for persons following the Marumakkattayam or the Aliyasantana Law.

Preamble.

Whereas it is expedient to enable persons following the Marumakkattayam or the Aliyasantana Law of Inheritance to contract marriages which shall be recognized by Courts of law as legal marriages; and to provide for the issue of such marriages: It is hereby enacted as follows:—

Title and application.

1. This Act may be called the Malabar Marriage Act, 1896: and it shall be applicable to all Hindus domiciled in the Presidency of Madras following the Marumakkattayam or the Aliyasantana Law of Inheritance.

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

(w) *Raman* v. *Parvathi*, 38 L.W. 587=65 M.L.J. 629=1933 M.W.N. 1276=1933 M. 794; *Bharata Iyer*, In re, 1924 M. 549=19 L.W. 275=46 M.L.J. 324=1924 M. W.N. 305; *Chamban* v. *Mathu*, 39 M. 957=(1916) 1 M.W.N. 111=32 I.C. 144; *Thillamma* v. *Sankunni*, 52 I.C. 893=10 L.W 229=1919 M.W.N. 632=37 M.L.J. 361.

"Sambandham."

"Sambandham" means an alliance between a man and a woman by reason of which they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife;

"Children."

"children" means sons and daughters of parents whose Sambandham has been registered as a marriage under this Act, whether born before or after such registration; but shall not include step-sons or step-daughters. In the case of any one whose personal law permits adoption, "children" shall include adopted sons and daughters;

"Marriage."

"marriage," with its grammatical variations and cognate expressions, means, except in section 3 clause (a), the last word of section 3 clause (c), section 15, clause (a), and the last word of section 15 clause (c), a Sambandham registered under the provisions of this Act;

"Tarwad."

"Tarwad" means and includes all the members of a joint family with community of property governed by the Marumakkattayam or the Aliyasantana Law of Inheritance.

Conditions subject to which a Sambandham may be registered as a marriage.

3. A Sambandham between Hindus both or either of whom follow the Marumakkattayam or the Aliyasantana Law of Inheritance may be considered under this Act as hereinafter provided subject to the following conditions:—

(a) neither party must be subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other party;

(b) the relation of the parties must not be such in respect of consanguinity or affinity that a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs:

(c) neither party must at the date of the notice under section 5 have a husband or wife living whose Sambandham with her or him has been registered under this Act and which marriage is not null and void under section 15 or with whom she or he is otherwise legally married:

(d) the parties must not belong to different communities between the members of which, according to the custom or usage applicable to either community, cohabitation is prohibited:

(e) the Sambandham must have been formed in accordance with the customary ceremonies, if any, prevailing in the community to which they belong or either of them belongs;

(f) a party to a Sambandham who is a minor must have obtained the consent of his or her legal guardian to the registration of the Sambandham as a marriage.

Appointment of Marriage Registrars.

4. The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called "Registrar of Marriages under the Malabar Marriage Act, 1896," and is hereinafter referred to as the "Registrar." The portion of territory for which any such officer is appointed shall be deemed his district.

Registration.

Notice of intention to register a Sambandham to be given to the Registrar.

5. When it is intended to register a Sambandham as a marriage under this Act, both or either of the parties shall give notice in the form (A) to this Act annexed to the Registrar within whose local jurisdiction either of the parties resided at the time when the Sambandham was formed or within whose local jurisdiction it is intended to form it.

Registrar to file such notices and to maintain the "Marriage Notice Book."

6. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices fairly into a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Notice Book." Such book shall be open at all reasonable times without fee to all persons desirous of inspecting the same.

Copies of notice to be served on interested parties.

7. (1) Every Registrar shall, on receiving any such notice, forthwith cause a copy thereof to be affixed to a notice-board in some conspicuous place in his office; and shall then serve or cause to be served at the expense of the party giving such notice a copy thereof on the other party to the Sambandham, if both parties have not joined in giving such notice, on the guardians, if any, of the parties thereto, and on the managing members of the Tarwads or families to which they respectively belong.

Withdrawal of notice.

(2) If at any time before registration is effected the party by whom notice was given under section 5 signifies in writing to the Registrar that he withdraws such notice, the Registrar shall, thereupon, at the expense of the party withdrawing the same, communicate the fact of withdrawal to the persons mentioned in sub-section (1).

Persons entitled to object to registration of a Sambandham.

8. (1) Any person entitled to receive a notice under sub-section (1) of section 7, any member of the Tarwad or family of either party, or any person having any expectancy of succession to the property, if any, of such Tarwad or family of either party may, within one month from the date of such service of notice, object to such registration on the ground that such Sambandham or registration is in contravention of the conditions prescribed in section 3.

Procedure of Registrar if objection is taken.

(2) Such objection shall be in writing signed by the person objecting and shall be presented by the objector or his duly authorized agent to the Registrar who shall file the same in his office. A copy of such objections shall

at the expense of the objector be served on the party by whom notice was given under section 5.

(3) On receipt of a notice of objection [made under sub-section (1)], the Registrar shall not proceed to register the Sambandham as a marriage until the expiry of four months from the receipt of such notice unless such notice is in the meantime withdrawn.

Procedure if no objection is taken.

(4) If no such objection be made under this section and if neither party withdraws the notice under section 7, sub-section (2), such Sambandham may at any time, not being less than one month nor more than six months from the service of the notice under section 7, be registered as a marriage.

Person objecting may file a suit in Civil Court.

9. Any person objecting to the intended registration of a Sambandham may, after complying with the provisions of section 8, file a suit in a competent Civil Court for a declaratory decree declaring that such registration would contravene one or more of the conditions prescribed in section 3.

Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar.

10. The Judge before whom such suit is instituted shall thereupon give the person instituting the same a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within four months from the receipt of notice of objection, the Sambandham shall not be registered as a marriage under this Act till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given or such suit or appeal has been withdrawn or dismissed for default.

If such certificate be not lodged within the period prescribed in the last preceding paragraph, or if the suit by the objector be finally dismissed or withdrawn, the Sambandham may be registered as a marriage.

Declaration to be signed before registration.

11. Before a Sambandham is registered as a marriage, the parties thereto and three witnesses shall, in the presence of the Registrar, sign a declaration in the form (B) to this Act annexed. If either party is a minor, the declaration shall also be signed by his or her legal guardian, and in every case it shall be countersigned by the Registrar.

Registrar to enter certificate of marriage in the Marriage Certificate Book.

12. When such a declaration has been made, the Registrar shall enter a certificate of marriage in a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Certificate Book" in the form (C) to this Act annexed, and such certificate shall be signed by the Registrar and countersigned by the parties, three witnesses and, if either party is a minor, by his or her guardian also.

Registration at a private residence.

13. Subject to such rules as may be prescribed in that behalf by the Local Government, the Registrar may attend at the private residence of the parties

or of the guardian of a party who is a minor for the purpose of such declaration and marriage certificate book being signed by them in his presence.

Fees payable to Registrar.

14. The Local Government shall prescribe the fees payable for the duties to be discharged by the Registrar under this Act.

The Registrar may demand payment of any such fee before the registration of the Sambandham or performance of any other duty in respect of which it is payable.

The said marriage certificate book shall, at all reasonable times, be open for inspection. The Registrar shall furnish certified extracts from the marriage certificate book upon payment of the fee prescribed by the Local Government therefor, and such extracts shall be admissible as evidence of the due registration as marriage of the Sambandham therein mentioned.

Marriage when null and void.

15. (1) A marriage shall be null and void only—

(a) if either party is subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other;

(b) if a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, and by reason of such relationship a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs;

(c) if either party has a husband or wife living whose Sambandham with such party has been registered as a marriage under this Act and such marriage is not null and void under clauses (a) and (b) of sub-section (1) or with whom she or he has been otherwise legally married.

(2) A marriage shall not be invalid on the ground that the Sambandham or registration contravenes any of the grounds mentioned in section 3 other than those specified in clauses (a), (b) and (c) of sub-section (1).

Marriage not invalid by reason of irregularity in procedure.

16. (1) No marriage under this Act shall be held invalid by reason of any irregularity in the giving of notice under section 5 or of failure to give notice under section 7 to any person entitled to receive it, or by reason of any irregularity in the publication or service of the copy of such notice or in complying with the provisions of section 5, 11 and 12.

(2) But, when any person entitled to be served with copy of notice under section 7 has not been so served, it shall be competent to him to institute a suit within three months from the date of registration of the Sambandham for cancellation of such registration on all or any of the grounds mentioned in section 3.

MAINTENANCE.

Maintenance of wife and children.

17. (1) The wife and children shall be entitled to be maintained by the husband or father, as the case may be. In a civil suit by the wife or children

for maintenance, it shall be open to the husband or father to plead all defences open in such a suit to a Hindu governed by the ordinary Hindu law.

(2) Nothing herein contained shall affect the right of the wife and children to be maintained by the Tarwad.

GUARDIANSHIP.

Guardianship of minor wife and children.

18. When a man's wife and children are minors maintained by him or his Tarwad, he shall, subject to the provision of the Guardians and Wards Act, 1890, be the guardian of his wife when she is over fourteen years of age and of his children: Provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the Tarwad to which his wife and children belong.

DIVORCE.

Petition for dissolution of marriage.

19. A husband and wife or either of them may present a petition for dissolution of the marriage in the Court of the District Munsif within the local limits of whose jurisdiction either the husband or wife, or in cases in which one of them alone is petitioner, the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain at the time when the petition is presented.

Explanation.—For the purposes of this section the Madras City Civil Court shall be deemed to be the Court of the District Munsif in respect of the area within the local limits for time being of the ordinary original civil jurisdiction of the High Court of Madras.

Notice to be given to other party, if petition is not joint.

20. A copy of such application when made by one party alone shall be served on the other party to the marriage at the expense of the petitioner.

Court to declare marriage dissolved on motion made within a specified period.

21. Six months after the presentation of a petition by both parties, or in cases where the application is made by one party alone six months after the service of notice under section 20, the Court shall, on the motion of the applicants or applicant, declare in writing the marriage dissolved:

Provided that such motion is made within seven days after the expiration of the six months or, if the Court is closed then that such motion is made on the day on which the Court is re-opened. Upon such declaration the marriage shall be deemed dissolved from the date of such declaration; and no declaration made under this section shall be held invalid by reason of any irregularity in complying with the provisions of sections 19, 20 and 21. If no such motion is made within the time hereinbefore prescribed, the Court shall dismiss the petition.

Maintenance when claimable by divorced wife.

22. Where a marriage has been dissolved without the consent of the wife, she shall, notwithstanding such dissolution, be entitled to claim maintenance from the husband so long as she remains a Hindu, continues chaste, and does not form a Sambandham or contract a marriage:

Provided that she was not guilty of adultery uncondoned before such dissolution.

Succession to separate property of a married man dying intestate.

23. Where a man following the Marumakkattayam or the Aliyasantana Law of Inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one-half of such property or in the event of no member of his Tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children, or on his children in equal shares if he leaves no widow, or on his widow and children in equal shares if he leaves both widow and children.

Succession to separate property of a married woman dying intestate.

24. Where a woman following the Marumakkattayam or the Aliyasantana Law of Inheritance dies intestate in respect of her separate or self-acquired property or any portion thereof, one-half of such property shall devolve in equal shares upon her children and, in the event of no member of her Tarwad surviving her, the whole of such property shall devolve on her husband.

Service of notice under this Act.

25. Copies of notices under subsection (1) of section 7, notice of withdrawal under sub-section (2) of section 7, copies of objections under sub-section (2) of section 8, shall be served through such officer or Court as the Local Government may direct in this behalf, and the law in force for the time being for the service of summons on a defendant in a civil suit shall apply to such service.

FORM A.

(Section 5.)

To

NOTICE OF MARRIAGE.

———, a Registrar of Marriages under Act
the District of

I hereby give you notice that I intend registering as a marriage under Act the Sambandham between me and the other party herein named and described :—

Name	Names of Tarwad and of the managing member thereof.	Names of the legal guardians (if any)	Rank or profession or calling.	Residence	Age.	Caste.	The place in which the Sambandham was formed or is intended to be
A. B. ..							
C. D. ..							

Witness my hand, this day of 189 .

FORM B.

(Section 11.)

DECLARATION TO BE MADE SEPARATELY BY THE BRIDEGROOM AND BY THE BRIDE

I, A. B, hereby declare as follows:—

(1) I am a Hindu governed by the Law of Inheritance.

(2) I am years of age,

(3) The registration of my Sambandham with will not contravene any of the conditions prescribed in section 3 of Act.

(4) I consent to the registration as a marriage of the Sambandham between me and C.D. [*or, if the party making the declaration is a minor,* (4) My legal guardian consents to the registration as a marriage of the Sambandham between me and C.D.]

(5) I am aware that, if any statement in this declaration is false and if in making such statement I either know or believe it to be false or do not believe it to be true, I am liable to imprisonment and fine.

(Sd) A.B. (the Bridegroom or Bride).

(Signed) G.H.
„ I.J.
(„) K.L.
} Three witnesses.

(A.B.) E.F. (Guardian, if any.)
(Countersigned) M.N.,
Registrar of Marriages under Act for the District of

FORM C.

(Section 12.)

MARRIAGE CERTIFICATE.

I, E.F., certify that, on the of 189 , appeared before me A.B. and C.D., each of whom in my presence and in the presence of three witnesses, whose names are signed hereunder, made the declarations required by Act , and that the Sambandham between them was registered as a marriage under the said Act in my presence.

(Signed) E.F.,

Registrar of Marriages under Act for the District of

(Signed) G.H.
(„) I.J.
(„) K.L.
} Three witnesses.

(Signed) A.B.
(„) C.D.
(„) M.N. (Guardian, if any)

Dated the day of 189.

651. Adoption—Adoption is of very rare occurrence in Malabar and is purely a secular act without any religious significance, undertaken to perpetuate a tarwad which has approached the brink of extinction. Usually the adoption is made of a girl, for the adoption of a boy does not serve this purpose as his descendants cannot become members of a tarwad for purposes of perpetuating it. But

there is no objection to the adoption of a male[x] nor to the number of persons adopted[y] or to the age of the adoptee[z] or adoptees. But an adoption can never be made to a member or branch of a tarwad but to the tarwad as a whole[a], and though it is made by the Karnavan of the tarwad it can be made only after consulting all the members of the tarwad.[a] Where the adoption is made only of a member or some of the members of another tarwad, the adoptees lose their rights in the tarwad of their birth, but if all the members of a tarwad are adopted, the adoptees do not lose the properties of that tarwad but continue to hold them as their separate properties distinct from the properties of the adoptive tarwad.[b]

652. Partition.—Except when all the members of the tarwad consent there can be no partition of its properties.[c] If there are minors in the tarwad they have to be properly represented by other adult members and their interests protected. Otherwise on their attaining majority the partition is liable to be reopened.[d] When a partition does take place with the concurrent will of all the tarwad members, the question of what share is to be alloted to a particular branch or individual member of the tarwad can hardly arise because unless all the persons agree to the partition which mean unless they agree not only to the property being divided but also in what shares it is to be divided, there cannot be a binding partition. Partition being opposed to the genius and spirit of the Malabar law any arrangement by way of partition is in the nature of a family arrangement or Karar and hence is subject to all the legal incidents of such a transaction. But it may be safely premised that every member of the tarwad being equally interested in the property[e] any partition arrangement should not be on the *stirpital* but on the *per capita* basis.[f] Thus if a tarwad consists of a brother and two sisters and the issue of the sisters, and one sister has 9 children and the other sister has 14, the property is to be divided into 26 shares, one share being alloted to the brother, ten shares to the tavazhi of the sister having nine children and fifteen shares to the tavazhi of the sister having fourteen children.[f] Now under the Madras Marumakkattayam Act of 1933, which however applies only to persons governed by the

(x) *Subramanyam* v. *Parameswaran*, 11 M. 116.

(y) Moore's *Malabar Law*, page 33, S.A. No. 19 of 1874; *Kunja* v. *Aiyappan*, 9 Tr. L.R. 100.

(z) *Vallappu* v. *Paru*, 9 M.L.J. 196.

(a) *Ramon Menon* v. *Ramon Menon*, 24 M. 73=27 I.A. 231=10 M.L.J. 245=4 C.W.N. 310; *Chandu* v. *Subbu*, 13 M. 209.

(b) *Velayudhan* v. *Ramaswami*, 7 Tr. L.R. 664; See also *Machingal Seetha* v. *Machingal Kelu*, 49 L.W. 581 for a discussion of this question.

(c) *Veluthakkal* v. *Kalappan*, 31 M.L.J. 879=34 I.C. 813=1917 M.W.N. 106.

(d) (Ibid). *Narayani* v. *Achuthan*, 42 M. 292=51 I.C. 10=36 M.L.J. 529.

(e) *Panga* v. *Unnikutti*, 24 M. 275.

(f) *Sreedevi* v. *Peruvunni*, 40 L.W. 455 =1935 Mad. 71=67 M.L.J. 671=1934 M.W.N. 1210.

Marumakkattayam Law, it is not necessary that all the members of the tarwad should consent for a valid partition; any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad and separate from it provided that if there is an ancestress common to that tavazhi and any other tavazhi of the tarwad her consent is obtained for such separation (Section 38 of Mad. Act 22 of 1933) and the share alloted to the tavazhi shall be on the *per capita* basis (Section 40 of Mad. Act 22 of 1933). But conversion of a member of a tarwad to another religion entitles him to claim and the other members to compel him to take his or her share of the tarwad properties and separate from the tarwad (Sec. 39 of Act 22 of 1933).[g]

653. Inheritance.—Religious efficacy not being a ground of preference in succession among the people governed by the Marumakkattayam law, the only test that ought to be applied to determine the preferential heir must be the test of propinquity or nearness of blood. But group succession being the rule among these people, the question arises whether when a person having separate property dies, his property should be taken by the tarwad of which he was a member or by the tavazhi to which he belonged. Applying the test of propinquity, it is the tavazhi that must succeed and not the whole tarwad.[h] But the Madras High Court has not been quite logical in its conclusions on this question and while it holds that the separate property of a female member would go to her tavazhi,[i] it says that of a male member would be taken by the tarwad[j] subject to the exception that if the property of the male member has been acquired with the help of the tavazhi property, that property would be taken by the tavazhi.[k] When there are several tavazhies, they having separated from one another, on the extinction of a tavazhi by the death of its last member, the tavazhi from which the extinct tavazhi separated last, succeeds to its properties in preference to others, though more nearly connected with it by blood.[l] This is yet another unwarranted exception to the rule of propinquity.

654. Wills.—Every person governed by the Marumakkattayam or the Aliyasantana Law of Inheritance, if of sound mind and not a minor, can dispose of his self-acquired or separate property

(g) But see *Pathuma* v. *Raman Nambiar*, 44 M. 891=14 L.W. 257=41 M.L.J. 243=1921 M.W.N. 594=1921 M. 224 (F.B.).

(h) *Sakthi* v. *Sakthi*, 24 Tr. L.R. 102; *Manjappa* v. *Marudevi*, 39 M. 12=30 M. L.J. 204=32 I.C. 165, a case under Aliyasantana Law.

(i) *Krishnan* v. *Damodaran*, 38 M. 48=17 I.C. 769=24 M.L.J. 240.

(j) *Raman* v. *Madhavan*, 1927 M. 244; *Govindan* v. *Sankaran*, 32 M. 351=2 I.C. 183=19 M.L.J. 350.

(k) *Komu* v. *Ittiatha*, 10 M.L.J. 57.

(l) *Gopala* v. *Raghava*, 21 L.W. 215=1925 M. 460; *Sankunni* v. *Rama*, 1929 M. 346.

by will under the provisions of the Malabar Wills Act, V of 1898. Even property which once belonged to a tarwad may become the separate property of a person when he or she happens to be the last survivor of the tarwad. So also in the case of property belonging exclusively to the tavazhi of a tarwad, the last surviving member of that tavazhi can dispose of that property by will, even though he belongs to a tarwad consisting of other members.

THE MALABAR WILLS ACT, 1898.

Act No. V of 1898.

An Act to declare the testamentary power of persons governed by the Marumakkattayam or the Aliyasantana Law of Inheritance and to provide rules for the execution, attestation, revocation and revival of the wills of such persons.

Preamble.

Whereas doubts have arisen regarding the testamentary power of persons governed by the Marumakkattayam or the Aliyasantana Law of Inheritance; and whereas it is expedient to remove such doubts, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons: it is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title.

1. *(1) This Act may be called the "Malabar Wills Act, 1898.*

Local extent.

(2) It extends to the whole of the Presidency of Madras; and

Commencement.

(3) It shall come into force on such date as the Local Government by notification shall appoint in this behalf.

Provided that nothing in this Act shall be deemed to affect the Hindu Wills Act, 1870.

Interpretation clause.

2. In this Act, unless there be something repugnant in the subject or context,—

"Minor."

(1) "minor" means any person who shall not have completed the age of eighteen years:

(2) "will" means any legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death:

"Codicil."

(3) "Codicil" means an instrument made in relation to a will and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will.

PART II.

OF WILLS.

Persons to whom this Part shall apply.

3. This Part shall apply to persons domiciled in the Presidency of Madras who are governed by the Marumakkattayam or the Aliyasantana Law of Inheritance.

Persons capable of making wills.

4. Every person of sound mind and not a minor may by will dispose of property which he could legally alienate by gift 'inter vivos' and shall be deemed to have been always competent so to dispose of such property.

Explanation I.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will, if they are able to know what they do by it.

Explanation II.—One who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation III.—No person can make a will while he is in such a state of mind whether arising from drunkenness or from illness or from any other cause that he does not know what he is doing.

Will obtained by fraud, coercion or importunity.

5. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Will may be revoked, or altered.

6. A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

7. Nothing contained in section 4 shall—

(a) affect any right established before the commencement of this Act by a final decree of a Court of competent jurisdiction;

(b) authorize a testator to deprive any person of any right of maintenance of which, but for section 4, he could not deprive them by will;

(c) affect any law of intestate succession or authorize any testator to create in property any interest which he could not have created prior to this Act.

PART III.

OF THE EXECUTION, ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

Person to whom this Part shall apply.

8. This Part shall apply to persons governed by the Marumakkattayam or Aliyasantana Law of Inheritance, whether they are domiciled in the Presidency of Madras or not.

Execution of wills and codicils.

9. All wills and codicils made on or after the date of the commencement of this Act within the Presidency of Madras, and all such wills and codicils made outside the said Presidency so far as relate to immoveable property situated within the said Presidency, must be executed according to the following rules:

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Incorporation of papers by reference.

10. If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be considered as forming a part of the will or codicil in which it is referred to.

Witness not disqualified by interest or by being executor.

11. No person, by reason of interest in or of his being an executor of a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

Revocation of will or codicil.

12. No will or codicil, nor any part thereof, shall 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 a will is hereinbefore required to be executed, 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.

Effect of obliteration, interlineation or alteration in a will.

13. No obliteration, interlineation or other alteration made in any will after the execution thereof shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end of some other part of the will.

Revival of a will or codicil.

14. No will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same: and when any will or codicil, which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown by the will or codicil.

Execution and revocation of will or codicil by soldiers or mariners.

15. No will or codicil made by a soldier employed in an expedition or engaged in actual warfare or by a mariner at sea and no revocation by such person of his will or codicil shall be deemed invalid by reason only of such will, codicil or revocation not being made in accordance with the provisions of this Part.

THE MADRAS MARUMUKKATTAYAM ACT, 1933
ACT NO. XXII OF 1933.

(Received the assent of the Governor on the 21st March, 1933 and of the Governor-General on the 12th April, 1933)

An Act to define and amend in certain respects the law relating to marriage, guardianship, intestate succession, family management and partition applicable to persons governed by the Marumakkattayam law of inheritance.

Whereas it is expedient to define and amend in certain respects the law relating to marriage, guardianship, intestate succession, family management and partition applicable to persons governed by the Marumakkattayam law of inheritance;

and whereas the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title and application.

1. This Act may be called "The Madras Marumakkattayam Act, 1932.

(2) It shall apply—

(a) to all Hindus in the Presidency of Madras who are governed by the Marumakkattayam law of inheritance.

(b) to all Hindus outside the said Presidency governed by the said law in respect of properties within it; and

(c) to all Hindu males, whether governed by the said law or not, who have contracted or may contract marital alliances with Hindu females governed by the said law.

Repeal of Madras Act IV of 1896.

2. *The Malabar Marriage Act, 1896, in so far as it is applicable to Hindus following the Marumakkattayam law of inheritance, is hereby repealed.*

Definitions.

3. *In this Act, unless there is anything repugnant in the subject or context—*

(a) 'anandravan' means any member of a tarwad other than the karnavan;

(b) 'Collector' means the Collector of Malabar or South Kanara, as the case may be, and includes any Revenue Divisional Officer who is authorized by the Collector to perform his functions under this Act,

(c) 'karnavan' means the oldest male member of a tarwad or tavazhi, as the case may be, in whom the right to management of its properties vests, or, in the absence of a male member, the oldest female member or where by custom or family usage the right to such management vests in the oldest female member, such female member;

(d) 'major' means a person who has attained eighteen years of age;

(e) 'marumakkattayam' means the system of inheritance in which descent is traced in the female line but does not include the system of inheritance known as the Aliyasantana.

(f) 'marumakkattayi' means a person governed by the Marumakkattayam law of inheritance:

(g) 'minor' means a person who has not attained eighteen years of age.

(h) 'prescribed' means prescribed by rules made under this Act;

(i) 'tarwad' means the group of persons forming a joint family with community of property governed by the Marumakkattayam law of inheritance;

(j) (i) 'tavazhi' used in relation to a female means the group of persons consisting of that female, her children and all her descendants in the female line; and

(ii) 'tavazhi' used in relation to a male means the tavazhi of the mother of that male.

CHAPTER II.

Marriage and its Dissolution.

Marriages valid under the Act.

4. *(1) Save as provided in section 5, the conjugal union of a Marumakkattayi female with—*

(i) a male belonging to the same community as such female, or

(ii) a male, not belonging to such community and whether a marumakkattayi or not, shall be deemed for all purposes to be a legal marriage if—

(a) the parties to the union are not related to each other in such degree of consanguinity or affinity that conjugal union between them is prohibited by any custom or usage of the community to which they belong or either of them belongs; and

(b) the union—

(i) was openly solemnized in accordance with the customary ceremonies, if any, prevailing in the community to which the parties belong or either of them belongs, before the date on which this Act comes into force and is subsisting on such date; or

(ii) is so solemnized in accordance with such ceremonies on or after the date on which this Act comes into force and, where either or both the parties are minors, with the consent of the guardian or guardians of such minor or minors; or

(iii) was registered as a marriage under the Malabar Marriage Act, 1896, before the date on which this Act comes into force and is subsisting on such date.

(2) A conjugal union between minors or between a minor and a major which would otherwise be a valid marriage under sub-section (1) shall not be deemed to be invalid merely on the ground that the consent of the guardians or guardian of such minors or minor was not obtained to the union.

(3) Notice of every marriage contracted on or after the date on which this Act comes into force shall be given by such person, to such authority, in such form and within such time as may be prescribed. Failure to give such notice shall be punishable with fine which may extend to fifty rupees but such failure shall not invalidate the marriage or affect the legal rights of the parties to, or the issue of, such marriage.

Marriage during continuance of prior marriage void.

5. *(1) During the continuance of a prior marriage which is valid under section 4, any marriage contracted by either of the parties thereto on or after the date on which this Act comes into force shall be void.*

(2) On or after the said date, any marriage contracted by a male with a marumakkattayi female, during the continuance of a prior marriage of such male, shall be void, notwithstanding that his personal law permits of polygamy.

Note:—In the case of a female governed by the Marumakkattayam Law as modified by this Act, any marriage contracted by her with a Hindu male during the continuance of a prior marriage of such male is void under this section, notwithstanding that his personal law permits of polygamy, and such a marriage cannot be held to be valid merely because at the time of the marriage the Marumakkattayee female had made a declaration that she had renounced her personal law. (m)

Dissolution of marriage.

6. *A marriage valid under section 4 may be dissolved—*

(a) by a registered instrument of dissolution executed by the parties thereto; or

(b) by an order of dissolution as hereinafter provided:

Provided that if either or both the parties is or are minors, the marriage shall not be dissolved until after the party has become a major or both the parties have become majors, as the case may be.

Petition for dissolution.

7. *(1) A husband or wife may present a petition for dissolution of marriage—*

(m) *Venkataraman v. Janaki*, 49 L.W. 403.

(i) if the place where the marriage was contracted or the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain, at the time the petition is presented, is situated within the local limits of the jurisdiction of the Court of a District Munsif, in such Court;

(ii) if such place is not situated within the local limits of the jurisdiction of the Court of any District Munsif, in the Court of the Subordinate Judge or if there is no such Court, in the Court of the District Judge, within the local limits of whose jurisdiction such place is situated; and

(iii) if such place is situated within the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Madras, in the Madras City Civil Court.

(2) The petition shall specify the place where and the date on which the marriage was contracted and if the respondent was a minor at the time of the marriage, the name and address of the guardian, if any, with whose consent the marriage was contracted.

Service of copy of petition on respondent.

8. A copy of such petition shall be served at the expense of the petitioner on the respondent.

Order of dissolution.

9. On the motion of the petitioner made not earlier than six months after the service of the copy as aforesaid, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied after such inquiry as it thinks fit that a marriage which is valid under section 4 was contracted between the parties, by order in writing declare the marriage dissolved. The dissolution shall take effect from the date of such order.

Application of the Code of Civil Procedure, 1908, to petitions.

10. The provisions in the Code of Civil Procedure, 1908, shall, so far as may be, apply to petitions under this Chapter.

Bar of suit for restitution of conjugal rights.

11. No Court shall entertain a suit for restitution of conjugal rights between the parties to a marriage valid under section 4.

Chapter not to apply to marriages of Nambudri women.

12. Nothing contained in this Chapter shall apply to the marriage of any Nambudri woman following the Marumakkattayam law of inheritance.

CHAPTER III.

MAINTENANCE AND GUARDIANSHIP.

Maintenance of wife and minor children.

13. (1) The wife and minor children other than married minor daughters under the guardianship of their husbands, shall be entitled to be maintained by the husband or the father, as the case may be:

Provided that the wife shall not be entitled to maintenance from the husband if she refuses to live with him without just cause.

(2) Nothing contained in sub-section (1) shall affect the right of any person to maintenance from his or her tarwad or tavazhi properties.

(3) In awarding maintenance under sub-section (1) the Court shall have due regard to the means and circumstances of the person against and by whom maintenance is claimed and to the reasonable wants of the person claiming maintenance.

Guardianship of minor wife and children.

14. The husband shall be the guardian of his minor wife in respect of her person and property and, subject to the provisions of section 15, the father shall be the guardian of his minor children other than married minor daughters under the guardianship of their husbands, in respect of their person and property.

Provided that such guardianship shall not extend to the right and interest of the wife or children in respect of their tarwad or tavazhi properties:

Provided further that nothing contained in this section shall apply to a female member of any of the tarwads included in the schedule or her children, where such female member resides in her own tarwad house and not with her husband.

Guardianship of minor children by husband deceased or divorced.

15. The mother shall be the guardian of the person and property of her minor children if their father is dead or the marriage of their parents is dissolved.

Saving of the operation of the Guardians and Wards Act, 1890.

16. Nothing contained in sections 14 and 15 shall be deemed to affect the operations of the Guardians and Wards Act, 1890.

CHAPTER IV.

INTESTATE SUCCESSION.

Property as to which a person is considered to have died intestate.

17. A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations.

(i) A has left no will. He has died intestate in respect of the whole of his property.

(ii) A has left a will whereby he has appointed B his executor but the will contains no other provisions. A has died intestate in respect of the distribution of his property.

(iii) A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.

(iv) A bequeathed Rs. 1,000 to B and Rs. 1,000 to the eldest son of C and made no other bequest and died leaving Rs. 2,000. C died before A without ever having had a son. A has died intestate in respect of the distribution of Rs. 1,000.

Devolution of property left by marumakkattayi male intestate.

18. On the death intestate of a marumakkattayi male, his property, which is self-acquired or separate, shall devolve in the order and according to the rules contained in sections 19, 20, 21, 22, 23 and 24.

Where intestate has left mother, widow, children and lineal descendants.

19. Where the intestate has left surviving him a child or children, or a lineal descendant or descendants in the female line through a deceased daughter or daughters, or both, and also his mother or a widow or widows or both his mother and a widow or widows, the whole of the property shall belong to them. In the absence of the mother and widow, the whole of the property shall belong to the child or children and such lineal descendant or descendants; and in the absence of the mother, widow and child, the whole of the property shall belong to such lineal descendant or descendants.

Rules of distribution in cases falling under section 19.

20. The distribution of the property among the heirs referred to in section 19 shall be made in accordance with the following rules:—

(i) The widow or, if there is more than one widow, each of the widows shall be entitled to a share equal to that of a child.

(ii) The mother shall be entitled to a share equal to that of a child.

(iii) Every child (son or daughter) shall be entitled to an equal share:

Provided that if a daughter has pre-deceased the intestate, the lineal descendants of such daughter in the female line, shall be entitled to the share which such daughter would have taken had she survived the intestate.

(iv) Grandchildren by a deceased daughter, shall be entitled in equal shares to what their mother would have taken had she survived the intestate:

Provided that if a granddaughter has pre-deceased the intestate, the lineal descendants of such granddaughter in the female line, shall be entitled to the share which such granddaughter would have taken had she survived the intestate.

(v) In like manner the property shall go to the surviving lineal descendants of the intestate in the female line where such descendants are in the degree of great-grandchildren or in a more remote degree.

Explanation I.—The descendants of a daughter, daughter's daughter or other female descendant in the female line, shall not be entitled to any share in such property if such daughter, daughter's daughter or other descendant is alive at the time of the death of the intestate.

Explanation II.—The descendants of a son who has pre-deceased the intestate shall not be entitled to any share in such property.

Illustrations.

(1) Z dies intestate leaving two widows A and B, his mother C, a son D, a daughter E, a granddaughter F by such daughter, the lineal descendants of a deceased daughter G and the lineal descendants of a deceased son T A, B, C, D and E each gets one-sixth and the lineal descendants of G get one-sixth of the property. The granddaughter F and the lineal descendants of H do not get any share.

(2) Z dies intestate leaving no widow or mother, but leaving A a son, B a daughter, E and F a grandson and a granddaughter by a deceased daughter

C, and a granddaughter G by a deceased daughter D and two great-granddaughters H and J by a deceased daughter of D. A and B will each be entitled to one-fourth of Z's property, E and F will each be entitled to one-eighth, G will be entitled to one-eighth and H and J each to one-sixteenth.

(3) Z dies intestate leaving no mother, widow or child, but leaving three grandchildren A, B and C by a daughter X who has pre-deceased him and two grandchildren D and E by a daughter Y who has also pre-deceased him. A, B and C will each be entitled to one-sixth, and D and E will each be entitled to one-fourth of Z's property.

Rules of distribution where intestate has left no child or lineal descendant but only mother or widow or both.

21. Where the intestate has not left surviving him any child or lineal descendant in the female line through a deceased daughter but has left his mother and a widow or widows, one-half of the property shall devolve on his mother and the other half on his widow or widows in equal shares. In the absence of a widow, the whole of the property shall belong to the mother.

Rules of distribution where intestate has left only widow or mother's tavazhi or both.

22. Where the intestate has not left surviving him his mother or any child or lineal descendant in the female line through a deceased daughter but has left a widow or widows and his mother's tavazhi, one-half of the property shall devolve on his widow or widows and the other half on his mother's tavazhi. In the absence of the mother's tavazhi, the whole of the property shall belong to the widow or widows and in the absence of a widow, the whole of the property shall belong to the mother's tavazhi.

Rules of distribution where intestate has left only father and maternal grandmother's tavazhi.

23. Where the intestate has not left surviving him any of the heirs mentioned in sections 19, 21 and 22 but has left his father and his maternal grandmother's tavazhi, one-half of the property shall devolve on his father and the other half on his maternal grandmother's tavazhi. In the absence of the maternal grandmother's tavazhi, the whole of the property shall belong to the father and in the absence of the father, the whole of the property shall belong to the maternal grandmother's tavazhi.

Rules of distribution where intestate has not left any of the heirs mentioned in sections 19, 21, 22 and 23.

24. Where the intestate has not left surviving him any of the heirs mentioned in sections 19, 21, 22 and 23, the property shall devolve on the tavazhi of his mother's maternal grandmother or on the tavazhi of a more remote female ascendant in the female line, the nearer excluding the more remote.

Devolution of property left by marumukkattayi female intestate.

25. On the death intestate of a marumakkattayi female, her property which is self-acquired or separate shall devolve in the order and according to the rules contained in sections 26, 27, 28 and 29.

Rules of distribution where intestate has left children and lineal descendants.

26. Where the intestate has left surviving her, children or lineal descendants in the female line through deceased daughters, or both, the whole of the property shall belong to them,

The provisions of clauses (iii), (iv) and (v) of section 20 and of Explanations I and II to that section shall apply to the distribution of the property among the children and lineal descendants of the intestate.

Rules of distribution where intestate has not left any child or lineal descendant.

27. Where the intestate has not left surviving her any child or lineal descendant in the female line through a deceased daughter the whole of the property shall devolve on her mother's tavazhi.

Rules of distribution where intestate has not left any of the heirs mentioned in sections 26 and 27, but has left husband and maternal grandmother's tavazhi.

28. Where the intestate has not left surviving her any of the heirs mentioned in sections 26 and 27 but has left her husband and her maternal grandmother's tavazhi, one-half of the property shall devolve on her husband and the other half on her maternal grandmother's tavazhi. In the absence of the maternal grandmother's tavazhi, the whole of the property shall belong to the husband, and in the absence of the husband, the whole of the property shall belong to the maternal grandmother's tavazhi.

Rules of distribution where intestate has not left any of the heirs mentioned in sections 26, 27 and 28.

29. Where the intestate has not left surviving her any of the heirs mentioned in sections 26, 27 and 28, the property shall devolve on the tavazhi of her mother's maternal grandmother or on the tavazhi of a more remote female ascendant in the female line, the nearer excluding the more remote.

Devolution of property left by non-marumakkattayi male intestate.

30. (1) On the death intestate of a male not being a marumakkattayi,

(i) who—

(a) has, before the date on which this Act comes into force, contracted a marriage with a marumakkattayi female which is valid under section 4; or

(b) has contracted on or after such date a marriage with a marumakkattayi female which is valid under that section; and

(ii) who has left surviving him by such marriage or marriages one or more of the following relations, namely:—

(a) a widow or widows,

(b) children,

(c) lineal descendants in the female line through deceased daughters, such relation or relations shall be entitled, if the intestate has also left relations who are heirs according to the personal law by which he is governed, to one-half of his property which is separate or self-acquired and if the intestate has left no such heirs, to the whole of such property:

Provided that the reasonable funeral expenses of the intestate shall first be deducted from such separate or self-acquired property.

(2) The property devolving on the relations referred to in sub-clauses (a), (b) and (c) of clause (ii) of sub-section (1) shall be distributed among them in accordance with the rules contained in clauses (i), (iii), (iv) and (v) of section 20 and Explanations I and II to that section.

Possession and management of property until division is effected.

31. (1) The senior major male member among the children and other lineal descendants through deceased daughters of the intestate or in the absence of any such male member the widow, or if there is more than one widow, the senior among such widows, shall be entitled to possession and management of the property referred to in sections 19, 21, 22 and 26 until division is effected.

(2) In the case of the property referred to in section 30, if the intestate has left relations who are heirs according to the personal law by which he is governed, such heirs shall be entitled to possession and management of the property until division is effected.

(3) The karnavan of the tavazhi mentioned in sections 23, 24, 27, 28 29 shall be entitled to possession and management of the property referred to therein until division is effected.

CHAPTER V.

TARWAD AND ITS MANAGEMENT.

Duty of karnavan to keep accounts.

32. The karnavan shall keep true and correct accounts of the income and expenditure of the tarwad. The accounts of each year shall be available for inspection at the tarwad house by the major anandravans once in a year throughout the month of Kanni following such year and any such anandravans may take copies of or extracts from such accounts.

Alienation of immovable property by karnavan.

33. (1) Except for consideration and for tarwad necessity or benefit and with the written consent of the majority of the major members of the tarwad, no karnavan shall sell immovable property of the tarwad or mortgage with possession or lease such property for a period exceeding twelve years.

(2) No mortgage with possession or lease with premium returnable wholly or in part, of any such property executed by a karnavan for a period not exceeding twelve years, shall be valid unless such mortgage or lease is for consideration and for tarwad necessity or benefit

(3) Nothing contained in this section shall be deemed to restrict the power of the karnavan to grant, in the usual course of management, for a period not exceeding twelve years, any lease without premium returnable wholly or in part, or the renewal of an existing kanom.

Debt contracted by karnavan when binding on tarwad.

34. No debt contracted or mortgage without possession executed by a karnavan shall bind the tarwad unless the debt is contracted or the mortgage is executed, for tarwad necessity.

35. Every member of a tarwad, whether living in the tarwad house or not, shall be entitled to maintenance consistent with the income and the circumstances of the tarwad.

Relinquishment of karnavanship.

36. Any karnavan may by a registered document give up his rights as

Application of chapter to tavazhis.

37. The provisions of this Chapter shall apply to every tavazhi possessing separate properties as if it were a tarwad.

CHAPTER VI.

PARTITION.

Right of tavazhi to claim partition.

38. (1) Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad:

Provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to such tavazhi and to any other tavazhi or tavazhis of the tarwad, except with the consent of such ancestress, if she is a member of the tarwad.

(2) The share obtained by the tavazhi shall be taken by it with the incidents of tarwad property.

Explanation.—For the purposes of this Chapter, a male member of a tarwad or a female member thereof without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad.

Note :—This section confers in unmistakable terms upon a member who constitutes a tavazhi a right to demand partition and have his share in the joint estate converted into a separate estate. Hence a creditor of his is entitled to attach that share(n) and if that member dies after instituting a suit for partition and during its pendency, his legal representatives in whom his divided interest vests can continue the suit.(o)

Partition on change of religion.

39. Notwithstanding anything contained in section 38, any member of a tarwad who has changed his or her religion may claim or be compelled by any other member of the tarwad, to take his or her share of all the tarwad properties over which it has power of disposal and separate from the tarwad.

Ascertainment of shares at partitions of tarwads.

40. (1) In the case referred to in section 38, tavazhi shall be entitled to such share of the tarwad properties as would fall to the tavazhi if a division 'per capita' were made among all the members of the tarwad then living.

(2) In the case referred to in section 39, the member who claims or is compelled to divide from the tarwad, shall be entitled to such share of the tarwad properties as would fall to such member if a division 'per capita' were made among all the members of the tarwad then living.

Application of chapter to tavazhis.

41. The provisions of this Chapter shall apply to every tavazhi possessing separate properties as if it were a tarwad.

(n) *Subramanyam* v. *Narain* (1938) 1 M.L.J. 710=47 L W. 538=1938 M.W.N. 478=1938 M. 559.

(o) *Madhavi* v. *Subramaniam*, 49 L.W. 413; *Kunchi* v *Minakshi*, 49 L W. 111 — 59 M. 663

CHAPTER VII.

IMPARTIBLE TARWADS.

Certain tarwards to be impartible unless registered as partible.

42. (1) Every tarwad included in the Schedule shall be an impartible tarwad and the provisions of Chapter VI shall not apply to such tarwad unless and until it is registered as a partible tarwad.

(2) Not less than two-thirds of the minor members of a tarwad referred to in sub-section (1), may at any time present petition to the Collector for the registration of the tarwad as partible.

(3) Such petition shall be in such form and contain such particulars as may be prescribed.

(4) If, after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the registration of the tarwad as partible, he shall register the tarwad as partible.

(5) On such registration, the provisions of Chapter VI shall apply to such tarwad.

Registration of tarwards as impartible.

43. (1) Not less than two-thirds of the major members of a tarwad may, at any time, present a petition to the Collector for the registration of the tarwad as impartible.

(2) Such petition shall be in such form and contain such particulars as may be prescribed.

(3) If, after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector is satisfied that not less than two thirds of the major members of the tarwad have signed the petition with their free consent and desire the registration of the tarwad as impartible, he shall register the tarwad as impartible.

(4) On such registration the provisions of Chapter VI shall not apply to such tarwad unless and until the registration is cancelled under section 44.

Note :—The right to demand a partition having been clearly conferred by the Act on a person representing a tavazhi, if pending a suit by him for partition, the tarwad is registered as impartible by the Collector, the order of registration does not render the partition suit incompetent, even though the order is made on an application filed prior to the partition suit.(p) So also when after attachment in execution of the share of a member constituting a tavazhi, the tarwad is registered as impartible, such registration cannot defeat the rights under the attachment.(q)

Cancellation of such registration.

44. (1) Not less than two-thirds of the major members of a tarwad registered as impartible under section 43 may at any time present a petition to the Collector for the cancellation of such registration.

(p) *Madhavi* v. *Nagappan*, 1938 M.W. N. 1243—48 L.W. 868.

(q) *Krishnan* v. *Narayanan*, 1938 M.W. N. 330—47 L.W. 786=(1938) 1 M.L.J. 715 (1938 M. 555.

(2) Such petition shall be in such form and contain such particulars as may be prescribed.

(3) If, after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire the cancellation of the registration, he shall cancel such registration.

Power of Collector to take evidence on oath, etc.

45. The Collector shall, for the purposes of this Chapter, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely:—

(a) enforcing the attendance of any person and examining him on oath or affirmation;

(b) compelling the production of documents; and

(c) issuing commissions for the examination of witnesses: any proceeding before the Collector under this Chapter shall be deemed to be a judicial proceeding.

Collector's order to be final.

46. The order of the Collector registering a tarwad as partible under section 42 or registering a tarwad as impartible under section 43 or cancelling such registration under section 44, shall be final and shall not be questioned in any civil court.

Maintenance of register by Collector.

47. The Collector shall keep a register of all petitions presented to him under sections 42, 43 and 44 and of all orders passed by him on such petitions and shall, at all reasonable times, allow search to be made in such register and shall, on payment of the prescribed fee, give a copy, certified under his hand, of any entry therein.

CHAPTER VIII.

MISCELLANEOUS.

Construction of bequests, gifts, etc., to wife or wife and children.

48. Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line:

Provided that in the event of partition of the property taking place under Chapter VI, the property shall be divided on the 'stirpital' principle, the wife being entitled to a share equal to that of a son or daughter.

Rules.

49. (1) The Local Government may make rules consistent with this Act to carry into effect the purposes thereof.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) all matters expressly required or allowed by this Act to be prescribed; and

(b) the procedure to be followed in respect of applications under Chapter VII.

(3) All rules made under this section shall be published in the 'Fort St. George Gazette' and on such publication shall have effect as if enacted in this Act.

Savings.

50. Nothing contained in this Act shall—

(a) be deemed to confer any rights on the parties to or the issue of any marriage which is dissolved before this Act comes into force, or

(b) be deemed to affect any rule of Marumakkattayam law, custom or usage, except to the extent expressly laid down in this Act.

THE SCHEDULE.

[*See the second proviso to section 14 and sub-section (1) of section 42.*]

LIST OF IMPARTIBLE TARWADS.

1. The Zamorin's family consisting of—
   (a) *Puthia Kovilakom situate in Thiruvannoor, Calicut taluk,*
   (b) *Putinhare Kovilakom situate in Mankav, Calicut taluk, and*
   (c) *Kizake Kovilakom situate at Kottakal, Ernad taluk.*
2. *The Chirakal Kovilakom near Cannanore.*
3. *The Nilambur Kovilakom in Nilambur amsam, Ernad taluk.*
4. *The Kizhake Kovilakom of the Kottayam Raja's family, Kottayam taluk*
5. *The Thekke Kovilakom of the Kottayam Raja's family, Kottayam taluk.*
6. *The Patinhare Kovilakom of Kottayam Raja's family in Kottayam taluk.*
7. *Ayancheri Kovilakom in Purameri amsam, Kurumbranad taluk.*
8. *The Edavalath Kovilakom in Purameri amsam, Kurumbranad taluk.*
9. *The Ayiranazhi Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.*
10. *The Kadannamana Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.*
11. *The Mankada Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.*
12. *The Aripura Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.*
13. *The tarwad from which the Kuthiravattath Nair attains stanom, situate in Pulapatta amsam, Walluvanad taluk.*
14. *The tarwad from which the Punnathur Raja attains stanom, in Kottapadi amsam, Ponnani taluk.*
15. *The Venganad Kovilakom of the Venganad or of Kollengode Valia Nambidi.*
16. *The Mayavadi Raja's family of Kasargod taluk.*
17. *The Neleswar Raja's family of Kasargod taluk.*

CHAPTER XVIII

THE LAW OF THE JAINS

655. The Jains and their religion.— Living interspersed amongst the Hindus in India and little, if at all, distinguishable from them in outward appearance and manners, is the enterprising community of people known as the Jains, boasting of an ancient and remarkable religion of their own, which although distinct from the prevailing Brahmanical religion of Hindustan, namely, the worship of the Triad, Brahma, Vishnu and Siva and the minor Hindu deities, appears to belong to the same stock and agrees with it in respect of several principal tenets. They both resemble in their character of quietism, in their tenderness of animal life and in the belief of repeated transmigrations, of various hells for the purification of the wicked and heavens for the solace of the good. The great object of both is the ultimate attainment of a state of perfect apathy, which to western eyes seems little different from annihilation, by the practice of mortification and of abstraction from the cares and attachments of wordly life. The differences from the Hindu belief are no less striking than the points of resemblance, and the Jains in this respect may be said to hold an intermediate place between the followers of Buddha and those of the Brahminical religion. The Jains agree with the Buddhists in denying the activity and Providence of God, in believing the eternity of matter, in the worship of deified saints, in the scrupulous care of animal life, in having no hereditary priesthood, in disclaiming the divine authority of the Vedas and in having no sacrifices and no respect for fire. They agree with the Buddhists also in considering a state of passive abstraction as supreme felicity and in all the doctrines which they hold in common with the Hindus. They agree with the Hindus in their caste distinctions, though with the Jains they are not as strict and rigorous as in the case of the Hindus proper. Though they reject the scriptural character of the Vedas, they allow them great authority on all points not at variance with their own religion, their principal objection being to the bloody sacrifices which the Vedas enjoin and the loss of animal life which burnt offerings are liable, though undesignedly, to occasion. They admit the whole of the Hindu gods and worship them, though they consider them as entirely subordinate to their own saints who are therefore the proper objects of adoration. Besides these points common to the Brahmins or the Buddhists, they hold some opinions peculiar to themselves. The chief objects of their worship are a limited number of saints called Tirtankaras who have raised them-

selves by austerities to a superiority over the Gods. These are twenty-four for the present age, but twenty-four also for the past and twenty-four for the future. All these Tirtankaras remain alike in the usual state of apathetic beatitude and take no share in the government of the world.

When a man dies, the Jains burn his corpse and throw the ashes into the water and do not perform other obsequies to the dead, for, according to them the dead man cannot feel any satisfaction in ceremonies and the feeding of others. "Even a lamp no longer gives light by pouring more oil into it after its flame is once extinguished. Therefore it is vain to make feasts and ceremonies for the dead, and if it be wished to please relations, it is best to do so while they are yet living: what a man drinketh, giveth and eateth in this world is of advantage to him but he carrieth nothing with him at his end".

The Jains appear to have originated in the sixth century before the Christian Era, to have become conspicuous in the eighth or the ninth century A.D., got to the highest prosperity in the eleventh, and declined after the twelfth. Their principal seats seem to have been in the southern parts of the Peninsula, and in Guzerat and west of Hindustan, Mewar and Marwar being apparently the cradle of the sect. They are very numerous in Guzerat, Rajputana and Canara and are generally an opulent and mercantile class, many of them being bankers and possessing a large proportion of the commercial wealth of India.[a]

656. Are the Jains governed by the Hindu Law?—It is usual to talk of Jains as dissenters from Hinduism and to apply to them the ordinary Hindu law in the absence of proof of a custom to the contrary. The correctness of this judicial attitude is certainly questionable in the light of modern research which has shown that the Jains are not Hindu dissenters but that Jainism had a history long anterior to the Smrities and Commentaries which are the recognised authorities on Hindu law and usage. In fact Maha Veera the last of the Jain Tirtankaras was a contemporary of Buddha and died about 527 B.C. The Jain religion refers to a number of previous Tirtankaras and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. In fact Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of various ceremonies which Hindus consider essential. So far as Jain law is concerned, it has its own law books of which Bhadrabahu Samhita is an important one. Vardhamana Niti and Ashana Niti by the great

(a) See the discussion of the origin of *das Tejmal* v. *Rajmal*, 10 Bom. H.C.R.

Jain teacher Hemachandra deal also with Jain law. No doubt by long association with the Hindus who form the bulk of the population, Jainism has assimilated several of the customs and ceremonial practices of the Hindus but this is no ground for applying the Hindu law as developed by Vignaneswara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal system, en bloc to Jains and throwing on them the onus of showing that they are bound by the law as laid down by Jain law-givers. The proper thing to do in considering questions of Jain law relating to adoption, succession and partition is to see what the law as expounded by the Jain lawgivers is and to throw the onus on those who assert that in any particular matter the Jains have adopted Hindu law and custom and have not followed the law as laid down by their own law givers.(b) But the matter is not *res integra*. Due largely, if not entirely, to the superstitious notion of sacrilige entertained by the priests of the Jain shrines, which were normally the repositories of their sacred and legal literature, in the matter of releasing their books for perusal of the public or diffusing their knowledge in any other way, so as to be easily available to the litigants, the Courts of the country were deprived of valuable materials in forming correct conclusions regarding the jurisprudential aspect of the customs and usages of the Jains, and the apparent similarity of their conduct to that of the generality of the Hindus amongst whom they lived and moved and had their being, was quite justifiably understood by the Courts as pointing to a negation of the existence of a distinct and different code of laws governing the lives and conduct of the Jain community as a whole. This process of assimilating the legal personality of a Jain with that of a Hindu for purposes of applying to the former the personal law of the latter was considerably accelerated by a certain amount of obstinacy on the part of those entrusted with the administration of justice in sticking, despite cogent and convincing indications to the contrary, to doubtful precedents enunciating, due to ignorance of the essential foundations of the Jain law, that even the Jains were governed by the Commentaries of the Hindu legists, and the general apathy and indifference of the Jain jurists in the matter of making their voice heard within the citadels of justice, helped considerably in this acceleration. The consequence is that to-day one finds a long catena of judicial pronouncements rendered by the various courts in our country and by the Judicial Community of the Privy Council laying down almost uniformly and in unambiguous terms that the Jains are but dissenters from Hinduism and that in the absence of proof of custom to the contrary, the general incidents of Hindu Law are

(b) Gateppa v. Eramma, 50 M. 228=51 M.L.J. 757=26 L.W. 408=1927 M. 228.

as much applicable to them as to those who are indisputably governed by those incidents.(c) The result, however, is not altogether unsatisfactory. After all the Jains are of the same stock and soil as the Hindus, animated by common ideals and influenced by common aspirations in matters outside the narrow groove of religion. Their social, ethical and cultural backgrounds are virtually the same, hallowed by the same simple sublimity and enlivened and illumined by kindred philosophies. Even the manners and customs of the two peoples do not in many essential matters betray any profound difference in outlook or definite dissimilarity in details. As a matter of fact it is plainly noticeable that in several of their ceremonial observances connected with happy occasions in the family like marriage, birth etc., many of the practices of the Hindus in all their essential details are adopted and followed with the same scrupulous care and religiosity as are observable amongst the more orthodox sections of the Hindu community. In the case of kindred communities sprung from the same stock and living cheek by jowl for centuries on the same soil, sharing in the woes and joys of a common country and equally interested in its happiness and prosperity, all these are but natural and inevitable, and the fact that there has not been so far any violent or widespread agitation amongst the Jains against the application to them of practically the entire rules of Hindu Law is certainly a cogent argument in favour of the view that the Jains as a class are not dissatisfied with the application of Hindu Law to them and that the demurrers and objections which we hear in the courts against such application emanate more from forensic necessities than from any deep rooted and general sense of dissatisfaction prevailing in the community at large. In a country housing the powder magazine of communal feuds and religious discords, aggravated by caste and social barriers and accentuated by acute differences in the personal laws of the inhabitants, the administration of a uniform and homogeneous law for the entire population is the first device to be thought of and will undoubtedly go a long way for avoiding the oft-recurring and unfortunate communal conflicts and dissensions, and the British Indian Courts have really done, though unwittingly, a valuable service to the country by judicially instilling in the minds of the Jains the idea that they are one with the Hindus, thus avoiding the addition and perpetuation of another isolated social atom in the warring communities of Indian polity.

(c) *Cholay Lal* v. *Chunnu Lal*, 6 I.A. 15=4 C. 744 (P.C.); *Sheo Singh* v. *Mt. Dakho*, 1 A 688; *Rup Chand* v. *Jambu*, 32 A. 247; *Bhagwan* v. *Bose*, 31 C. 11 (P.C.); *Dhanraj* v. *Soni Bai*, 52 I.A. 231=23 A.L.J. 273=27 Bom. L.R. 837=30 C.W.N. 601=49 M.L.J. 173=1925 P. C 118. *Gatepps* v. *Ramma*, 50 M. 228 =51 M.L.J. 757=26 L.W. 408=1927 M. 228; *Bhikabai* v. *Mani Lal*, 32 Bom. L.R. 1217=1930 B. 517=54 B. 780; *Mt. Lado* v. *Banarsi*, 14 Lah. 95=1932 Lah. 546; *Sheokuarbai* v. *Jeoraj*, 25 C.W.N. 273=1920 M.W.N. 627=1921 P.C. 77; *Jaiwanti* v. *Anandi*, I.L.R. 1938 A. 196=1937 A. L. J. 1295=1938 A. 62.

Sometimes even ignorance is bliss, and the ignorance of the Courts in the matter of Jain Law has been in this respect a distinct advantage to the country at large and the Hindu community in particular.

657. The Jains are governed by the Mitakshara School.—The Jains differ from the Brahminical Hindus in their conduct towards the dead, repudiating their doctrines relating to obsequial ceremonies, the performance of the Shradd, and the offering of oblations for the salvation of the soul of the deceased; nor do the Jains believe that a son by birth or adoption confers any spiritual benefit on the father.[d] In other words, according to the Jain religion, every man is the architect of his own beatitude, and his progress or felicity in the world in which he is supposed to be sojourning after his death in this, is not dependent on or facilitated by the oblations that may be made to him by his sons or relations whom he has left here below. In view of this fundamental creed of the Jains, it is but natural that the School of Hindu Law that should apply to them is what may be called the secular school of the Mitakshara,[e] and not the Dayabhaga school built and developed essentially on spiritual considerations. Hence even in Bengal the Law which governs the Jains is the Mitakshara law[f] and not the law which is applicable there to the generality of the Hindus. In other provinces it is the Mitakshara that applies as modified by the rules of the subschool that is prevailing in any particular province.[g] Thus though generally a Jain widow cannot make an adoption without the authority of the husband express or implied, yet in Bombay a widow can adopt even without her husband's authority if there is no prohibition from him and in the Madras Presidency she can make the adoption even in the absence of her husband's authority, with the consent of his sapindas. This principle of the applicability to the Jains of the general rules of the Hindu law prevailing in each province is subject to the operation of any custom to the contrary which is proved as applicable to them in that province. For instance even in a province where a Hindu widow cannot adopt without her husband's authority a custom may be proved by which the widow of a Jain can adopt without the husband's authority. It may be convenient to consider this question under separate heads of *adoption*, *inheritance* and *widow's estate*.

658. Adoption among Jains.—The Jains differ, as already said, particularly from the Brahminical Hindus in their conduct towards

(d) *Sheo Singh* v. *Mt. Dakho*, 1 A. 688 =5 I.A. 87; *Dhanraj* v. *Soni Bai*, 52 I A. 231=23 A.L.J. 273=27 Bom. L.R. 837=30 C.W.N. 601 -49 M.L.J. 173=1925 P.C. 118.

(e) *Sundar Lal* v. *Baldeo*, 14 Lah. 78; *Rup Chand* v. *Jambu*, 37 I.A. 93=7 A.L. J. 349=14 C.W.N. 545=12 Bom. L.R. 402 ...6 I.C. 272; *Bachebi* v. *Makhan Lal*, 3 A 55.

(f) *Mt Mandit Koer* v. *Phool Chand*, 2 C.W.N. 154

(g) *Gateppa* v. *Eramma*, 50 M 228=51 M.L.J. 757=26 L.W. 408=1927 M. 238; *Bhikabai* v. *Mantlal*, 54 B. 780=32 Bom. L.R. 1217=1930 B. 517.

the dead, omitting all the obsequies after the corpse is burnt or buried, and as the birth of a son has no effect according to them on the future state of the progenitor, the adoption is merely a temporal arrangement having no spiritual object.[h] But though the religious significance of the adoption is not there, the Jains have so generally adopted the Hindu Law that the Hindu rules of adoption are applied to them in the absence of proof of some contrary usage.[i] Thus it was held in a Madras case that a Jain widow could not make a valid adoption in the absence of the husband's authority or the consent of the sapindas and a custom set up in the case of dispensing with the necessity for such authority or consent was held not proved.[j] But there are cases in other parts of the country wherein it has been held that an adoption can be validly made by the widow without the permission of the husband and the consent of his heirs[k] and that the adoption can even be of a grown up and married man.[l] It has further been held that the only essential ceremony for the validity of an adoption is the giving and taking of the adoptee and that the ceremonies prescribed by the Hindu law need not be gone through.[m] In one of those cases it has even been said that an unequivocal declaration of adoption followed by the treatment of a person as an adopted son would be sufficient to constitute an adoption valid among the community of Jains with which the Court has to deal.[n] But these rulings which are contrary to the general law of the Hindus proceed on the footing of custom proved in each case and cannot be held to affect the general law that in the absence of proof of any such custom the ordinary law applicable to the Hindus must be applied to the Jains also.[c] On the ground of custom an adoption of an orphan[o] or of a daughter's son or

(h) *Sheo Singh* v. *Mt. Dakho*, 1 A. 688 =5 I.A. 87; *Dhanraj* v. *Soni Bai*, 52 I. A. 231=23 A.L.J. 273=27 Bom. L.R. 837 =30 C.W.N. 601=49 M.L.J. 173=1925 P.C. 118;

(i) *Sheokuarbai* v. *Jeoraj*, 25 C.W.N. 273=1920 M.W.N. 627=1921 P.C. 77.

(j) *Galeppa* v. *Eramma*, 50 M. 228=51 M.L.J. 757=26 L.W. 408=1927 M. 228; *Peria Ammani* v. *Krishnaswami*, 16 M. 182.

(k) *Sundar Lal* v. *Baldeo*, 14 L. 78 (Agarwal Jains of Delhi); *Sheo Singh* v. *Mt. Dakho*, 1 A. 688 5 I.A. 87 (Saraoji Agarwals of North-Western Province); *Lakshmi Chand* v. *Gatto*, 8 A. 319 (Jains of Aligarh District); *Manohar Lal* v. *Banarsi*, 29 A. 495 (Jains of Meerut); *Asharfi* v. *Rup Chand*, 30 A. 197 (Jains of Saharanpur); *Sheokuarbai* v. *Jeoraj*, 61 I.C. 481=25 C.W.N. 273=1920 M.W. N. 621=1921 P.C. 77; *Manik Chand* v. *Jagat Sattani*, 17 C. 518 (Oswal Jains); *Harnath* v. *Mawdi*, 27 C. 379 (holding that there is no difference in the custom on the point among Agarwal, Choruwal, Khandwal and Oswal sects of the Jains); *Kapurchand* v. *Narinjan* 20 P.R. 1897 (Jains of Karnal).

(l) *Manohar Lal* v. *Banarsi*, 29 A. 495; *Sheokuarbai* v. *Jeoraj*, 25 C.W.N. 273=1920 M.W.N. 627=1921 P.C. 77; *Dhanraj* v. *Soni Bai*, 52 I.A. 231=23 A.L.J. 273 =27 Bom. L.R. 837=30 C.W.N. 601=49 M.L.J. 173=1925 P.C. 118.

(m) *Lakshmi Chand* v. *Gatto*, 8 A. 319; *Sheokuarbai* v. *Jeoraj*, 25 C.W.N. 273= 1920 M.W.N. 627=1921 P.C. 77; *Dhanraj* v. *Soni Bai*, 52 I.A. 231=23 A.L.J. 273= 27 Bom. L.R. 837=30 C.W.N. 601=49 M.L.J. 173=1925 P.C. 118;

(n) *Chiman Lal* v. *Hari Chand*, 40 I.A. 156=40 C. 879=15 Bom. L.R. 646=17 C. W.N. 885=1913 M.W.N. 509=19 I.C. 669.

(c) See foot-note (c) on page 732.

(o) *Parshottam* v. *Venichand*, 45 B. 754 =1921 B. 147.

sister's son [p] has been held to be valid. When there is a valid adoption, though according to the custom of the Jain community which is contrary to the general Hindu law, the adopted son acquires all the rights of a natural born son and if the adoptive father was at the time of his death a member of a coparcenary, the adoptee takes his coparcenary interest,[q] and if a natural son is born after the adoption, the adoptee gets in competition with that son, his share computed according to the rules given in S. 153.[r]

659. Inheritance amongst the Jains.—It has been held in a long series of cases that the Jains are governed by the Hindu Law of the Mitakshara school except in so far as it may be proved to have been modified in any particular instance by a well established custom.[c] Hence in the absence of such custom the ordinary Hindu law of inheritance according to the Mitakshara is to be applied to the Jains,[s] they being treated as belonging to one of the twice-born castes.[t] Thus a widow of a coparcener cannot claim to succeed to his interest in the coparcenary property,[u] nor can she claim to be absolutely entitled to the property inherited by her from her husband when he had died childless leaving ancestral property.[v] But owing to the proof of custom in some cases it has been held therein that in the case of self-acquired property left by a Jain and taken by his widow as his heir, she takes an absolute estate.[w] The fact that the ancestral property of a Jain was held by him as the last surviving coparcener would not make it the self-acquired property so as to make the widow or mother taking that property on his death as his heir the absolute owner thereof.[x] No doubt the Jain books like *Arhan Niti*, *Badra Bahu Samhita* and *Vartaman Niti* do contain some passages pointing to the absolute ownership of the widow in the property inherited by her from her husband, but obviously they cannot be acted upon as binding on the Courts in view of the fact that the rules enunciated therein are often inconsistent with one another and do not seem to be reflecting the belief and customs of the Jains in the present day, the most glaring conflict between their precept and the present day custom being in the

(p) *Lakshmi Chand* v. *Catto*, 8 A. 319 (daughter's son); *Sheo Singh* v. *Mt. Dakho*, 1 A. 688=5 I.A. 87 (daughter's son); *Hasaan Ali* v. *Naga Mal*, 1 A. 288.

(q) *Sundar Lal* v. *Baldeo*, 14 Lah. 78. *Manohar* v. *Banarsi*, 29 A. 494.

(r) Rukhab v. Chunilal, 16 B. 347.

(c) See foot-note (c) on page 732.

(s) *Sundar Lal* v. *Baldeo*, 14 Lah. 78; *Bachebi* v. *Makhan Lal*, 3 A. 55; *Mt. Mandit Koer* v. *Phool Chand*, 2 C.W.N. 154; *Bhikabai* v. *Mani Lal*, 54 B. 780=32 Bom. L.R. 1217=1930 B. 517.

(t) *Ambabai* v. *Govind*, 23 B. 257; *Sheokuarbai* v. *Jeoraj*, 25 C.W.N. 273=1920 M.W.N. 637=61 I C. 481.

(u) *Mt. Lado* v. *Banarsi*, 14 Lah. 95.

(v) *Bhikabai* v. *Manilal*, 54 B. 780=32 Bom. L.R. 1217=1930 B. 517; *Nekram Singh* v. *Srinivas*, 1926 A. 586=24 A.L.J. 751; *Panhar* v. *Shamsher* 29 A.L.J. 314; Bachebi v. Makhan, 3 A. 55.

(w) *Sheo Singh* v. *Mt. Dakho*, 1 A. 688=5 I.A. 87; *Harnath* v. *Mandil*, 27 C. 379; *Shimbu Nath* v. *Gayan*, 16 A. 379; but see *Mt. Mandil* v. *Phool Chand*, 2 C.W.N. 154 and the discussion of this question in *Bhikabai* v. *Manilal*, 54 B. 780=32 Bom. L.R. 1217=1930 B. 517.

(x) See *Bhikabai's case*, supra.

matter of preference given in those books to the widow over the son for succession to a deceased Jain, a precept not at all observed by the Jains at the present day.[x] In view of the apparent inconsistencies in the Jain books and the wide gulf that often exists between their precepts and the customs practised by the Jains which in many instances conform to those practised by the Hindus, the Courts have chosen to administer, not without justification, the Hindu law wherever any custom pleaded and proved does not point to any contrary conclusion. Thus it was held that a son is entitled to succeed to the Stridhana property of his mother[y] and that as between a married daughter and an unmarried daughter the latter succeeds in preference to her sister to such property.[z]

660. Widow's estate.—Inasmuch as the general Hindu law must be held to apply to the Jains in the absence of proof of evidence to the contrary, the well known rule of the Mitakshara law that a woman succeeding to the property of her husband or son takes only a limited estate in that property must be held to apply to the Jains also. But judicial decisions have held, based upon the custom alleged and proved in each individual case, that in respect of the self-acquired property of the husband which the widow has inherited as his heir, she takes it as an absolute owner.[w] The result of the decisions bearing on the point may be summed up as follows:

The custom of a widow having an absolute title with regard to the ancestral immovable property held by the husband is not held proved in any of the decisions.[x] In some of the Allahabad cases the widow's right to alienate the self-acquired property inherited from the husband was held proved,[w] but a distinction is made between immovable property inherited from the husband and the ancestral property in his hands. There is a conflict of decisions in the Calcutta High Court, and in *Harnabh* v. *Mandil*, 27 C. 379 at 393 there is an obiter dictum that there is no distinction between the self-acquired property of the husband and the ancestral property held by him. The Bombay High Court has held that a custom that a Jain widow is the absolute owner of the immoveable properties inherited from the husband has not been proved, much less the power of the widow to alienate ancestral property which has become the separate property of the husband and inherited by the widow as his heir and that the right of the mother to alienate even the self-acquired property of her son inherited by her has neither been alleged nor held proved in any of the decisions so far rendered.[x]

(x) See foot-note (x) on page 735.
(y) *Hariram* v. *Madan Gopal*, 33 C.W. N. 493=1929 P.C. 77.
(w) See foot-note (w) on page 735.
(z) *Jaiwanti* v. *Anandi*, I.L.R. 1938 A. 196=1938 A. 62.

CHAPTER XIX

HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1337.

(as amended up-to-date)

Short title and extent.

1. This Act may be called The Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

Application.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of S. 3 shall apply where a Hindu dies intestate.

Devolution of property.

3. (1) When a Hindu governed by the Dayabhag school of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, *his widow* or if there is more than one widow, all his widows together shall, subject to the provisions of Sub-S. (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son.

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son :

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-S. (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

Saving.

4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

HINDU WOMEN'S RIGHTS TO PROPERTY ACT

Object of the Act.—Whatever might have been the position of Hindu women in the social structure of ancient India, their successors in the present day are nurturing a feeling that their condition is not very enviable and that their brothers, actuated by their own selfish interests, are not as fair to them as they deserve. That this feeling is fast gaining ground cannot be gainsaid and is undoubtedly unfortunate. Any difference in the incidents of Hindu law in its application to men and women in whosesoever favour it may operate, is denounced as a mark of oppressive injustice to women, the perpetuation of which is not warranted by the needs of the times. The impact of Western civilisation and culture and the notion of equality between the sexes which is the key-stone of that civilisation have given a peculiar weight and momentum to the movement for obliterating the differences in the Hindu law incidents between man and woman, and the question is freely asked from every press and platform with all the gusto of conviction and the force of confidence, why a lady should be treated differently from a gentleman. To the opponents of this movement who honestly feel that their treatment of their sisters leaves nothing to be desired either from the point of view of social comfort or legal right, the question appears to carry its own condemnation. But our sisters are not wanting in chivalrous champions to echo and make their voice felt within the legislative chambers, and endeav-

ours are being sedulously footed to legislatively knock out all the disabilities from which Hindu women are labouring as compared with men. The Hindu Widow's Remarriage Act was probably the earliest of their victories and the Hindu Women's Rights to Property Act is undoubted the biggest success so far achieved. But he is a blind man who does not see that further triumphs are in store for his sisters at no distant date. The Hindu Divorce Act will soon be on the statute book and if the insidious influence of exotic social literature does not meet with an instinctive check in the hearts of our country's womanhood one can boldly say that the days of companionate marriages are not far off.

The object of the Hindu Women's Rights to Property Act, as its very name indicates, is to give fresh rights to Hindu Women. But like Sir Roger de Coverley our legislators appear to have had a softer heart for widows than for women in general and the result was that the Act contented itself with dealing with widows and refrained from improving the legal position of the women as a class. Hence the Act can more appropriately be called the Hindu Widows' Rights to Property Act. The reason for the deviation from the more comprehensive object indicated by the name of the Act would be clear to any one who goes into the history of the enactment. The sponsor of the bill, Dr. Deshmukh, originally projected to bring in women other than widows within the ambit of the provisions, but he was told that if he would not confine his chivalrous help to widows, he could have no support from the conservative section of the legislators who, though they are generally opposed to all change in their time-hallowed law, still saw that prudence and wisdom demanded some compromise when the old order was to their chagrine, rapidly changing yielding place to the new.

The effect of the Act as it finally emerged after having run the gauntlet of conservative abuse is to enlarge the maintenance right of some of the widows to a right to demand a share in the property from which maintenance is claimable and to introduce some more widows as heirs in the line of succession. Thus a widow of a coparcener is entitled to demand a partition and delivery to her of his share without being confined only to a right to maintenance and the widow of a predeceased son and the widow of a predeceased son of a predeceased son are let in as heirs to the separate property of a Hindu in respect of which he has died intestate. Apart from the question of the letting in of further heirs, it can be said that generally the object of the Act is to place a Hindu widow to whatever province she may belong in the same position as that hitherto enjoyed by a widow of a coparcener under the Dayabhaga Law.

The Act is not ultra vires.—Mr. S. Srinivasa Aiyangar in his revised edition of Mayne's Hindu Law has expressed the view that while the Act as it stood prior to its amendment in 1938 would be valid, the amendment of that Act in 1938 would be ultra vires the Indian Legislature in so far as it might affect agricultural lands in the country. He argues as follows:—Prior to the inauguration on 1st April 1937 of Provincial Autonomy under the Government of India Act of 1935, the Indian Legislature could validly pass an enactment governing succession to property including agricultural lands, and the Act prior to its amendment having been passed by that legislature during such period was perfectly valid. But at the time of the amendment in 1938 the Provincial Autonomy had been put into operation which took away from the Indian Legislature [which under S. 316 of the Government of India Act of 1935 had only the powers of the Federal Legislature if and when it might come into existence] the power to legislate in respect of agricultural lands and vested that power in the Provincial Legislature and for this position he refers to item 21 of the Provincial List dealing, inter alia, with "transfer, alienation and devolution of agricultural lands" and item 7 of the Concurrent List dealing with "wills, intestacy and succession, save as regards agricultural lands." From this he argues that the amendment of 1938 was ultra vires the Indian Legislature in so far as it affects agricultural lands in any province. This argument is attractive and certainly plausible on the wording of the statute. But can this be the proper interpretation and effect of the provisions mentioned? No doubt item 21 of the Provincial List says that the Provincial Legislature has the power to legislate in respect of the devolution of agricultural lands and item 7 of the Concurrent List while providing for succession in general excludes succession in respect of agricultural lands from the ambit of Federal legislation. But what is the proper operation of these inclusive and exclusive provisions? It certainly could not have been the intention of Parliament when it enacted the Government of India Act that there should be as many enactments relating to devolution of agricultural lands as there are provinces in India and that the Federal Legislature should not have power to enact a general law of devolution in respect of all properties and applicable to all the provinces even though in particular instances the scheme of devolution enacted might affect agricultural lands. The desirability of one common law of devolution governing all Hindus and all their properties whether agricultural or otherwise cannot be questioned and the only proper construction of the provisions above-mentioned would be, not to deny the Federal Legislature the power to legislate generally for the devolution of all properties but to leave the power of legislation in res-

pect of the devolution of *agricultural lands only* in the Provincial Legislature having regard to the particular or peculiar needs and conditions of agriculture in the particular province. This would be the only reasonable construction allowing as it does the enactment of a uniform and single legislation for the entire country, at the same time permitting to each provincial Legislature the liberty to provide specially and specifically sufficient safeguards or restrictions which would best subserve the peculiar needs of agriculture in that province. After all, as observed by Lord Atkin in the House of Lords case of *Gallagher* v. *Lynn*, (1937) A.C. 863, "It is well established that you are to look at the 'true nature and character of the legislation:' *Russell* v. *The Queen*, (1882) 7 A.C. 829 'the pith and substance of the legislation.' If on the view of the statute as a whole, you find the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not, under the guise of dealing with one matter, in fact encroach on the forbidden field." Again as pointed out by the learned Chief Justice of the Madras High Court, after an exhaustive and careful consideration of the entire case-law, in the Full Bench case of *Nagaratnam* v. *Seshayya*, 49 L.W. 257, relating to the validity of the Madras Agriculturists Relief Act, the fact that an Act which falls within the express powers of a particular legislature incidentally affects matters within the competence of another legislature is not the deciding factor and is no ground for holding the Act ultra vires.

Judged by the tests furnished by these cases, can it be said that this Act as amended in 1938 offends entry No. 21 of the Provincial List? That the Indian Legislature has power to legislate in respect of devolution of property in general cannot be denied, and the Act in question does not purport to provide for the devolution of agricultural lands. The fact that incidentally the Act might affect matters within the Provincial List would not affect its validity, for it is now well settled that the mere fact that an Act of the Federal Legislature may in some respects trench upon a Provincial subject is not the deciding factor, and that an Act which in one aspect and for one purpose falls within the powers of the Federal Legislature cannot be said to be beyond the powers of that Legislature merely because in another aspect and for another purpose it falls within the powers of the Provincial Legislature.

Apart from the above considerations, the amendment of 1938 is only explanatory of the Act as originally passed and does not add anything to its substantive provisions. Prior to the amendment, S. 2 ended with the words "leaving a widow" after the word "intestate." This gave room for a plausible contention that the

Act would not apply where the propositus was a widower. This contention, if accepted, would lead to the anomaly that if a Hindu died leaving a widow, his widowed daughter-in-law and his widowed grand-daughter-in-law would be entitled to succeed as heirs, but if he died a widower, they would have no such right. It is extremely doubtful, therefore, whether even without this amendment the Courts would countenance an argument which led to imputing to the Legislature an intention so absurd as this. The amendment also introduced some verbal changes in S. 3 and added a new section, S. 5, to elucidate and avoid the obscurities in the original enactment. Hence no practical purpose is served by the argument that the amendment of 1938 is to any extent ultra vires.

Construction of the Act.—It is difficult to introduce more anomalies and uncertainties by a shorter enactment and this Act is a striking illustration of the dangers and shortcomings of tinkering with an established law by hasty and immature attempts at piecemeal legislation which do not take into consideration the repurcussions thereof on the various branches of the law sought to be changed and the consequent difficulties and anomalies to which they lead. But piecemeal legislation is the rage of the present day and it is futile for the lawyer and the judge to raise their voice of protest against it. But their duty is clear. They cannot legislate of course, but they can by the judicious application of the well known principles of construction, mitigate to some extent the injustices and incongruities to which a too strict interpretation of the provisions of the enactment may lead. In construing the present Act, one should endeavour as far as possible to give to its provisions such meaning and effect as not to land one into positions of absurdity or illogicality, while at the same having an eye on the object and policy of the Act and on its express terms and phraseology. Again the Act should be so interpreted as to effectuate only such changes and alterations in the existing law as are imperatively demanded by its express provisions or by their necessary intendment or implication, without trenching on the incidents of the Hindu law the alteration whereof is not required for giving effect to the object and the express provisions of the enactment. If one proceeds to consider and construe the sections of the present Act with these two cardinal principles in view, it is not impossible, though still by no means easy, to give them a consistency and coherence as between themselves and to blend and harmonise them with the age-long and established law of the Hindus. The discussion and the conclusions given in the following sections are permeated by this line of approach so that only the minimum intensity of shock may be registered on the observatory of Hindu sentiment and the vague feeling of panic noticeable amongst the more con-

servative and orthodox section of the Hindus may at least to some extent be allayed.

Scope and operation of the Act.—The Act applies only when a Hindu dies intestate either partially or wholly and does not apply where he has disposed off all his property. But the fact that he has left a will, will not render the act inapplicable if the will is to any extent invalid. Besides the Act does not apply to Burma and hence does not govern Hindus already domiciled there, but if a Hindu residing in British India and whose personal law is governed by this Act hereafter betakes himself to Burma, he will be deemed to carry with him his personal law as altered by this Act. The same principle will apply to places or countries to which the Act cannot apply. The provisions of the Act are also inapplicable to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925 applies or to the property of a Hindu dying before the commencement of the Act. The Act came into force on 14th April 1937, and if a Hindu had died on 13th April, 1937 the provisions of the Act cannot be invoked but if he died on or after the 14th April, 1937, his relations mentioned as entitled to the benefit of the Act can claim the same. The fact that a Hindu male died prior to 14th April 1937 without leaving male issue but leaving a widow to succeed him as heir under the law as it then stood, would not render the Act applicable on the death of that widow subsequently to that Act so as to enable her widowed daughter-in-law or widowed grand-daughter-in-law to succeed to the estate under this Act. But if the death of the propositus took place after 13th April 1937, the circumstance that the daughter-in-law became a widow prior to that date would not deprive her of her right to succeed under the Act.

The kind of coparcenary that is created by the Act in the case of persons succeeding thereunder as heirs to the separate property of a Hindu is in many respects different from the Mitakshara and the Dayabhaga coparcenaries. Under the Mitakshara law, on the death of a Hindu leaving separate property, his male descendants in the male line upto three generations alone succeed to that property as coparceners with the right of survivorship as between them, and neither his widow nor the widow of his predeceased son or of his grandson is entitled to claim a share in that property. No doubt if and when a partition takes place between the sons, their mother should be given a share equal to that of a son, but so long as no such partition takes place she is only entitled to maintenance and cannot claim a partition of her share. Even this right to be

allotted a share at the time of partition between the sons was not claimable by the mother in the Madras Presidency on the ground that the right had been negatived by the usage of the province. As regards the widows of sons, whether they became widows prior to or subsequent to the death of the father-in-law, their claim was only to maintenance against the father-in-law's property in the hands of his heirs. Even under the Dayabhaga the widow of a predeceased son could not claim a share in the estate left by the father-in-law, and the right of her mother-in-law was only confined, in the presence of sons, to a claim for a share if and when her sons chose to effect a partition. But under this Act, both the widow and the widowed daughter-in-law of a Hindu, whether he belonged to the Mitakshara or the Dayabhaga School, are allowed to share his inheritance along with the sons with a right to call for a partition whenever they like and in the same way as the sons.

The provisions of the Act so far as succession to the separate property of a Hindu is concerned may be summarised as follows:—

(i) His sons, his widows, the widows of his predeceased sons, his sons' sons and sons' sons' sons and the widows of predeceased sons of predeceased sons, succeed together to that property with this qualification that if the parties are governed by the Dayabhaga School in the presence of the son his own son cannot claim any interest in the property inherited.

(ii) The share of the widow of a propositus is equal to that of a son where there is a son or son's widow or grandson or grandson's widow or great-grandson. If the propositus has left more than one widow of his, then all such widows together will take the share of a son. If the propositus has left only his widow or widows and none of the other heirs mentioned in the Act, then she or they take the whole estate.

(iii) The share of the widow of a predeceased son is equal to that of a son provided that in the case of the existence of more than one widow of a predeceased son, all such widows are entitled to claim only one such share, and provided further that if there is a son of such predeceased son all such widows will take together a share which is equal to that of a grandson.

(iv) Similar provisions apply in the case of the widow or widows of a predeceased son of a predeceased son

(v) Each of the widows abovementioned is entitled to claim and sue for partition and delivery to her of her share under the Act.

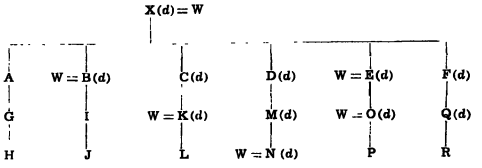
In the case of a widow of a member of a Mitakshara coparcenary she virtually steps into the shoes of her husband and is entitled

to claim a separation and delivery to her of his share both as against his sons and as against his other coparceners, whether they be ascendants, descendants or collaterals of her husband.

Effect of the Act on the law of Devolution under the Dayabhaga. —The change introduced by the Act in the law of devolution under the Dayabhaga is not very considerable when compared with the change in the law of devolution obtaining under the Mitakshara. Under the Dayabhaga, so far as succession to the property of a deceased Hindu is concerned, there is no difference between his ancestral and self-acquired property, for in neither does the son get an interest by birth so as to be able to demand a partition in respect of it during the father's life-time. On the father's death the son succeeded to the ancestral property held by the father not as a co-owner or coparcener with him as under the Mitakshara but as his heir. This feature of the Dayabhaga succession is not departed from even under the present Act. The only change is that on the death of a Hindu, not only his sons succeed but also his widow and the widows of predeceased sons and the widows of predeceased sons of predeceased sons can succeed. Even after the Act, if the son has succeeded to his father's estate either alone or along with the other heirs mentioned in the Act, his own son (that is, the son's son) does not get an interest in it during his life-time. No doubt if the son who has succeeded to his father's estate dies, then that son's son can claim to succeed to the property along with the latter's mother or stepmother, each taking a half share. But during the life-time of the father neither the son nor the son's widow has any interest in the property.

A widow or the widowed daughter-in-law can succeed to the property of a Hindu under the Act freed from the restriction imposed by the Dayabhaga School that she should be chaste at the time the succession opens. On remarriage she forfeits the interest that she has taken, her share then going to the persons who would be the heirs of the person as whose heir she has originally taken the property. The same rule applies if she dies. Thus if on the death of a Dayabhaga Hindu, his widow his son, the son of a predeceased son and the widow of another predeceased son had succeeded to his property, the subsequent death of the widowed daughter-in-law would enable the rest of the heirs of her father-in-law to take that interest by succession as the property of the father-in-law and not by survivorship as co-parceners under the Mitakshara. If in this illustration the son subsequently dies, his share would be taken only by his mother as his own heir and not by his co-heirs.

The following illustration will clearly bring out the effect of the Act on the devolution of property under the Dayabhaga.



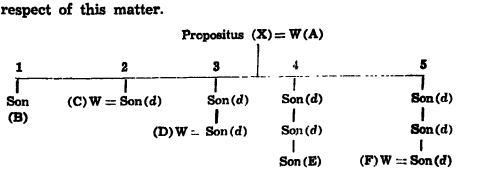
On the death of X, his property whether ancestral or self acquired is taken by his widow, his son, A, the widow and son of his predeceased son B, the widow and son of his grandson K, the widow, son's widow and grandson of his son E and the grandson of his son F. It would be seen that G and H do not take because their ancestor A is alive and during his life-time they cannot take any interest in the property. J does not take because his father I is alive. The widow of N does not take because she is the widow of a great-grandson and hence is neither an heir under the Dayabhaga or under the Act. B's widow comes in as an heir because she is the widow of a predeceased son, K's widow comes in because she is the widow of a predeceased son of a predeceased son and O's widow also comes in similarly. L, P, and R come in as great-grandsons in view of the fact that in each of their respective lines there is no male ancestor to exclude their right as in the case of J and H. Now if subsequently A dies, his share is taken by his son G, and his grandson H cannot claim any interest therein so long as G is alive. If A were to have no sons, then on his death his interest will devolve on his mother X's widow as his nearest heir and not on the other heirs above-mentioned who have taken, as the rule of survivorship is not applicable in the case of a Dayabhaga joint family. If O's widow dies then her share would go to P and not to E's widow because in E's line the share would be half to E's widow. quarter to O's widow and quarter to P. If both P and O's widow die and their shares are taken by E's widow and subsequently E's widow also dies, then that share would go to X's heirs as ascertained under the Act. If at the time of A's death A had no male issue but only a daughter then she would take his share as his heir, and this would be so whether there had been previously any partition or not.

EFFECT OF THE ACT ON DEVOLUTION OF SEPARATE PROPERTY UNDER THE MITAKSHARA.

Introduction of new heirs.—Under the law prior to this enactment, the widow of a Hindu was no heir to his property in the presence of his sons. This Act not only makes her an heir along with the sons, but also introduces the widowed daughter-in-law, and the widowed grand-daughter-in-law, as new heirs. This is revolutionary as it has no basis either in the Mitakshara or the Dayabhaga system. These widows succeed with the sons and before the daughter, the daughter's son and the parents, and one wonders whether this provision really reflects the wishes of a pious or even an impious Hindu, as it can be safely said that he is more anxious to provide for his daughter and his parents than for his daughter-in-law and grand-daughter-in-law.

Widows.—A widow is entitled under the Act to the same share as a son either in competition with a son or in competition with a widowed daughter-in-law or in competition with any other lineal male descendant or his widow entitled to succeed under this Act. If the propositus has left more than one widow all the widows together will be entitled to the same share as that which would come to a sole widow. Thus if a Hindu dies leaving separate property and a widow and a son, the widow is entitled to share equally with the son, i.e., the widow will take one half and the son will take the other half. So also if the only relations left by the propositus are his widow and a widowed daughter-in-law, each of them is entitled to take an equal share. The same principle should apply where the heirs are the widow, the son and the widowed daughter-in-law and each of them should be given an equal share. If instead of a son, a Hindu leaves only a grandson or only a great-grandson and a widow, she should be given one share and the grandson or great-grandson another equal share. But where the widow is the only relation left and there is neither a son nor any of the other relations mentioned in the Act as entitled to heirship, then the widow takes the whole estate, though only as a qualified owner.

The following will clearly bring out the position of the widow in respect of this matter.



This diagram shows that X (propositus) has left on his death his widow A, his son B, his widowed daughter-in-law C, his widowed grand-daughter-in-law D, his great-grandson E and his great-grand-daughter-in-law F. There are on the whole five lines of relations, but in the fifth line there is only a great grand-daughter-in-law, namely, F, who is not an heir either under the Hindu Law or under this Act. Hence, leaving her out of account, each of the other relations namely, A, B, C, D and E, is entitled to a son's share, *i.e.* each of them takes one-fifth of X's properties. If in the above illustrations B has a son, then B and his son will each take half of one-fifth or one tenth. So also if C has a son or a step-son then C and that son or step-son will each take one half of one-fifth or one-tenth as a grandson. Similarly if we assume that D has two sons or step-sons, then D and each of her sons or step-sons will take one-third of one-fifth or one-fifteenth as a great-grandson. If in the above illustration we assume that X has left in addition an illegitimate son, prior to the Act, that son (X being a Sudra) was entitled to get half of what he would take if he were legitimate in the presence of a legitimate son, widow, daughter or daughter's son of his putative father and he would take the whole of the property of the father if there is none of these relations; and the existence of the widowed daughter-in-law would not have affected his right in any way. But now, since the widowed daughter-in-law and the widowed grand-daughter-in-law also come in to share as sons, the quantum of the illegitimate son's share gets correspondingly reduced and his right to take the entire property in the absence of the son, widow, daughter, or daughter's son defeated when there is a widowed daughter-in-law or a widowed grand-daughter-in-law.

Unchastity and re-marriage of the widow.—The opening words of S. 2, namely, "notwithstanding any rule of Hindu Law or custom to the contrary," would, on their strict construction, lead to the position that the normal rule of Hindu Law which disables an unchaste widow from succeeding to her husband's property can no longer be operative, though it is doubtful if the legislature had really intended to abrogate that rule. The result is that a wife who had strayed away from the path of virtue and had been living away from her husband in adulterous intercourse with another can, under this Act, claim to come in as her husband's heir, even though she had wantonly and shamelessly thrown to the winds the solemn vows of matrimony and transferred her charms and affections to one who had no claim to them in any sacred or civilized law. Yet this is the strict effect of this enactment, an outrage to all ethical sentiments and a premium for vice and wickedness on the part of married women. Though this may be the position in respect of the immoral wife's right to succeed to her husband's property, yet if she re-

marries, her re-marriage will entail the forfeiture of her right to hold on to the husband's estate and the estate or share which she has taken therein will in law pass on to persons who at the time of the remarriage are entitled to the husband's property. If the widow (A) in the illustration given in the previous section dies or remarries, then the one-fifth share which she has taken in the husband's estate will be taken equally by the remaining four heirs, namely, B, C, D and E, and this will be so whether her marriage or death takes place either before or after she has obtained a partition and separate possession of her share from them.

The statutory co-heirs whether coparceners.—If the parties are governed by the Mitakshara then the co-heirs mentioned in the Act as suceeding to the separate property of a Hindu take the property together with the right of survivorship *inter se* and the right to maintenance and partition. But being a coparcenary which comes into existence only on the death of the last male holder the right by birth which is an essential incident of a Mitakshara coparcenary cannot be postulated in such co-heirs. This statutory coparcenary resembles more the coparcenary under the Dayabhaga. In both, a coparcener's right to possession and enjoyment arises only on the death of the last male holder. In both, females can be members and in both the right of a female coparcener to claim a partition of her share exists. Again in both the right of a female coparcener is only a limited right passing on her death to the heirs of the last male holder as whose heir she has come into the coparcenary. But here the resemblance between these coparcenaries ceases. In the Dayabhaga coparcenary there is no question of survivorship as between the coparceners and on the death of one of them his interest descends to his own heirs, whether male or female, who also thereupon become members of the coparcenary. But in the coparcenary under the Act, where the parties are governed by the Mitakshara law, the interest of a deceased coparcener is taken in survivorship right by the other members of the coparcenary whether these be males or females. Besides, the Dayabhaga coparcenary never starts with a female member and females become coparceners only later on as heirs of male members with whom the coparcenary originally commenced. Thus on the death of a Hindu under the Dayabhaga his sons become coparceners as between themselves, but a widow of a pre-deceased son does not succeed with them as a coparcener; but if one of the sons who has succeeded to the father's property subsequently dies the widow of that son becomes a coparcener along with the surviving sons. But a coparcenary under the Act can start with a female like the widow or widowed daughter-in-law. Again under the Dayabhaga copar-

cenary a male Coparcener's son does not get a right in the property of the coparcenary. But under the statutory coparcenary, amongst parties governed by the Mitakshara law, in the property taken by a son, his son and son's son get an interest by birth.

The introduction of this strange coparcenary into the Hindu Law by the Act under consideration does not, however, affect those incidents of an ordinary Hindu Law coparcenary which are not inconsistent with the provisions of the Act. In places governed by the Mitakshara school as already mentioned, in the interest taken by a son in the separate property of a deceased father that son's son and grandson get a right by birth; and in cases governed by the Dayabhaga, where a father's property is inherited by a son, the latter's son does not get an interest by birth in that property. So also the existence of the managership in the eldest male member should still be postulated with all the privileges and powers of management and alienation appertaining to that position and the corollary and concomitant disabilities and obligations of the junior members. But if there is no adult member, there is nothing to preclude a female member of the family who is competent and willing from taking up the reigns of the government of the household with all the incidental and necesary rights and duties flowing from the position of managership. She can contract debts and alienate the family property for the benefit or necessity of the family of which she is the manager and the junior members of the family, both males and females, would be bound by such debts and alienations. She can sue and be sued as representing the entire family and can generally do all acts which can be said to be acts of prudent management.

Widow's share how to be calculated.—The share of the widow which is to be equal to the share of the son under the Act is to be calculated with reference only to the separate property left undisposed of by the husband. If he has already gifted or devised some or most of his properties to his sons and has left only a portion thereof undisposed of, then the widow's share is to be ascertained on the footing that the undisposed of properties are the only properties left by the husband and that in those properties the widow and the sons must share equally. For instance, if a Hindu having Rs. 20,000 and 4 sons had already given away to each of his sons Rs. 4000 by gift or will, and left undisposed of only Rs. 4000, the widow can share only in the Rs. 4000 as one of five sharers, taking for her part Rs. 800 and cannot claim that, since each of the sons had already taken Rs. 4000, she should be given the entire amount of Rs. 4000 which was left undisposed of by her husband. So also the share which is to go to her thus calculated is not to be affected or reduced by the circumstance that she had already been given

large properties or moneys or jewels by her husband or father-in-law. Nor is this share to which the widow is entitled under the Act in respect of the undisposed of separate property of the husband, affected by any partition in respect of the ancestral property of the husband effected during or after his life-time and in which she has been given, as she is entitled to, a share under the general law along with her sons. The distinction between the share to which the widow is entitled under this Act in the undisposed of separate property of her husband and the share to which she is entitled under the general law on a partition between the sons is this, that while the former share comes to her as a determination and division of her statutory right in the property, in the latter case the share is allotted to her in lieu of maintenance with the result that in the calculation of her share in the latter case, any income-yielding property given to her already by her husband or father-in-law would be taken into account and her share correspondingly reduced.

Widow's adoption and divestment.—The rule of Hindu Law that in the case of an adoption by a widow she stands entirely divested of the property inherited by her from her husband, subject only to a right to maintenance, is modified by the Act, and she is entitled to retain a half share in that property, the divestment being operative only in respect of the other half to which alone the son would be entitled under the Act. Besides, if there is in existence a widowed daughter-in-law who along with her mother-in-law has taken a half share under the Act, an adoption by the mother-in-law would entail a divestiture of a portion of the property taken by both the mother-in-law and the daughter-in-law so as to ensure an equal division of the entire property into three shares, one share going to the adopting widow, another to the adopted son and the third to the widowed daughter-in-law, and this would be so whether the mother-in-law's adoption takes place before or after a division between the mother-in-law and the daughter-in-law. This rule of divestiture of a portion of a widowed daughter-in-law's share however applies only if she has taken as the heir of her father-in-law under the Act. If, one the other hand, on the death of a Hindu his separate property has been taken by his widow and his son in equal shares, and subsequently on the death of the son leaving his own widow, the latter has succeeded to the son's interest, any adoption thereafter made by the mother-in-law cannot divest the daughter-in-law's interest, or even the mother-in-law's interest, because the adoption itself would be invalid under the Hindu Law. But the widowed daughter-in-law, if otherwise qualified, is not precluded from making a valid adoption to her husband, whether she has succeeded as her father-in-

law's heir under the Act or as her husband's heir, and in either case, her adopted son would divest only her own interest to the extent of a half, and cannot touch any interest which has been taken by the mother-in-law. This is so because the son adopted by the daughter-in-law is in the position of a grandson and can claim a share under the Act, only in the share taken by the adopting widow as the representative of her husband's line.

Widow and illegitimate son of a Sudra.—Prior to the Act on the death of a Sudra leaving a widow and an illegitimate son, the widow would receive half the property and the illegitimate son the other half. This is on the footing that an illegitimate son is entitled to take in the presence of the widow half the share which he would take if he were legitimate. But under the Act the widow herself should be treated as a son, and hence the illegitimate son's share is only one fourth. If in addition to the widow and an illegitimate son there is a widowed daughter-in-law coming in as an heir under the Act, since both the widow and the daughter-in-law should be treated as sons, the illegitimate son's share will be half of one-third, that is one-sixth. In the same way should be calculated the shares of the widow and the illegitimate son where there are sons, or where there are grandsons, or grand-daughters-in-law representing the lines of deceased sons. Again, before the Act, if a Sudra died leaving a widow, an aurasa son and an illegitimate son, the latter two succeeded as coparceners and, on the death of the aurasa son undivided without male issue, the whole property was taken by the illegitimate son as against the widow of the putative father and the widow of the aurasa son. But under the Act, since the widow also succeeds as a son, the death of the aurasa son without male issue does not enable the illegitimate son to claim the entire property, but only to share in it along with the widow in the proportion of 1 to 3, and if the aurasa son has left a widow, she is entitled to step into the position of the husband thus defeating the said right of survivorship of the widow and the illegitimate son. If in the above case the aurasa son has died divided from the mother and the illegitimate son, then the aurasa son's own heir, just as his daughter, daughter's son or mother, will succeed to his interest in the absence of his own widow.

Widow's share liable to fluctuation by survivorship.—The share which a widow takes under the Act is liable to fluctuation by the operation of survivorship but such fluctuation can never operate to her detriment. On her husband's death, she takes a son's share, and as his death puts an end to the possibility of any increase in the number of sons (barring, of course, the case of a

posthumous son) her interest does not run the risk of being diminished by any additions to the membership of the coparcenary. If, for instance, a widow has succeeded to her husband's property with his son, the fact that subsequently sons are born to that son cannot affect the quantum or share of the interest which she has already taken. But if that son should die without leaving a widow or male issue and without getting himself divided from the widow, the widow is entitled to take by survivorship the son's interest also. But if the son dies leaving a widow, then his mother cannot claim his share, or if he dies after getting himself separated then his daughter or daughter's son is entitled to take it In the same way, if on the death of a Hindu, his widow and his widowed daughter-in-law have inherited his separate property, the death of the daughter-in-law undivided from her mother-in-law would leave her share to be taken by the mother-in-law even though the daughter-in-law has a daughter at the time. The question whether the mother-in-law would take the daughter-in-law's interest on the death of the latter divided and leaving a daughter, is not easy to answer. The daughter-in-law no doubt takes the share which her husband would have taken if alive. Does this mean that it is the intention of the legislature that the property in the hands of the daughter-in-law is taken by her as her husband's heir and as the husband's property, or does it mean that that property is taken by the daughter-in-law as the heir of the father-in-law and as *his* property? The former construction has not much force in view of the fact that the property descended straight from the father-in-law and that the son had never held any interest in it. Hence on the death of the daughter-in law, though divided and leaving a daughter, the property should be treated as the property of the father-in-law, and should be given to his heir and not to the heir of the son. In this view the mother-in-law would take that property and not the daughter of the daughter-in-law.

Widow's right to partition.—The widow being in the position of a coparcener in regard to her right to demand a partition as against the others who along with her have taken her husband's property all the rules applicable under the ordinary Hindu Law to a male coparcener's right to claim and obtain a partition of his interest are as much applicable to her right also. If she happens to be a minor, and her stepson or widowed daughter-in-law who has succeeded to the property is, by virtue of his or her seniority, in management of the property on her behalf as well, then unless it is shown that a partition is to her benefit or advantage, a suit for partition on her behalf is not sustainable. But the fact that there has been a partition of her share does not render it her abso-

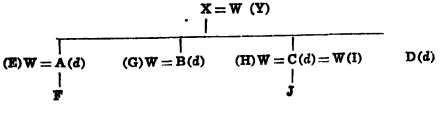
lute property and hence on her death that share will go to her husband's heirs, that is, the very heirs who along with her have inherited together his property.

Widow's maintenance.—When the widow succeeds to her husband's property with his other heirs under the Act, she becomes as it were a member of a coparcenary along with them with a right to maintenance from the manager of the family. The question whether this right which prior to the Act could be enforced by a suit against her sons can also be similarly enforced after the Act is not an easy one. There is, no doubt, nothing in the Act which expressly takes away that right, and the Act having been passed only in the interest of the widow, it can plausibly be held that if in any particular case, as for instance by reason of her incapacity to manage properly due to sickness, stupidity or age, it would be for her advantage to claim only maintenance instead of a share under the Act, she should be awarded reasonable maintenance in conformity with the well known principles applicable to such a case. But it is equally plausible to contend that the widow having been given a share, she is in the same position as an ordinary coparcener who cannot sustain a suit for maintenance, and that if reasonable maintenance is refused to her, her only right as in the case of a coparcener is to sue for partition and not for maintenance. If this contention prevails, one can safely guess that in the majority of cases, the result will be anything but satisfactory and the property allotted to the widow's share will, for various reasons of incompetence, ignorance and credulity, a freedom from which our women cannot yet confidently boast of, soon disappear into the hands of scheming interlopers, leaving the widow in the streets. But it is hoped that the conservative faith of our women in their male relations and the instinctive generosity of the latter towards the former would prevent any such result by providing reasonable maintenance or allowing partition to the widows in proper and suitable cases. In this connection it should, however, be remembered, that the maintainability or otherwise of a suit by a widow for her maintenance against her co-heirs who have taken her husband's separate property does not affect the maintainability of her suit for maintenance against her sons grounded on their personal liability to maintain her or against the legatees under her husband's will in case her reasonable maintenance cannot come from out of her share in his undisposed of separate property under this Act. Even where the husband has not disposed of any portion of his separate property by gift or will and he was not a member of a joint family, the separate property left by him is taken by his heirs subject to their obligation to maintain his widow in reasona-

ble comfort and in this respect there is no difference between the obligation of the son or the widowed daughter-in-law.

Widowed daughter-in-law.—In introducing a widowed daughter-in-law as an heir to her father-in-law, the Legislature has no doubt taken a very bold line. Prior to the Act, on the death of her father-in-law his widowed daughter-in-law who during his life-time had only a moral right to be maintained out of his self-acquired property obtained a legal right to maintenance out of that property in the hands of his heirs. By obtaining under this Act the more concrete right to a share, her former right only to sue for maintenance must now be held to have been taken away. But this right to a share is only in respect of the separate property of the father-in-law left undisposed of by him. The question whether when that share is insufficient for her reasonable maintenance, she can proceed to claim the deficiency from the donees or legatees of the father-in-law to whom he has transferred the major portion of his separate property, though not altogether free from doubt, appears to receive a negative answer from a recent decision of the Madras High Court which has considered all the previous cases on the point, even though that decision was not one under the Act. It, however, appears reasonable to hold that the widowed daughter-in-law should not be allowed to claim any thing beyond her statutory share from any one who has taken her father-in-law's separate property either under the Act or under an instrument, testamentary or non-testamentary, whether that donee is himself or herself an heir under the Act or not. But this does not mean that the daughter-in-law's right to claim her reasonable maintenance out of the father-in-law's ancestral property, if any, is taken away.

Plurality of widowed daughters-in-law.—If there are more than one daughter-in-law who were the wives of the same son, then all of them together succeed to a son's share in the place of their husband. If one of them has a son, then in that share the son will get a half share and all the widowed daughters-in-law will together get the other half share. But in a case where the widowed daughters-in-law were the wives of different sons, then the daughters-in-law will succeed to the shares respectively of their husbands. Let us take the following illustration.



In this illustration X's widow Y will be entitled to 1/5th share, she being treated as a son. A's widow E and A's son F will together take the one-fifth share which would be allotted to A if he were alive, but as between E and F, each will take half of one-fifth or one-tenth. In the case of B's widow G, she is entitled to take 1/5th share in the place of her husband. C having died leaving two widows H and I, and a son J, J will be given half of one-fifth or one-tenth and H and I together will take 1/10th. In D's line, there is only D's son K who takes D's 1/5th share as his representative. In this illustration if F died, his 1/10th interest would survive to E making her interest 1/5th and would not survive to the other co-heirs. So also if H died her interest would survive only to her co-widow I and not to J or other co-heirs. But if G died, her 1/5th interest would survive to Y and the three lines of A, C and D making the respective representative or representatives of each branch take 1/4 instead of 1/5th of the entire interest of X.

Immorality and remarriage of daughter-in-law.—As in the case of the widow, so also in the case of the widowed daughter-in-law, her unchastity does not prevent her from succeeding to the father-in-law's property; nor does her unchastity operate to entail the forfeiture of the share which she has taken. But if at the time the succession opened to her father-in-law she had already remarried, then she is not entitled to succeed to him because by her remarriage she has ceased to be his daughter-in-law and hence cannot claim that relationship for purposes of claiming the succession. So also if subsequent to her succeeding to her father-in-law she contracts a remarriage, she forfeits the interest which she has taken, for, remarriage, unlike mere unchastity, takes her away from the family of her husband and brings into operation the general Hindu law rule of forfeiture on remarriage by the widow, and in this respect that the remarriage has been according to the custom of the caste would not make any difference even though the provisions as to forfeiture in the Hindu Widows Remarriage Act are not in terms applicable to an estate inherited by a widow from a person other than the husband. On such remarriage entailing a forfeiture of her estate, that estate would devolve on the heir of the father-in-law in her husband's line so long as there is a son's son or son's widow in that line and not on the heirs of the father-in-law in the other lines of his other sons, but if there is no one in the husband's line who would take under the Act, then that share would devolve on the other heirs of the father-in-law under the Act. The rules applicable to the devolution of the estate taken by the widowed daughter-in-law in case of her remarriage are the same as the

rules applicable to the devolution of that estate in case of her death.

Other incidents of the estate taken by the daughter-in-law.—The incidents noted in connection with the estate taken by the widow and discussed already are applicable *mutatis mutandis* to the estate taken by the widowed daughter-in-law.

Postponement of daughter and daughter's son.—Prior to the Act on the death of a Hindu without male issue and without leaving a widow, his daughter, and failing her or after her, her son would succeed to the estate. But now by reason of the introduction of new heirs between the widow and the daughter, namely, the daughter-in-law and the grand-daughter-in-law, the right of succession of the daughter and the daughter's son is postponed till after the death of the daughter-in-law and the grand-daughter-in-law. Thus so long as any of the heirs mentioned in the Act is alive the estate must go to him or her and till all such heirs die, the daughter's chance of succeeding to the property is postponed. This, however, does not mean that in every case where all the statutory heirs die after inheriting property under the Act the daughter can come in. It all depends upon whether the last of such heirs was a male or a female. If such heir was a male then he becomes a fresh stock of descent and the property will descend to his own heirs. Thus where several persons mentioned in the Act inherit a Hindu's separate property and subsequently all of them die one by one and the last survivor is the son or the grandson, then on his death his own heirs such as his daughter will succeed to that property and not the daughter of the father as whose separate property it was inherited by him under the Act. But if the last survivor of the statutory heirs who had taken the property happens to be the widowed daughter-in-law of the original owner, then on her death the property would be taken by that owner's daughter or in her absence her son as his heir under the ordinary Hindu law. If at that time there is an illegitimate son of the original owner, then that illegitimate son will take half the property and the daughter or daughter's son would take the other half. The following illustration would bring out this clearly. Supposing A dies leaving a widow B, a son C, a widowed daughter-in-law D and a daughter E. On A's death, B, C, and D would be entitled to succeed to A's property as his heirs under the Act and each of them would take an equal share, that is, one third of the whole property left by A. If subsequently B and D die, then the entire property would be taken by C in full ownership and as such on his death that property would be taken by his own heirs such as C's daughter or daughter's son, if any, and not by E.

If on the other hand C and D die leaving B as the last survivor or B and C die leaving D as the last survivor, then on the death of such last survivor who is a female the property would go to the heir of A, namely, his daughter E.

THE EFFECT OF THE ACT AS REGARDS THE COPARCENARY INTEREST OF DECEASED HINDU

Position of the coparcener's widow.—On the death of a Hindu as a member of a Mitakshara coparcenary, his widow takes his interest in the family property subject to the coparcenary incidents of the right of survivorship, right to claim partition and right to maintenance. If the husband has also left a son, then the interest to which the widow is entitled does not include the interest of that son but is confined only to the interest of the husband. This interest of the coparcener's widow is liable to fluctuation by births and deaths in the coparcenary. Thus if the husband was one of four brothers constituting a Hindu coparcenary and on his death without male issue his widow succeeds to his interest in the coparcenary property, any subsequent death among the surviving brothers would result in the augmentation of her interest as representing her husband's share. So also if the coparcenary consisted also of the father of the brothers, then any subsequent addition in the number of the sons to the father-in-law would correspondingly reduce her interest in the joint family property. But these fluctuations are possible only so long as she remains undivided with the other coparceners. If, however, a partition has taken place between her and them, either at her instance or at their instance, the possibility of this fluctuation is put an end to and her interest gets defined and fixed from that moment. Thereafter, any birth or death among the remaining coparceners would affect the quantum of the interest of the individual members remaining joint. If a coparcenary consists of a widow, her son and her husband's brothers, and the widow afterwards gets herself alone divided from her son and brothers-in-law, then any subsequent death of one of such brothers-in-law would result in augmenting her son's share, but not hers. So also if her son dies, then the persons entitled to be benefited are the brothers-in-law and not the mother. But if the widow herself dies after division from her son and the brothers-in-law the only person entitled to her share is the son and not the brothers-in-law.

Widow's liability for her huband's death.—The question of the widow's liability for the husband's debts in case he has died a member of a coparcenary is beset with doubts and difficulties but appears to depend for its determination on the circumstance

whether he died leaving sons or not and whether the debt is a simple debt or a mortgage debt. If the debt is a valid mortgage debt then his share is taken by his widow burdened with the debt and is therefore liable for its satisfaction. But if the debt is a simple debt, then the share which she has taken in the family property is freed from the obligation of paying that debt if the coparcenary as a member of which he died consists of only his collateral relations, for in that case the rule of survivorship in favour of such relations defeats the creditor's right unless his interest has been attached during his life-time in execution of a decree obtained in respect of that debt, and the fact that the personality of the husband is in a sense continued by the widow is no ground for holding that the husband's interest is still liable for his simple debt, inasmuch as to so hold would, instead of the Act operating in favour of the widow, which obviously is the intention of the Act, make it operate to her detriment. The chief idea underlying the scheme of the Act is that the right to maintenance which the widow of a coparcener had prior to the Act must be converted into a right in specific property as a share-holder and if ignoring the fundamental foundation of the enactment one is to hold that her share would be liable for the simple debts of the husband, it would very often deprive her of her means of maintenance. For instance if a husband were to die leaving a widow and a debt of Rs. 4,000 and his share in the family property is worth, say, Rs. 3,000, then prior to the Act she would normally be entitled to claim maintenance from the husband's coparceners out of the income of this share, because they had taken that share freed from his debts as a result of the operation of their right of survivorship. If on the other hand it were held that that share should still continue liable for the debts, then that share would be swallowed by the debts and nothing would be left from which the widow could get her maintenance. Having regard to the object and the scheme of the Act, this certainly cannot be said to be its proper interpretation. But if the husband has left also sons, son's son's or son's son's sons, then her share must be held liable for the simple debts in the same way as her sons' shares would be. The contrary construction would place the widow in a more advantageous position than that of the sons, for the sons would be liable for the debts under the pious obligation but the widow would not be liable, a result which it is difficult to hold is the intention of the legislature. It may, however, be asked, why should a widow be in a worse position when she has sons than when she has no sons ? The answer is, otherwise there would be anomalies, and it is one of the fundamental canons of construction to interpret a statute in such a way as to avoid anomalous results. The construction favoured in the discussion here does not

take away the rights of persons which they formerly possessed, and where possible secures to the widow the benefit intended by the Act. The position that in case the husband died a coparcener leaving a widow and no sons the husband's share in the widow's hands is not liable for the simple debts of the husband in respect of which no decrees had been obtained and no attachments effected during his life-time, while operating beneficially to the widow does not take away any right which the creditors formerly had, for, the creditors formerly had none as on the death of the coparcener his interest in the family property became freed from the obligation of paying those debts as a consequence of the existence of the right of survivorship of the other coparceners. So also the latter position of the liability of the widow's share for those debts in the presence of the sons, while not taking away any right of the widow which she formerly possessed, leads to a reasonable construction that the sons should not be placed in a worse position than the widow.

Alienation by widow.—The interest which the widow of a deceased coparcener takes in the share which she gets under the Act is the limited interest of a female heir under the Hindu Law, and she can therefore alienate her share only for necessity or benefit, the words necessity and benefit including spiritual purposes and considered in Chap. XIV. Even the fact that a simple creditor of her husband has lost his remedy as a result of the operation of survivorship in favour of the surviving coparceners of her husband would not preclude her from alienating her interest for the purpose of satisfying such a debt, for such act of hers is considered by the religious law of the Hindus as conceived in the interest of the departed soul of the husband and certainly does not stand on a worse footing than the barred debt of the husband which the law says a Hindu widow can discharge by an alienation of the husband's estate. Nor does the fact that she is not the manager of the joint family of which she is a member prevent her from making a valid alienation of her interest for the satisfaction of such a debt. In a case where the surviving coparceners of her husband include his own sons, then necessarily the number of the purposes which would justify her alienation would be less by reason of the existence of the sons who would be the more proper persons to meet the expenses and perform the acts in connection with those purposes, as, for instance, the Shradd of the father or the marriage of his daughter etc., and though even here the widow would be liable to rateably contribute to the sons from her own share, she cannot alienate her interest for a purpose which is more the concern of her sons. When she validly alienates her interest, the alienee is only entitled to her share as it stood on the date of the alienation and not to any augmentation

which her share would have received subsequently by reason of any death in the family, such addition to that share enuring only to the benefit of the widow and not to the alienee. When she alienates, the alienee is bound by the family debts incurred for the necessity of the family by the manager.

Widow's share affected by the incident of survivorship.—The husband's share which the widow takes in the coparcenary property is liable to fluctuations by births and deaths in the family and is not to be taken as fixed as on the death of the husband. If for instance her husband was one of the members of a Mitakshara coparcenary consisting of his brothers and his father ther the subsequent birth of sons to the father would reduce the quantum of her share and so also any death among the brothers of the husband would enlarge that share. But this liability to fluctuation in the quantum of her share is put an end to if she effects a partition of her share, and thereafter any birth or death among those remaining joint would operate to reduce or enlarge the interest of the individuals remaining joint and would not affect the share that has been separated from their interests. This would be so even if the coparceners from whom she has divided off happen to be his own sons or the collateral relations of her husband or both. For instance if a coparcenary consisted of three brothers A, B and C and A's son D and subsequently on A's death leaving a widow E, the coparcenary continued with B, C, D and E, and E thereafter separated from the rest, then any subsequent death among B, C and D would not enlarge the one-sixth share which E had already taken away but would enure to the benefit of the persons who continued to remain joint. In such a case even if E's own son D died his interest would go to augment the interest of B and C and not the share of E. But if after separation of E, E dies then the share which she has taken would go to her son D and not to the others. The fact that at the time of her death she has a daughter or daughter's son would not prevent her son from getting the benefit of her death. But if in the above illustration the son D who had remained undivided had pre-deceased E unmarried, or married without leaving a widow or male issue, and if subsequently the widowed mother of D, namely E, gets herself divided from B and C, then on her death, A's heir whether it be his daughter or daughter's son, would succeed to the property in preference to the son's heir if any, as for instance, the son's daughter or daughter's son.

Apostacy of the widow.—Under the strict Hindu law the apostacy of the widow would operate as a forfeiture of her right to succeed to the property of another Hindu, because by her conversion from Hinduism she has ceased to be a Hindu so as to render that

law inapplicable to her. But this rule of Hindu law was abrogated by the Caste Disabilities Removal Act and is no longer in force. But that Act, while it removed a disability, did not confer any new right to the apostate. The question then is whether this Act which confers new rights can be so construed as to permit a widow who has become an apostate to Hinduism to claim such rights. The answer would appear to be in the negative. The Act applies to Hindu women, or to be more accurate, to Hindu widows. If at the time the succession opens she has embraced some other faith, it is impossible to say she is a Hindu for the purpose of the applicability of the Act. To hold that conversion of a widow from Hinduism would not operate as a bar to her succession under the Act would lead to the position of daughters-in-law and granddaughters-in-law, who prior to the opening of the succession had become converts to Christianity or Mahomedanism, claiming successfully to succeed to the property of a Hindu, a position which is sure to be abhorrent to all social and religious sentiments of the Hindus which no reasonable man would attempt to bring about. Therefore the proper construction of the Act would be that an apostate widow or daughter-in-law would not be entitled to claim the benefit of this Act since she is not a Hindu woman to whom alone the Act is applicable. But if at the time of the opening of the succession she has reverted to Hinduism from the religion to which she had previously gone over and such reconversion has been in conformity with the notions of the community to which she belongs and is sanctified by such religious ceremonies as have been prescribed by that community, it would appear that there is nothing to prevent the reconverted widow from claiming the benefit of the Act as a Hindu widow within the meaning of the Act.

EPITOME

SOURCES AND OPERATION OF HINDU LAW

Sources of Hindu Law. Hindu Law was not promulgated by any Sovereign but is based essentially on immemorial custom. It is a body of principles or rules recognised and allowed by the Sovereign to govern the subjects, and inasmuch as what a Sovereign can altar, but is not altered by him, can be taken to have been commanded by him, Hindu Law which has been allowed by the rulers of the past to govern the subjects may, in a qualified sense, be taken to have been promulgated by the Sovereign within the Austin's definition of law. The Hindu Law as administered to-day can be traced to one or other of the following sources:

(1) The *Sruti* meaning what was heard by the sages. This includes the four Vedas and is practically of no legal value. The four Vedas are the Rik, Yajur, Sama and Atharvan. Each of these consists of two parts, known as *Samhita* and *Brahmana*, the *Samhita* being a collection of *Mantras* or hymns in praise of the Almighty, and the *Brahmana* being the theological expositions of the Mantras. The intricacy and complexity of the Brahmanas necessitated their condensation and the *Sutras* came into existence by which the Vedic lore was analysed and digested under proper headings in the form of aphoristic rules known as *Smrities*. The Sutras fall into three classes known as *Srauta Sutras* dealing with the ritual, *Grihya Sutras* dealing with domestic ceremonies, and *Dharma Sutras* dealing with law. Of these the last alone are useful as a source of law.

(2) *The Smriti* meaning what was remembered. The Smrities constitute the principal source of Hindu Law The Smrities are divided into Primary Smrities and Secondary Smrities, the latter being later in date than the former. The primary Smrities, are again classified into Sutras and Dharmasastras. Gautama, Baudhayana, Apastamba, Vasishta and Vishnu are the chief Sutra writers, while Manu, Yagnyavalkya, Narada and Parasara are the most noteworthy of the writers of the Dharmasastras. Parasara Smriti is supposed to be specially applicable to the present age of *Kaliyuga*.

(3) *Commentaries.* The most important of the commentaries are: —

(a) *The Mitakshara* by Vignaneswara. This is the most important commentary on Yagnyavalkya Smriti and

is the prevailing authority in Southern India, the Mahratta country, the Northern Canara and Ratnagiri.

(b) *The Dayabhaya* by Jimutavahana. This is the paramount authority in Bengal.

(c) *Mayukha* by Nilakanta which is the chief authority in the Island of Bombay, Northern Konkan and Guzerat.

In addition to the above there are many other treatises. Two chief treatises on adoption are the *Dattaka Chandrika* written by Kubera and *Dattaka Mimamsa* written by Nandapandita. These are respected throughout India, and in the case of conflict between them, the former is preferred in Bengal and South India while the latter is preferred in Benares and Mithila.

(4) *Legislation.* A portion of the Hindu Law as administered nowadays is to be found in the several enactments passed by the legislatures of our country, *e.g.*, Caste Disabilities Removal Act of 1850, Hindu Widow's Remarriage Act of 1856, Native Converts Marriage Dissolution Act of 1866, Majority Act of 1875, Hindu Disposition of Property Act of 1916, Hindu Inheritance (Removal of Disabilities) Act of 1928, Hindu Law of Inheritance (Amendment) Act of 1929, Child Marriage Restraint Act of 1929, Hindu Gains of Learning Act of 1930, Hindu Women's Rights to Property Act of 1937 etc.

(5) *Judicial decisions.* The Hindu Law as found in the original Sanskrit texts has been in several respects modified or added to by the judges administering it by the application of the principles of equity and good conscience. Instances of such modification are to be found in the recognition in some of the provinces of the coparcener's power to alienate his interest in the joint family property, the limiting of the pious duty of the son to pay his father's debts to the actual ancestral assets in his hands and the restricted definition given to "stridhana."

(6) *Custom.* Under Hindu Law clear proof of usage or custom will outweigh the written text of the law.[a] A custom to be recognised must be ancient, certain, continuous and invariable, and being in derogation of the general rules of law must be strictly proved.[b] A custom which is either immoral or opposed to public policy or is forbidden by statute is not valid. Custom is of three kinds: (i) local custom, (ii) class custom and (iii) family custom. But a family custom unlike that of the locality or class can be discontinued by the concurrent will of the members of the family.

(a) *Collector of Madura* v. *Mootto Ramalinga*, 12 M.I.A. 397.

(b) *Abdul Hussein* v. *Bibi Sona*, 45 I.A. 10=45 C. 450.

Schools of Law.—Strictly speaking there are only two Schools of Hindu Law, the Mitakshara and the Dayabhaga, the others like the Dravida, the Mithila, the Benares and the Maharashtra Schools being really the sub-Schools of the Mitakshara differing from one another only in minor matters. The remote sources of law are common to all the Schools, but the subsequent commentators put their own gloss upon the ancient texts with the result that several Schools with conflicting doctrines came into existence owing to some of the Provinces accepting the commentary of a particular writer while others rejecting it and adopting the explanation of another commentator. Thus, though both the Mitakshara and the Dayabhaga equally admit the authority of Yagnyavalkya, they differ fundamentally even on principal matters. In like manner there are sub-Schools of the Mitakshara owing to differing glosses and commentaries placed thereon by subsequent writers in the several Provinces acknowledging the Mitakshara as their authority.

Difference between the Mitakshara and Dayabhaga Schools.

The Mitakshara.	*The Dayabhaga.*
(1) A son gets a right by birth in the ancestral property.	(1) No such right.
(2) A son can demand partition against his father.	(2) No such right.
(3) A son can restrain unauthorised alienations by father.	(3) No such right.
(4) No absolute right of alienation in a brother of his share.	(4) Such right exists.
(5) A joint brother's share survives, on his death without male issue, to his other brothers.	(5) No survivorship.
(6) A widow of a deceased coparcener cannot enforce partition.(c)	(6) She can.
(7) Propinquity is the chief test of heirship.	(7) Religious efficacy is the test.

Interpretation of texts.—The ancient books mingle religious and moral considerations with rules intended for positive laws and great caution is necessary in interpreting them. The *Mimamsa* of Jaimini

(c) She is now given that right under the Hindu Women's Rights to Property Act, 1937.

embodies some valuable rules of interpretation and one such rule was alleged to have the effect that a text supported by the assigning of a reason is to be deemed not as mandatory, but only as recommendatory. But there is no such rule in the *Mimamsa* and the rule which was alleged to have the above effect had been misinterpreted by Mr. Mandlik, and the alleged rule was characterised by their Lordships of the Privy Council as startling in *Balusu's case*[d] when they had to interpret Vasishta's text "Let no man give or receive an only son, since he must remain to raise up a progeny for the obsequies of ancestors." Besides, such an interpretation is unwarranted, as, in the case of texts which are held inspired, both the reason and the rule must have equal authority. It is impossible to imagine how an imperative order becomes merely a persuasive advice simply because a reason has been appended to the order.

There is a good deal of conflict and inconsistency in the Srutis and Smritis and between one Sruti or Smriti and another. Yagnyavalkya resolves this conflict by attributing to the Sruti an authority superior to the Smriti and by assuming different cases or customs for the application of the conflicting precepts. In the event of a conflict between the ancient texts and the commentaries the Privy Council has recently held that it is the opinion of the commentators that must be preferred.[e]

Factum Valet.—The doctrine of Quod Fieri Non Debuit Factum Valet, which means that a thing when done is valid, though it ought not to have been done, has been applied by the British Indian Courts in the administration of Hindu Law on grounds of justice, equity and good conscience. The applicability of this doctrine is confined only to the violation of moral precepts and cannot be availed of to cure the violation of a mandatory text of the Hindu Law, such as the text against the adoption of an orphan. The precept against the adoption of an only son or the eldest son has been held to be only a moral precept so as to render the adoption valid by the application of the doctrine of *factum valet*.

Operation of Hindu Law.—The term Hindu can safely be applied to all those who claim and are regarded as Hindus by the society surrounding them. Hinduism is a mass of fluctuating beliefs and opinions and holds within its ambit men of divergent views and traditions who have nothing in common except a vague faith in what may be called some of the fundamentals of the Hindu religion. Hindu Law applies not only to those persons who were born in the Hindu religion and continue to remain within its fold, but even to persons who have become converts to Hinduism from other

(d) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 =26 I.A. 113 (P.C.).

(e) *Atmaram* v. *Bajirao*, 62 I.A. 139.

religions(f). It applies to all Hindus whether of Aryan or non-Aryan stock, whether orthodox or heterodox(g), whether conformists such as the orthodox Brahmins or dissenters such as the Jains, the Sikhs, the Brahmos, the Lingayats and the Arya Samajists, whether legitimate or illegitimate by birth, provided in the case of a person illegitimate by birth either both the parents are Hindus, or at least the mother is a Hindu and the child brought up as a Hindu(h). But a person who is a Hindu by birth cannot, after his conversion to some other religion, claim to be governed by Hindu Law unless he has become reconverted to Hinduism, and the decision in *Abraham* v. *Abraham*(i) that a Hindu in spite of his conversion to Christianity can still choose to be governed by Hindu Law is of no authority after the passing of the Succession Act of 1865.(j) But in the case of some of the Hindu converts to Mahomedanism, such as the Khojas, the Suni Boras, Molesalem Girasias, Cutchi Memons, Nassapoori Memons and Halai Memons, the rule of Hindu Law excluding females from succession, though not in accordance with the precepts of the Koran, has been engrafted as a custom on the Mahomedan law.(k)

Effect of conversion from Hinduism.—A Hindu by becoming a convert to Mahomedanism or Christianity is bound by the law of the new religion which he has embraced, namely, the Mahomedan law or the Succession Act, as the case may be, and cannot claim to conform to the Hindu Laws and usages. If at the time of conversion he is a member of a Hindu joint family, he becomes at once severed as an outcaste from the family and the tie which bound him to the family becomes dissolved with the result that the obligations consequent upon and connected with that tie also become dissolved with it.(l) The forfeiture of civil rights imposed by the ancient texts upon a convert from Hinduism was done away with by the Caste Disabilities Removal Act of 1850 which saved such rights with the result that, on conversion, a member of a Hindu joint family walks out of the family as a divided member taking his share in the family property. But this Act does not enable a convert to free himself from the obligations imposed upon him by the Hindu Law prior to his conversion(j) Thus conversion does not put an end to his liability to maintain his aged parents or infant children. Nor does the

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(f) *Kamawati* v. *Digbijai Singh*, 48 I.A. 381=43 A. 525; *Sahadeo* v. *Kusum Kumari*, 50 I.A. 58; *Morarji* v. *Administrator-General*, 52 M. 160.

(g) *Bhagwan* v. *Bose*, 30 I.A. 249=31 C. 11.

(h) *Myna Boyee* v. *Cotaram*, 8 M.I.A. 400; *In the matter of Ram Kumari*, 18 C. 264.

(i) *Abraham* v. *Abraham*, 9 M.I.A. 195.

(j) *In re Ram Kumari*, 18 C. 264.

(k) But now after the Cutch Memons Act of 1938, Cutchi Memons are governed by Mahomedan Law even as regards succession.

above Act enlarge the convert's interest in any property or get rid of any condition or restriction to which it was originally subject, *e.g.*, a member of a Malabar tarwad was held not entitled to claim partition of the tarwad property on the ground of conversion, because under the Malabar law no member of the tarwad is entitled to a separate share of the tarwad property[l]. Besides, the Act operates only to benefit the apostate and not his descendants in the new faith or his relations in the old[m]. In the case of a husband's conversion from Hinduism he can get his marriage dissolved under the Native Converts Marriage Dissolution Act of 1866 and thus terminate his obligation to maintain his Hindu wife under an order of Court.

Migrating families.—Every Hindu is governed by the law of his personal status and carries that law with him wherever he goes[n]. The law of the Province wherein he resides *prima facie* governs him, but if it is shown that he came from another Province, the presumption is that he is still governed by the law which obtained in his original Province at the time of his migration[o]. But where a family migrates to another country and is shown to have so acted as to cut itself off from its old environment, a presumption that it has adopted the law of the people among whom it has newly settled is more readily drawn[p].

MARRIAGE AND SONSHIP

Nature of marriage.—Marriage is an essential sacrament with the Hindus, regarded as a holy union between a man and a woman for begetting a son necessary for spiritual salvation and for performance of religious rites. It is not a civil contract and neither minority nor any disability, physical or mental (barring perhaps total lunacy) of either the bride or the bridegroom operates as a bar to a valid marriage. There is no objection to having any number of wives, but polyandry is prohibited by Hindu Law.

Capacity to give in marriage.—According to the Mitakshara, the order of persons authorised to dispose of a girl in marriage is: (i) the father, (ii) the paternal uncle, (iii) the brother, (iv) other paternal relations of the girl in the order of kinship and (v) the mother; according to the Dayabhaga, the maternal grandfather and the maternal uncle come before the mother. This order of guardianship for the purpose of the marriage of a girl is only directory and not mandatory and does not affect the legal rights vested in the

(l) *Paru* v. *Raman*, 44 M. 891 (F.B.); but now after the Madras Marumakkattayam Act, a partition of the tarwad property can be enforced.

(m) *Mitar Sen* v. *Maqbul*, 57 I.A. 313.

(n) *Parbati* v. *Jagadis*, 29 I.A. 82=29 C. 433.

(o) *Balwant Rao* v. *Baji Rao*, 48 C. 30 (P.C.).

(p) *Abdur Rahim* v. *Halimabai*, 43 I. A. 35.

mother as the girl's legal guardian to select a husband for her and give her in marriage to him even in the presence and without the concurrence of the preferential guardians mentioned in the above order. Hence a marriage will not be invalidated merely because the girl has been given away by the mother without the consent of the father.(q) The doctrine of *factum valet* applies in such a case to cure the want of consent of the preferential guardian. But so long as the marriage has not been performed and the matter is still in the stage of negotiation and contract, a preferential guardian is entitled to sue to restrain by an injunction the attempt on the part of an unauthorised person to give the girl away in marriage. The Court has jurisdiction to interfere to prevent a marriage taking place, even when it is contemplated by the proper guardian, if the marriage is shown to be prejudicial to the girl's interests. If the marriage has been brought about by force or fraud, there is jurisdiction in the court to declare it void even though it has been performed with sastric ceremonies, as there has been really a fraud on the policy of religious ceremony.(r)

Forms of marriage.—Originally eight forms of marriages were recognised by the ancients, namely, the Brahma, the Daiva, the Arsha, the Prajapatya, the Asura, the Gandharva, the Rakshasa and the Pisacha, and of these the first four were the approved forms and the last four unapproved. But the forms of marriage other than the Brahma and the Asura need not here be considered, as they have become obsolete.

The Brahma and the Asura forms of Marriage.—The Brahma and the Asura, which are respectively the most respectable of the approved and the least objectionable of the unapproved forms of marriage are the only forms now recognised among all classes. The presumption ordinarily is that a Hindu marriage is in the Brahma form. "The gift of a daughter, clothed only with a single robe, to a man learned in the Veda, whom her father voluntarily invites and respectfully receives, is the nuptial called Brahma." "When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that marriage is named Asura." Though the Brahma form, from the description given above of the bridegroom as one learned in the Vedas, is strictly speaking inapplicable except in the case of Brahmins, it is now practised by all castes, including the Sudra. The chief difference between this form and the Asura is that in the former the parents of the bride do not receive any consideration for giving the girl in marriage, while the receipt

(q) *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316.

(r) *Ankamma* v. *Bamenappa*, (1927), 1 M.L.J. 192; *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316.

of pecuniary benefit by the bride's parents is the striking feature of the latter. Even the defraying by the bridegroom of the expenses of the marriage which the girl's father is in law bound to meet will make the marriage one in the Asura form.[s] But the mere fact that the bridegroom gives the bride or her mother a present as a token of compliment or defrays the expenses of the marriage voluntarily in accordance with the caste custom and not in pursuance of a contract with the bride's father[t] does not render the marriage one in the Asura form.

Marriage ceremonies.—The ritual of every Hindu marriage consists of three stages: (i) the betrothal, (ii) the recitation of holy texts before the Sacred Fire and (iii) the *Saptapati*.. Of these it is the *Saptapati* or the taking of the *Seven Steps* by the bridal pair in the marriage ceremony that makes the marriage complete and irrevocable, the earlier two stages being merely those of preparation when the parties can resile from the transaction. Consummation is not necessary for a valid marriage and even the above ritual need not be gone through in the case of those communities amongst whom some other form equally effective to complete a marriage prevails by force of custom.

Capacity to marry.—Though neither minority[u] nor any of the physical defects barring lunacy[v] operates as a disqualification for contracting a valid marriage, Hindu Law prescribes certain rules which should be observed for recognising a marriage as valid. The rules are: (i) that the bride and the bridegroom should belong to the same caste, (ii) they should not belong to the same *gotra* or *pravara* and (iii) they must not be within the prohibited degrees of relationship.

(i) *Inter-caste marriages.*—Hindus are divided into four castes, (i) Brahma or priestly caste, (ii) Kshatria or warrior caste, (iii) Vaisya or commercial caste or (iv) Sudra or serving caste. The first rule is that the parties to a marriage must not belong to different castes. This rule does not invalidate a marriage between persons belonging to different sub-divisions of the same caste[w]. Even in the case of marriages between persons belonging to different main castes, all such marriages are not invalid. Such marriages are of two kinds, (i) *Anuloma* and (ii) *Pratiloma*. An *anuloma* marriage is one between a man of a higher caste and a woman of a lower caste, while a *pratiloma* marriage is that between a woman

(s) *Rathnathanni* v. *Somasundara*, 41 M.L.J. 76; *Samu Asari* v. *Anachi Ammal*, 49 M.L.J. 553.

(t) *Sivanagalingam* v. *Ambalavana*, 47 L.W. 300.

(u) The Child Marriage Restraint Act which penalises marriages of boys below 18 years of age and girls below 14 years of age does not make the marriage invalid.

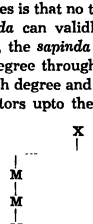
(v) *Mouji Lal* v. *Chandrabati*, 38 C. 700.

(w) *Inderum* v. *Ramaswamy*, 13 M. I.A. 141; *Gopi Krishna* v. *Mt. Jaggo*, 58 A. 397 (P.C.).

of a higher caste and a man of a lower caste. *Pratiloma* marriages are absolutely void, but *anuloma* marriages, though rare and not quite approved, are not invalid.(x) A convert to Hinduism from another religion should be considered as a Sudra for purposes of ascertaining his or her caste(y). An illegitimate person is not prevented from concluding a valid marriage in the caste to which he or she is considered as belonging by the members of that caste.(z)

(ii) *Gotra and Pravara.*—Every twice born or person belonging to the first three castes owns a *Rishi* or *Sage* as the founder of his family or *gotra*. *Gotrajas* are persons who claim to be descended in the male line from one of the ancient sages after whose name the *gotra* is named, and who is either a descendant of or himself one of the eight accredited progenitors of the human race, namely, Agastya, Atri, Baradwaja, Gautama, Jamadagni, Kashyapa, Vasishta and Viswamitra. The three lineal male ancestors of the founders of the *gotra* are referred to as *pravara*. The rule is that persons of the same *gotra* or *pravara* cannot contract a valid marriage between them and such a marriage is wholly void(a).

(iii) *Prohibited degrees.*—The rule relating to prohibited degrees is that no two persons one of whom is related to the other as *sapinda* can validly marry each other. According to the Mitakshara, the *sapinda* relationship comprises all descendants up to the 7th degree through male or female links of paternal ancestors upto the 7th degree and such descendants upto the 5th degree of maternal ancestors upto the 5th degree.



In this diagram **X** represents the common ancestor, G the girl and B the boy. M stands for a male ancestor and F for a female ancestor. In computing the degrees, the person concerned and the common ancestor should each be counted as one degree. The girl being related to the boy through his mother, she is not the *sapinda* of the boy since she is descended from a common ancestor who is beyond the 5th degree counting from B as degree one. But being related to G through her father, he is related to G as *sapinda*, because he is one of the descendants within the 7th degree of the common ancestor **X** who is also within the 7th degree from the girl G. In this connection it may be interesting to consider the doctrine of *frog's leap* under which the *sapinda* relationship springs into existence between two persons between whose parents that relationship does not exist. This anomaly which prohibits a valid marriage

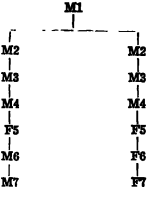
(x) *Morarji* v. *Administrator-General*, 52 M. 160.

(y) *Ibid—Muthusa...* v. ..... -s. ... M. 362.

(z) *In the matter of Ram Kumari*, 18 C. 264; *Emperor* v. *Madan Gopal*, 34 A. 589; *Rai Gulab* v. *Jivanlal*, 46 B. 871.

(a) *Ramachandra* v. *Gopal*, 32 B. 619.

between two persons whose parents, though more closely related to each other, could have validly married can be best illustrated by the following diagram.



It will be seen in this diagram that M6 (male) and F6 (female) could have contracted a valid marriage between themselves because both of them being related to each other through their mothers, neither of them is the Sapinda of the other applying the relevant five degrees rule. But M7 and F7 cannot marry each other because, even though M7 is not the *sapinda* of F7, F7 is really the *sapinda* of M7 and hence cannot be married to him.

Under the Dayabhaga, the rules for ascertaining the *sapinda* relationship are more cumbrous, though they substantially agree with the rules of computation according to the Mitakshara. The Dayabhaga, however, validates a marriage between persons, though within the prohibited degrees, if the girl is removed by three *gotras* from the boy.

Operation of the Prohibitory rules.—Persons who want to marry each other, though belonging to different castes, can now effect a valid marriage, whether *anuloma* or *pratiloma*, under the Special Marriage (Amendment) Act of 1923, though such a marriage affects materially the position and rights of the husband under the Hindu Law. The prohibitory rule regarding *pravara* and *gotra* does not apply to the Sudras, as they have no *gotra* or *pravara*. But the rule relating to *sapinda* relationship applies to all castes. When a marriage has been effected in violation of these rules, the girl does not obtain the status of a wife, nor can she re-marry. But she is entitled to be maintained by the person who was the author of her unfortunate position, namely, her supposed husband.[b]

Legal effect of marriage.—Once a marriage becomes complete, it becomes indissoluble. The husband becomes the guardian and protector of his wife and is entitled to the enjoyment of her person and society. He is entitled to succeed to her property if she predeceases him without issue, and can utilise her Stridhana property to relieve himself in circumstances of extreme distress. As regards the wife, she is entitled to be maintained by her husband and given the conjugal privileges which every woman expects from her husband. Either spouse can bring a suit for the restitu-

(b) *Ramachandra* v. *Gopal*, 32 B. 619.

tion of conjugal rights, but such a suit by the husband can be resisted by the wife by proof (1) of habitual cruelty, (2) of loathsome disease to the husband, (3) husband's conversion to another religion or (4) outrage to her feelings by the husband keeping a concubine in the same house. But defences such as the minority of the wife, or the infidelity or the second marriage of the husband will not avail the wife to resist the husband's suit for restitution of conjugal rights.

Breach of marriage contract.—A contract to marry cannot be specifically enforced, nor will any of the parties be restrained by an injunction from marrying another.[c] But when the contract is broken, damages are awardable against the guardian to the party aggrieved by the breach and a plea that the boy or girl refuses to marry is no defence to the action.[d] When the contract has been broken on justifiable grounds, as, for instance, discovery of the chronic ill-health of the boy, only the actual expenses incurred during the betrothal are recoverable.

Marriage expenses.—Under the Mitakshara the marriage expenses of the male members of a joint family and of their daughters are borne by the family property so long as the family is joint. Even when a son institutes a suit for partition against his father and brothers, his share in the family property cannot escape the liability of share in the expenses of the marriage of his sister who was married after the institution of the suit and of those sisters who are still to be married. In such a case the share of the plaintiff's brother or father will not be liable for the expenses of the future marriage of the plaintiff's daughter. Again, the rule that provision should be made on partition for the expenses of future marriages in the family does not apply in the case of unmarried male members of the family.[e]

Divorce.—Except when sanctioned by custom[f] or under the Native Converts Marriage Dissolution Act of 1866 when one of the spouses becomes a convert to Christianity, no divorce is valid as between Hindus. Even when sanctioned by custom, the custom will not be recognised if it allows the wife to desert her husband and marry another at her pleasure and without the consent of her first husband.[g]

Marriage of widows.—A Hindu widow who formerly could not, except when sanctioned by custom, contract a second marriage,

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(c) In re *Ganput*, 1 C. 74.

(d) *Purushottam* v. *Purushottam*, 21B. 23.

(e) *Subbayya* v. *Ananta*, 53 M. 94 (F.B.); *Ramalinga* v. *Narayana*, 45 M. 489 (P.C.).

(f) *Sankaralingam* v. *Subban*, 17 M. 479.

(g) *Narayan* v. *Laxing*, 2 B. 140.

can now lawfully marry under the Hindu Widows Re-marriage Act of 1856, but she forfeits on such marriage any right or interest which she may have in her first husband's property.

Customary and statutory forms of marriage.—In addition to the forms of marriage known to the Sastras, there are certain customary marriages in vogue, such as Phoolbibaha, Dang Marriage, Santigrahita Marriage, Sarvaswadhanam Marriage and Sword Marriage. *The Statutory Marriages* are those under the Anand Marriage Act of 1909, Malabar Marriage Act of 1896, Hindu Widows Re-marriage Act of 1856 and the Special Marriage Amendment Act of 1923.

Kinds of sons.—In ancient days when society was very much unsettled and the relationship between men and women was very loose, all kinds of sons, some of whom were not the sons of the father and others not even born to his wife, were recognised for the protection of his own house and land of which, in the absence of men superior in strength and number, he was often threatened with deprivation by his neighbours. But with the settlement of the society to peace and order, all the sons excepting the aurasa, the adopted, and the concubine's sons have become obsolete.

Position of an illegitimate son.—In the first three castes an illegitimate son is only entitled to maintenance and cannot inherit to his putative father. But amongst Sudras, if the illegitimate son is born to a permanently and exclusively kept concubine and is not the offspring of an incestuous or an adulterous intercourse with a married woman, he gets a heritable capacity in respect of the estate of his Sudra putative father if the latter dies divided from his brothers or leaving separate property. But if the connection, though adulterous at the beginning, ceased to be such at the time the illegitimate son was conceived, his heritable capacity is not affected. This heritable capacity is confined to the estate of his putative father and does not enable the illegitimate son to succeed to the father's ancestors or descendants or collaterals.(h) Nor is he entitled to claim his father's share when the father dies undivided from his own brothers or other collaterals.(i) The illegitimate son's right to succeed to his putative father is one transmissible to his male issue and hence in a competition between a divided brother of the father and a son of an illegitimate son, the latter will exclude the former.(j)

(h) *Ayiswaryanandaji* v. *Sivaji*, 49 M. 116. M. 1 (P.C.).

(i) *Vellaiyappa Chetty* v. *Natarajan*, 55.

(j) *Ramalinga* v. *Pavadai*, 25 M. 519.

Extent of his heritable right.—An illegitimate son does not get any interest in the father's property so long as the father is alive. But on the death of the father divided from his collaterals and leaving neither an aurasa or adopted son, nor a widow, nor a daughter or daughter's son, the illegitimate son is entitled to succeed to the whole estate of the putative father. But if any of these exists, he would be entitled to get ½ of what he would have taken had he been legitimate.(k) Where a Sudra father dies leaving legitimate and illegitimate sons and they continue undivided, then on the death of the legitimate son without male issue, the illegitimate son would take the whole property by survivorship, even excluding the legitimate son's daughter or widow.(l) An illegitimate son is also entitled to inherit to his mother in respect of her Stridhana property if she has no legitimate issue.

Succession to illegitimate son.—A putative father can succeed to his illegitimate son among the Sudras, but a legitimate son cannot inherit to the illegitimate son.(m) So also the mother or sister of an illegitimate son can succeed to him.(n)

ADOPTION

What is adoption.—Adoption is the formal affiliation as a son of a person, of one who is in fact not his son, and is resorted to to satisfy the desire of a sonless Hindu to perpetuate his family name and to be saved from the superstitious torments of the next world by leaving a child in this.(o)

Who can adopt.—Every sonless Hindu ('sonless,' meaning without a son, grandson or great-grandson, aurasa or adopted), be he a bachelor, a married man or a widower, can make a valid adoption to himself, provided that at the time of adoption he has arrived at the age of discretion and can understand the nature and effect of his act. But the mere physical existence of a son, grandson or great-grandson, is not sufficient to preclude the father from making a valid adoption if the son is incapacitated from offering spiritual benefit either by asceticism, apostacy, illegitimacy or any physical or mental defect such as virulent leprosy or insanity.(p) Neither pollution nor degradation of the adopter, nor the want of consent or pregnancy of his wife operates as a bar to his making a valid adoption.

(k) *Kamulammal* v. *Viswanathaswami*, 46 M. 167 (P.C.).

(l) *Jogendra* v. *Nityanand*, 18 C. 151 (P.C.).

(m) *Zipru* v. *Bomiya*, 46 B. 424.

(n) *Dattatraya* v. *Matha Bala*, 58 B. 119.

(o) *Amarendra* v. *Sanatan*, 12 Pat. 642.

(p) *Nagamma* v. *Sankarappa*, 54 M. 576; contra in *Bharmappa* v. *Ujjanpouda*, 46 B. 455.

Adoption by woman.—Except where the Kritrima form of adoption is allowed and in the case of Dancing Girls, a woman cannot make an adoption to herself. But a wife can make an adoption to her husband with his consent. If the woman happens to be a widow, (1) she cannot in Mithila adopt even with her husband's consent, (2) in Bengal and Benares she can adopt only if her husband had assented, (3) in Western India she can adopt even without her husband's consent provided he had not prohibited it, and (4) in Southern India she can make an adoption either with her husband's consent or with the assent of his sapindas. In none of the Provinces can a widow adopt if her husband had prohibited it either expressly or by necessary implication(q) or if she has not attained years of discretion.(r)

Authority to the widow to adopt.—The husband's authority empowering the wife to make an adoption to him need not be given in any particular form and may be oral or written, but it must have been given at a time when the husband has attained years of discretion and is not mentally disqualified. The authority may be to make any number of successive adoptions, provided each time an adoption is made, the previously adopted son is dead, and may be either absolute or conditional. It must be strictly construed(s) and if strict compliance with its terms is either impossible or will render the adoption invalid, the authority cannot be acted on. Thus an authority to two widows to make two simultaneous adoptions which would be invalid in law,(t) or an authority to adopt with the consent of the husband's father who is dead at the time the adoption is sought to be made is ineffective to validate an adoption.(u) But the authority must be construed so as to advance the purpose the husband had in view in giving the authority so that any authority for adopting a particular boy should not be construed as a prohibition against the adoption of any other boy unless such prohibition is expressly made and clearly intended by the husband.(v) But a widow cannot be compelled to act upon the authority unless she chooses to do so(w) and when she does so choose, the fact that a long time has elapsed since the authority was conferred is by itself no ground for invalidating the adoption.(x) But this absolute discretion of the widow in the matter of acting or not upon the authority is

(q) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397.

(r) *Sattiraju* v. *Venkataswami*, 40 M. 925.

(s) *Sitabai* v. *Bapu*, 47 C. 1012 (P.C.).

(t) *Surendra Keshav* v. *Doorgasundari Dassee*, 19 C. 513 (P.C.).

(u) *Rajendra* v. *Gopal*, 10 Pat. 187.

(v) *Yadao* v. *Namdeo*, 49 C. 1 (P.C.); *Veeraperumal*, v. *Narain Pillai*, 1 N. C. 91; *Mutaddilal* v. *Kundan Lal*, 28 A. 377 (P.C.).

(w) *Mutaaddi Lal* v. *Kundan Lal*, 28 A. 377 (P.C.).

(x) *Pratap Singh* v. *Agarshingh*, 43 B. 776 (P.C.).

personal to her and cannot be delegated to another.[y] Nor can an authority be given to the widow to be exercised in conjunction with another person.[z] But an authority which merely directs the widow to adopt after consulting or with the consent of another person cannot be said to be invalid.[a]

Authority in the case of co-widows.—Where a man has two or more wives he can authorise one or all of them to adopt to him. When the power is given to only one of them, she alone can adopt, but if it is severally given to all the widows, then the senior-most of them gets the preferential right to make the adoption unless she dies or refuses to adopt or leads an immoral life which disqualifies her from making an adoption.[b] When a joint power is given to two or more widows, they should all act conjointly in the matter of adoption,[c] and if one of them dies, the others cannot act.[d]

Adoption by widow in the Bombay Presidency.—Under the Bombay School of Hindu Law, a widow has in herself power to adopt to her husband subject only to such restrictions if any as may have been imposed upon her by her husband. Thus so long as her husband has not prohibited an adoption she may adopt in her own independent right and without the consent of his kinsmen, whether the husband died a joint or a separated member of a Hindu family.[e] Even an adoption made by a widow succeeding to the last male holder's estate, not as his widow, but as his *gotraja Sapinda*, is valid.[f]

Adoption with the consent of sapindas.—In Southern India the want of the husband's consent for the widow making the adoption can be supplied by the consent of the nearest sapindas.[g] If the father of the husband is alive, then his consent alone would be sufficient to validate an adoption. But if he be dead, there should be such evidence of the assent of her husband's nearest kinsmen as suffices to show that the adoption is made by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive.[g] In the case of more than one nearest heir left by her husband, she must get the consent of all or a substantial majority of them for making a valid

(y) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169.
(z) *Amrito Lal* v. *Surnomoyee*, 27 C. 996 (P.C.).
(a) *Rajendra* v. *Gopal*, 10 Pat. 157; *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441.
(b) *Rakhmabai* v. *Radhabai*, 5 B.H.C. R. 181; *Ranjit* v. *Bijoy*, 39 C. 582.
(c) *Tiruvengalam* v. *Butchayya*, 52 M. 199.
(d) *Narasimha* v. *Parthasarathy*, 37 M. 199.
(e) *Bhimabai* v. *Gurunath Gouda*, 57 B. 157 (P.C.).
(f) *Radhabai Damodar* v. *Rajaram*, I. L.R. 2938 B. 679.
(g) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M I.A. 397.

adoption.[h] It is the duty of the widow to ask for the consent of every one of the nearest sapindas even when she knows that the consent of some of them will be refused,[i] but it is not necessary that she should consult a sapinda who has separated from her husband's family when there are undivided sapindas or who by reason of minority or lunacy or absence in a foreign country cannot give her his consent.[h] Besides, where a near relative in refusing to give his consent is actuated by corrupt motives, his dissent may be disregarded.[h] But a consent procured by fraud or corruption is invalid.[j] Besides, the mere circumstance that the consent of a substantial majority of the nearest sapindas has been obtained will not validate an adoption if the widow has omitted to consult any one of the nearest sapindas[k] even if he be inimically disposed towards her and would have refused his consent if asked.[j] The absence of consent of the nearest sapinda cannot be made good by authorisation from distant relatives more remotely connected.[i] When there are no sapindas, the widow has in herself no residuary power to adopt,[l] but in the presence of sapindas, near or remote, a daughter's consent to the adoption is unnecessary.[m] An adoption made with the consent of the deceased son of the adopting widow is a valid adoption when there is no change in the circumstances and there are no grounds for the next presumptive reversioner to object to the adoption when actually made.[n]

When there are two widows, an adoption made by the senior widow with the sapindas' consent is quite valid even though the junior widow has not assented[o] but the junior widow cannot make such an adoption without the consent of the senior widow.[p]

Husband's authority and sapindas' consent.—There is an essential difference between the husband's authority and the sapindas' assent in empowering an adoption. The former is intended to be exercised only after the death of the husband and there is no obligation upon the widow to make the adoption at once or within a reasonable time.[q] But the latter is intended to be used within a reasonable time after it is given and cannot be pocketted by the widow to be utilised long after it is given, when entirely different

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(h) *Kristnayya* v. *Lakshmipathi*, 43 M. 650 (P.C.).

(i) *Veerabasavaraju* v. *Balasurya Prasada Rao*, 41 M. 998 (P.C.).

(j) *Venkamma* v. *Subramanian*, 30 M. 50 (P.C.).

(k) *Subbamma* v. *Adimoorthappa*, 21 L.W. 85.

(l) *Balasubramania* v. *Subbayya*, 1938 P.C. 34.

(m) *Murahari* v. *Sumitramma*, 57 M. 411.

(n) *Annapurnamma* v. *Appayya*, 52 M. 620.

(o) *Narayanasami* v. *Mangammal*, 28 M. 315.

(p) *Muthusami* v. *Pulavaratal*, 45 M. 266.

(q) *Rawat Sheo* v. *Beni Bahadur*, 1 Luck. 403 (P.C.).

considerations as to the expediency of the adoption may apply.[r] Besides, the sapindas' consent must be with reference to a particular boy referred to their consideration, and, unlike in the case of the husband's authority, the consent of the sapindas to the adoption of any boy at any time will be invalid.[s]

Determination of the widow's authority to adopt.—A widow's power to adopt comes to an end where her husband dies leaving a son, natural or adopted, and that son dies leaving a natural born or adopted son or leaving no son but his own widow.[t] The same principle will apply to invalidate an adoption made in Southern India by a widow with sapindas' consent after her son's death leaving his own widow.[u] But if the son who has succeeded his father dies leaving no heir other than his mother, then an adoption by her is not invalid.[v] So also an adoption by a widow inheriting immediately to her grandson who had succeeded directly to his grandfather would be valid[w] In the case of a Hindu dying leaving a son and a widow with power to adopt, the duty of providing for the continuance of the line for spiritual purposes which was upon the father is laid conditionally upon the mother, and if this duty is assumed by the son and passed on by him to his own son or widow, the mother's power is gone. But if the son dies himself sonless and unmarried, the duty will still be upon the mother and the power in her which was necessarily suspended during the son's lifetime revives. A widow's power to make the adoption must be held to be dead or alive by applying this principle and not by applying the principle of divestment of the estate vested in another. The vesting of the property on the death of the last holder in some one other than the adopting widow, be he another coparcener of the joint family, or an outsider claiming by reverter or by inheritance, cannot be in itself the test of the continuance or extinction of the widow's power of adoption.[t] Nor is a mother's authority extinguished by the mere fact that her son succeeding her husband has died after attaining the age of discretion or ceremonial competence,[t] or has died a widower leaving only a daughter.[x] In no case can a widow adopt to her deceased husband after her remarriage to another.[y]

Who can give in adoption.—A boy can be given in adoption only by his natural parents, and as between them, the father's dis-

(r) *Ammannee* v. *Satyanarayana.* 49 M. 636.

(s) *Brahmayya* v. *Rattayya,* 20 L.W. 503.

(t) *Amarendra* v. *Sanatan,* 12 Pat. 642 =38 L.W. 1 (P.C.); *Bhooban Moyee* v *Ram Kishore,* 10 M.I.A. 279.

(u) *Thayammal* v. *Venkatarama,* 10 M. 205 (P.C.).

(v) *Vellanki* v. *Venkata,* 4 I.A. 1=1 M. 174.

(w) *Narhar* v. *Balwant,* 48 B. 559.

(x) *Chanbasappa* v. *Madhwalappa,* 1937 B. 337.

(y) *Fakirappa* v. *Santrawa,* 1921 B. 1. (F.B.).

cretion is absolute and he can give away the boy even against his wife's will. Neither the adoptive parents, nor the brother, nor any other relation of the boy can give him in adoption. Even the mother cannot give the boy in adoption except when her husband is dead or is a lunatic or is permanently absent and has not prohibited the giving of the boy. But the mere conversion of the parents to another religion does not deprive them of this power, though in such cases the necessary religious ceremonies have got to be done by a Hindu delegate. But the right to give in adoption cannot be delegated to another; nor can it be exercised by the widowed mother after she has married another.[z]

Who can be adopted.—Except in the case of Dancing Girls an adoption can only be of a boy and not a girl. The boy to be adopted must belong to the same caste as the adopter (though they may be of different sub-castes) and should not be the son of a woman whom the adoptive father could not have married in her maiden state. Hence the adoption of the daughter's son, sister's son or mother's sister's son is invalid[a] except when sanctioned by custom. Besides, a boy who is an orphan cannot be adopted except where it is approved by custom. But the adoption of an only son[b] or of the eldest son or a remote relation or outside the gotra is not invalid. Since the boy to be adopted must have the capacity to make religious offerings, an adoption of a boy who cannot offer them by reason of lunacy, leprosy or illegitimacy cannot be valid. As regards the age of the adoptable boy, it can now be taken as settled that except in the Bombay Presidency, the limit of time after which a boy cannot be adopted is his Upanayanam amongst the twice born or regenerate castes and his marriage among the Sudras. Even the performance of the Upanayanam does not operate as a bar to an adoption where the adopter and the adoptee belong to the same gotra.[c] In the Bombay Presidency, however, there can be a valid adoption in any community of a married man, even older than the adopter and with children, though on adoption the sons born to the adoptee before adoption remain in the original family.[d]

Ceremonies of adoption.—The physical act of giving and taking the boy which is the operative and the most essential part of the ceremony is absolutely necessary for a valid adoption and cannot be dispensed with even in the case of Sudras. Whether the ceremony of *Datta Homam* is necessary or not, the decisions are not uniform,

(z) *Punchappa* v. *Sangambasawa*, 24 B. 89. See contra in *Putlabai* v. *Mahadu*, 33 B. 107.

(a) *Bhagwan Singh* v. *Bhagwansingh*, 21 A. 412 (P.C.).

(b) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (P.C.).

(c) *Balgangadhar Tilak* v. *Shrinivas Pandit*, 39 B. 441 (P.C.).

(d) *Balabai* v. *Mahadu*, 48 B. 387.

but it may be taken that the Bombay, Calcutta and Madras decisions take the view that it would be necessary in the three regenerate castes, while the Allahabad decisions hold that it is not necessary. But if the adopter and the adoptee belong to the same gotra, the *Datta Homam* is only a matter of unessential ceremonial, as the same would be necessary, if at all, only when the adoption effects a change in the boy's *gotra*.(c) It has been recently held by the Madras High Court that in the case of an adoption of daughter's son which is valid under the custom of the province, *Datta Homam* is not necessary.(e) Nor is it necessary in the case of Sudras(f). Even where *Datta Homam* is necessary, it can be performed after the physical act of giving and taking and even by delegating some other person to perform it.(g)

Effect of adoption.—The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect of his paternal and maternal lines, and his complete substitution into the adopter's family as if he were born in it. But the adoption does not obliterate the tie of blood, and the disabilities against adoption and marriage in the boy's natural family still continue in spite of the adoption, and in cases where adoption of married persons is allowed, sons born to the adopted person prior to adoption still continue in the natural family. Besides, the adopted boy takes a lesser interest in the property of his adopter's family as against his after-born *aurasa* son.

Rights and liabilities in the natural family.—On adoption, the boy adopted loses all his future rights of inheritance in his natural family and *vice versa* his relations in that family can no longer be his heirs. But properties which have already become vested in him before adoption as an absolute owner either as the sole surviving coparcener or by inheritance or partition in his natural family are not forfeited by the adoption. In respect of such property which he carries into his adoptive family he would be liable for all those obligations incidental to the possession thereof, such as the maintenance of dependent members, discharge of binding debts etc.

Rights in the adoptive family.—An adopted son occupies the same position, except in respect of a few matters, as the *aurasa* son, and can never claim higher rights than the latter. Thus he cannot prevent his adoptive father from disposing of his self-acquired property in any way he likes. Like an *aurasa* son, he is entitled to succeed both lineally and collaterally and *ex parte materna* as well as *exparte paterna* in his new family. But as against an

(c) See foot-note (c) on p. 780.
(e) 49 L.W. 53 (short notes).
(f) *Shoshinath* v. *Krishnasundari*, 6 C. 381 (P.C.).
(g) *Seetharamamma* v. *Suryanarayana*, 49 M. 969.

after-born *aurasa* son, he occupies an inferior position and gets ¼ of the *aurasa* son's share in Madras and Bombay, ⅓ of it in Benares and ½ of it in Bengal. This rule, however, applies only in the case of the division of the ancestral estate, and not in the case of collateral succession wherein the adopted and the *aurasa* sons succeed to equal shares. Besides, among Sudras in Madras and Bengal, the adopted son shares equally with the after born aurasa son.[h] In the case of succession to an impartible estate, the *aurasa* son takes precedence and excludes the adopted son.[h-a]

Adoption and divesting of estate.—On a valid adoption of a boy by a widow, the property either vesting in her, or in her and her co-widows as the husband's heirs or vesting in her as the heir of her son, at once becomes divested from her and becomes vested in the adopted son. This question of divestment will never arise when the adopter is the husband or the widow of a deceased coparcener. But in order to divest a widow's estate by her adoption, the estate must have vested in her either directly as her husband's heir or directly as her son's heir and not after it has vested in some body else just as the son's widow or the son's son who has succeeded to the estate after the death of her son. Even when the property has not vested in the adopting widow, if by virtue of the adoption, the adoptee becomes a nearer relation to the last male-holder than the person in whom the property has vested, then the adopted son is entitled to divest that person of that property.[i] But the Stridhana property of the adopting widow does not become divested by the adoption. In the case of a coparcenary, the adopted son steps into the joint family with all the interest and rights held by his adoptive father. After the Hindu Women's Rights to Property Act of 1937, adoption divests only half the estate of the adoptive widow's husband, since under that Act the widow is herself entitled to share as a son.

Widow's alienation and adoption.—If the widow has made any alienation or created any encumbrance in respect of her husband's estate in excess of her powers as a qualified owner, the adopted son is entitled to set aside the same and recover possession from the alienee immediately after the adoption and without waiting till the death of the adopting widow.

Doctrine of relation back.—An adopted son's right to set aside an invalid alienation made by the widow relates back to the death of her husband so that all unauthorised alienations effected by the

(h) *Perrazu* v. *Subbarayudu*, 44 M. 656 (P.C.).

(h-a) *Sahebgouda* v. *Shiddangouda*, 1939 B. 186.

(i) *Amarendra* v. *Sanatan*, 12 Pat. 642 (P.C.); *Vijaysingji* v. *Shivsangji*, 59 B. 360 (P.C.); But see *Balu Sakharam* v. *Lahoo Sambhaji*, 39 Bom. L.R. 382.

widow after her husband's death can be set aside by him. But his rights in other respects do not relate back to the adoptive father's death. Thus, for instance, where a man empowers his wife under a will to make an adoption and under the same instrument makes certain dispositions of property or where a man gifts away his property to his daughters knowing that the widow of his predeceased son has been authorised by him to make an adoption, the son subsequently adopted either by the widow in the former case or by the daughter-in-law in the latter case cannot question the dispositions. Again, if the widow validly makes a surrender to her daughters, her subsequent adoption cannot enable the adopted son to claim back the property surrendered.

Results of an invalid adoption.—Where the adoption is for any reason invalid, the adopted son does not acquire any right in the new family, nor does he forfeit any of his rights in his natural family.(j)

Ante-adoption agreements.—Ante-adoption agreements entered into between the natural father of the boy and the adoptive father or mother having the effect of curtailing the rights of the adoptive boy, though not absolutely void so as not to be ratified and accepted by the boy on coming of age, are yet of no validity except in so far as such agreements are sanctioned by custom and regulate the right of the widow for her life-time against the adopted boy. Where, however, such arrangements, though assented to by the natural father, go beyond this and give the widow property absolutely or give the property to strangers, or authorise improper alienations of the property in which the adopted boy by his adoption acquires a right, they are not binding on the adopted son, and he being a minor, the principle of approbation and reprobation has no application in his case.(k) But if the adopted son is of full age and deliberately agrees to an arrangement under which he is to receive no more than half the property of his adoptive father the agreement is not invalid and is binding on him.(l)

Proof of adoption.—An adoption requires to be proved in the same way as any other fact, there being, however, a heavy onus on the person setting it up to prove it. But circumstances may exist in any particular case to strengthen or weaken the probability of an adoption. For instance, if the alleged adoptive father was young, and could reasonably have hoped of begetting issue on his wife, the adoption would be rendered very unlikely. If, on the other hand, the said father was old and decrepit and was inimically

(j) *Viswasundara v. Somasundara*, 43 M. 876.

(k) *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*, 50 M. 508 (P.C.).

(l) *Dal Bahadur v. Bijai Bahadur*, 52 A. 1. (P.C.).

disposed towards those who would succeed him if he died childless, this would be a circumstance that could be urged in favour of the adoption having taken place. If it is proved that an adoption is apparently valid as performed, the onus is upon the person attacking its validity to establish how it was defective.

Estoppel and acquiescence.—Where a person makes an adoption and treats the adoptee as his or her adopted son, he or she would be estopped from questioning the validity of the adoption; but the others who are not the representatives of the person adopting will not be so estopped from questioning its validity. Mere acquiescence by those whose interest it is to deny or impeach the adoption will not preclude them from subsequently challenging the factum or the validity of the adoption, provided they are not barred by the statute of Limitation (see Arts. 118, 119 and 141 of the Limitation Act).

Kinds of Adoptions other than the Dattaka

Dvyamushyayana: Dvyamushyayana is the name given to a person who is given in adoption under an agreement that he should be considered to be the son of both the adoptive father and the natural father. Such a person inherits in both the natural and adoptive families[m] and on his death his relations in both the families can inherit to him. But the children of the dvyamushyayana continue as members of the natural family. Where subsequent to a dvyamushyayana adoption, a natural son is born to the adopter, the share of the dvyamushyayana is ½ of what a Dattaka son would take as against an aurasa son. If, however, a legitimate son is subsequently born to the natural father of the dvyamushyayana, the latter takes half the share of the former.

Illatom adoption. Illatom adoption is a customary adoption of a son-in-law by his father-in-law prevalent among the Reddies and Kammas in the Madras Presidency. This has no religious significance, being brought about in consideration of the adoptee's future services in the management of the adopter's property. This kind of affiliation is not prevented by the existence of an aurasa or Dattaka son, nor does it prevent the adopter from making a subsequent Dattaka adoption. Though he counts as a son on a partition in his father-in-law's family, he is not a coparcener with his father-in-law or his sons, nor does he lose his rights in his natural family; nor do his children become members of the adoptive family.

Kritrima adoption. This kind of adoption is also purely secular in nature as the illatom and the adoptee's rights in the natural

(m) *Wooma Dasee* v. *Gokoolanand*, 3 C.587.

family remain unaffected. Kritrima adoption can be made by either man or woman and when a woman makes this adoption, the adoptee does not become the son of the adopter's husband. Any person may be adopted, though he be the father or brother of the adopter, and no ceremonies are necessary, the only requisite being the consent of the adoptee if a major or his parents consent, if a minor. By this kind of adoption the adoptee becomes the son of the adopter, but he is not entitled to claim any right of succession to any person other than the adopter in the new family

THE MITAKSHARA JOINT FAMILY

Constitution of a Hindu joint family.—A joint Hindu family consists of male members descended lineally from a common male ancestor together with their mothers, wives and unmarried daughters. What is known as a Mitakshara coparcenary is a narrower body than the joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being. The former commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus, while a son, grandson or a great-grandson of the holder of ancestral property is his coparcener, his great-great-grandson is not a coparcener with him, because he is removed more than three degrees from the holder. Only males can be the coparceners. Though a common ancestor is necessary for the commencement of a coparcenary, it may continue without him consisting of collaterals and their descendants some of them being removed more than three degrees from the deceased common ancestor. This coparcenary is a creature 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 thereof. But a coparcenary may exist within another bigger coparcenary. Thus if a coparcenary consists of father and sons by several wives, the sons of one wife hold the property obtained by them by inheritance from their maternal grandfather with the incident of survivorship without any rights therein to the father or his sons by his other wives. After the Hindu Women's Rights to Property Act of 1937, a coparcenary can consist of widows of deceased coparceners.

Incidents of a Mitakshara coparcenary.—While the family remains undivided, no individual coparcener can predicate of the joint property that he has a certain definite share either in the corpus or in the income thereof. There is a community of interest and unity of possession between all the members and on the death of any of them the others take his interest also by survivorship. Till

a partition takes place, a coparcener's interest remains fluctuating, enlarged by deaths and diminished by births within the coparcenary limits. Every coparcener, whether son, grandson or great-grandson, obtains an interest by birth in the coparcenary property so as to be able to control and restrain improper dealings with the joint property by another coparcener. He is entitled to reside and be maintained in the family house along with his wife and children and enjoys certain powers of alienation with a right to enforce partition of his share in the joint property.

Difference between Mitakshara coparcenary and joint tenancy.—A Mitakshara coparcenary and what is known as joint tenancy resemble each other in that (i) there is a right of survivorship in both, (ii) in both each member is entitled to joint possession over the whole of the joint property and (iii) the acts of one member enure to the benefit of others in both cases. But there are equally striking differences between them: (1) a Mitakshara coparcenary is a creature of law and comes into existence by birth or descent while a joint tenancy is created by a deed or will and not by descent from another; (2) a Mitakshara coparcenary consists of only relations, while a joint tenancy may consist of strangers; (3) a coparcener's power of alienation of his share is restricted while that of a joint tenant is absolute though he too cannot transfer it by will; (4) a coparcener's interest is fluctuating by births and deaths in the family while the interest of a joint tenant is fixed; and (5) on the death of the last surviving coparcener, the whole property passes only to his heirs, while on the death of the last surviving joint tenant, the property descends in equal shares to the heirs of all the joint tenants.

Kinds of property owned by coparceners.—Property owned by a coparcener may be separate property or coparcenary property. Separate property of a coparcener is held by him free of all claims from the rest of his coparceners and comprises: (1) property inherited by him from persons other than the three immediate paternal ancestors, namely, father, father's father and father's father's father; (2) nuptial gifts out of the joint family fund and marriage gifts and other friendly offerings made by others; (3) property acquired by him unaided by the joint family estate together with the income and purchases from the income of such acquisition; (4) gains of science; (5) property obtained on partition with his other coparceners; and (6) property held by him as the sole surviving coparcener. Coparcenary property means and includes: (1) property obtained by gift or succession from any of the three immediate paternal ancestors (known as ancestral property); (2) acquisitions made by the coparceners with the help of ancestral pro-

perty; (3) joint acquisitions of the coparceners even without such help provided there was no proof of intention not to treat it as joint family property; and (4) separate property of coparceners thrown into the common stock. Property inherited by the sons of a daughter from their maternal grandfather is not coparcenary property.(n)

Gains of science.—The texts of Hindu Law which lay down the divisibility among the co-heirs of the gains of science which has been imparted at the family expense contemplate the special branch of science which is the immediate source of the gains of the coparcener and not any elementary education which is the necessary stepping stone to the acquisition of all science. Thus earnings of a coparcener due to special education given him at the cost of joint family will become joint family property.(o) But gains made by a coparcener who has received only an ordinary education at the family expense suitable to his position as a member of the joint family or gains of a coparcener which are the result not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education can never become the property of the joint family.(p) The whole question has now been set at rest by the Hindu Gains of Learning Act (XXX of 1930) which by S. 3, which, however, is not retrospective, declares that "Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of (a) learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member thereof or (b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of the family, or by the funds of any member thereof."

Obstructed and unobstructed heritage.—Heritage is of two sorts: unobstructed (Apratibandha) or obstructed (Sapratibandha). Where ownership accrues to a person by virtue of his relationship to another who has been holding the property and even during the lifetime of the latter, the heritage is known as unobstructed: such is the ancestral property in the hands of the father, father's father or father's father's father. But where the life of the owner is an impediment to the accrual of the right to the successor, it is known as obstructed heritage, for example, property devolving upon brothers, parents, uncles etc.

(n) *Muhammad Husain* v. *Babu Kishva Nandan*, I.L.R. 1937 A. 655.
(o) *Gokul Chand* v. *Hukam Chand*, 48 I.A. 182=2 Lah. 40.
(p) *Metharam* v. *Revachand*, 45 I.A. 41=45 C. 666.

Joint family property and joint ancestral family property.—The essential difference between joint family property and joint ancestral family property is that the latter necessarily connotes descent and predicates a nucleus while the former does not. Though the incidents of both the properties are the same, the former can be property acquired by the present members of the joint family by their joint labour, while the latter must necessarily have been obtained by descent.

Ancestral Property.—The term "ancestral property" is a technical one meaning only property inherited from father, father's father or father's father's father. In that property, the inheritor's son, son's son and son's son's son get an interest by birth and can interdict improper alienations. Property inherited from the maternal grandfather by his daughter's sons is not taken by them as ancestral property with the incident of right by birth accruing to their own sons.(q) There is a difference of opinion among the High Courts whether property received from the father by gift or will is ancestral in the son's hands so as to enable the latter's sons to claim an interest in it as ancestral property. But if ancestral property is allotted to a coparcener's share in a partition, that coparcener's sons, whether born before or after partition, can claim an interest in it as ancestral property.

Presumptions as regards joint family and separate property.—The joint family is the normal condition of Hindu society and every such family is ordinarily joint not only in estate, but in food and worship. But there is no presumption that because a family is joint, it possesses any joint property. The presumption that property in the possession of an individual coparcener is joint family property arises only if it is shown that there was a nucleus of joint family property from which it might be fairly said to have grown, and where such nucleus is admitted or proved, the onus of proving separate acquisition is upon the coparcener alleging it. But if the property is admitted to have been originally self-acquired but it is alleged that it was afterwards thrown into the common stock, the onus of proving such mingling is upon the persons asserting it, and this onus is not discharged unless a clear intention to waive separate rights is established.

Manager and his powers.—So long as the members of the family remain undivided, the senior-most male member of the family is entitled to manage the family properties on behalf of all the members except when he is incapacitated by age, illness or other sufficient cause. The managership of the joint family property

(q) *Muhammad Husain* v. *Babu Kishva, Nandan*, I.L.R. 1937 A. 655.

comes to a person by birth and is not the result of the consent of the coparceners. Though he is likened to a trustee or agent of the joint family, he is not under the same obligation to economise or to save as an agent or trustee. He is entitled to the possession and management of the property : a contract binding debts for the family necessity or benefit, alienate the family property for such purposes and, in his capacity as representative of the family, give receipts, compromise or discharge claims, make a reference to arbitration, acknowledge debts and do all acts necessary and incidental to the proper management of the family estate. But he cannot revive a time-barred debt nor can he start a new business so as to bind the other members without their consent. But he can sue and be sued on behalf of the family. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the joint family money to his own personal use, he is liable to account at the time of partition between him and the other members, only for what he actually received and not for what he ought to or might have received if the estate had been more profitably managed.(r)

DEBTS AND ALIENATIONS

Sources of liability to pay debts.—A debt which a person may be under a liability to discharge may be a debt contracted by himself or by another. The liability to pay the debts contracted by another may arise out of (1) a legal duty as when the debt is contracted by an agent, (2) a moral duty as when a person has succeeded to the property of the person who contracted the debt or (3) a religious duty as in the case of a Hindu son to pay the debts of his father and thus save him from sin.

Coparcener's debts.—Every coparcener is bound to pay his debts out of his separate property. Besides, his undivided interest in the joint family property is liable to be proceeded against by his simple creditor if he has attached that interest in execution of a decree during the coparcener's lifetime.

Alienation by coparcener.—It is now settled that in the provinces of Madras, Bombay, Berar and the Central Provinces, one of several coparceners may, without the assent of the others, sell, mortgage or otherwise alienate his share for valuable consideration. But under the Mitakshara as administered in Bengal, United Provinces, the Punjab and Behar and Orissa, a coparcener cannot without the consent of his other coparceners mortgage or sell his undivided share on his own account. In none of the Provinces can a

(r) *Perrazu* v. *Subbarayudu*, 44 M. 656 (P.C.).

Mitakshara coparcener dispose of his undivided interest by gift or will.

Manager's power to incur debts and alienate joint family property.—A manager of a joint family, in addition to his powers as an ordinary coparcener, enjoys certain privileges by virtue of his position as the manager of the joint family. He can contract debts so as to be binding upon the undivided interest of all the other coparceners either for family necessity or for family benefit. In the same way, he is also entitled to alienate the whole joint family interests including those of the other coparceners for such family benefit or necessity. An alienation by the manager by way of mortgage or sale of joint family property will be good as against the other coparceners either when all of them had consented to the transaction, or the alienee is able to show that it was supported by legal necessity or benefit of the family or that he made *bona fide* and reasonable enquiries which showed him that such necessity existed even though no such necessity did in fact exist[s]. If the alienee does so enquire and acts honestly, the real existence of the alleged necessity is not a condition precedent to the validity of the alienation, and the alienee is not bound to see to the application of the consideration for purposes of any such necessity or benefit. If the transaction itself was justified by necessity, the mere fact that a part of the consideration is not substantiated by legal necessity would not necessarily nullify the alienation.[t] Legal necessity justifying an alienation by the manager of the family property may be of various kinds and may be religious or secular; marriage and obsequial ceremonies in the family, the education and maintenance of the various members of the household, payment of binding debts and Government revenue, judicial proceedings for recovering the family estate or defending a member of the family in a prosecution and a hundred other similar things may fall under the category of such legal necessities. But in all cases where the validity of an alienation by the manager is impeached by the other members of the family, the burden of establishing its validity on any of the grounds above mentioned is on the alienee.

Father's debts and alienations and son's pious obligation.—Every son, son's son or son's son's son is under a pious duty to discharge the debts with interest of the father, father's father or father's father's father, provided the debts are not tainted by illegality or immorality and the sons etc., have joint family assets in their hands. The liability of the sons etc., is not a personal liability but

(s) *Hunooman Persad's case*, 6 M.I.A. 393.

(t) *Ram Sundar Lal* v. *Lachmi Narain*, 51 A. 430 (P.C.); *Krishna Das* v. *Nathu Ram*, 49 A. 149 (P.C.).

is one limited to their interest in the joint family property. This obligation exists both during and after the ancestor's life-time and if the debt was incurred at a time the father and the son were living together and not after, the liability of the son continues even after their separation. But the son alone cannot be sued during the father's life-time. *Avyavaharika* is the term employed to denote a debt which is illegal or immoral The mere circumstance that the debt is imprudent or unreasonable or improper or indicates a lapse from right conduct or is incurred in trade or speculation does not render a father's debt *avyavaharika*. In order to render a debt *avyavaharika* there must be an element either of immorality or illegality. Even in respect of father's alienations, the sons are under a distinct disadvantage, for a father enjoys certain powers of alienation in addition to those which he may have as an ordinary coparcener or manager of the family. Thus he can make within reasonable limits gifts of ancestral property either for pious purposes or through affection. Besides a father can alienate joint family property by way of sale or mortgage, so as to be binding even upon his son's interest, to discharge his antecedent (previously incurred) debts which are neither illegal nor immoral, though such debts were incurred only for his own personal benefit and not for the benefit or necessity of the family. But such an antecedent debt for which the alienation is made, must be antecedent both in fact and in time to the alienation and should not be a part of the transaction impeached,(u) though the debt may be a simple debt or a mortgage debt. Where a question arises whether the father's debt or alienation is binding upon the sons, the onus of proving that the transaction was illegal or immoral is upon the sons. Mere proof of the general immoral life of the father without establishing a direct connection between his immorality and his debt does not discharge this onus;(v) in other words the evidence should be such that the Court could reasonably infer that the debt must have been incurred for an immoral purpose.

PARTITION

What is partition.—Under the Mitakshara, partition does not mean simply division of property into specific shares. It covers both division of title and division of property. An unequivocal manifestation by a member of a joint family by his words or conduct of a fixed and determined intention to become separate from the other members is sufficient to effect the separation of his title and the severance of his interest, although division of possession.

(u) *Brij Narain* v. *Mangla Prasad*, 46 A. 95.

(v) *Shyam Narain* v. *Suraj Narain*, 37 L.W. 277 (P.C.).

or partition by metes and bounds, does not take place and the members continue joint in food and dwelling[w]. For a severance in status (i) there must be an unmistakable manifestation of intention to become divided, (ii) no division by metes and bounds is necessary, (iii) existence of property is not essential, (iv) reasons for the severance are immaterial, (v) the existence of minors in the family is no bar and (vi) the intention to separate must be communicated to the other members.

Partition how effected.—Partition between the members of a joint family may be effected (i) by the father dividing the property equally amongst his sons during his life-time, (ii) by a coparcener unambiguously expressing his intention to become divided from the other coparceners, (iii) by the coparceners making a submission to arbitrators for effecting a division, (iv) by the institution of a suit for partition by a coparcener (if the suit is not subsequently withdrawn), (v) by agreement of partition between the coparceners and (vi) by conversion of a coparcener to another religion. In the case of a minor coparcener, if a suit is instituted on his behalf for partition, if it ends in a decree, it has the effect of creating a division of status from the date of the plaint, but a mere filing of the plaint does not by itself effect his severance from the joint family.

Agreement not to partition.—There is a conflict of decisions on the question whether an agreement not to partition is binding upon the parties thereto[x] but that it is not binding upon their heirs and successors[y] seems to be clear.[z]

Form of partition.—A partition need not be in writing, but if it is in writing, it requires registration for proof of its terms, though when the writing is unregistered, it is admissible to prove the division in status.

Subject-matter of partition.—The property to be partitioned is only the coparcenary property and does not include either the separate property of the individual members or coparcenary property which by its nature is indivisible, such as family idol, right to well or way, or an impartible estate. In the case of the dwelling house and other properties, movable or immovable, which are not conveniently partitionable, the proper method is to assign them to the shares of particular members and give compensation to the others.

(w) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (P.C.).

(x) *Ramalinga* v. *Virupakaha*, 7 B. 538; See contra *Rupsingh* v. *Bhubuti*, 42 A. 30 and *Krishendra* v. *Debendra*, 12 C.W.N. 793.

(y) *Venkataraman* v. *Bramanna*, 4 M. H.C. 345.

(z) See *Arumugha* v. *Ranganatham*, 57 M. 405 and *Ajit Kumar* v. *Srimati Tarubala*, 63 C. 209.

In ascertaining the assets available for division, adequate provision should be made for payment of debts binding on the family, for meeting the expenses of necessary religious ceremonies and maintenance of disqualified heirs, and for the marriage expenses of unmarried sisters.

Rules as to accounting.—All that a coparcener is entitled to ask at the time of partition from the manager is an account of the assets as they exist at the date of the severance in status. In the absence of fraud, dishonesty, misappropriation or gross reckless waste, the manager cannot be called upon to defend the propriety of his past transactions or the manner in which he has disposed of the income in the past[a]. No coparcener is entitled to credit being allowed to him on the ground that the amount spent upon him and his branch was smaller than what had been spent upon another member's branch. But when a coparcener has been deliberately excluded from joint possession and enjoyment of the family property or where partition was improperly refused he is entitled to claim mesne profits from those who excluded him.

Persons entitled to demand and share on partition.—Every coparcener is entitled to demand a partition and obtain a share therein provided he is not disqualified. In Bombay, however, an exception is recognised that a son is not entitled to demand a partition without his father's consent so long as the father is joint with his own ancestors or collateral relations. Besides coparceners, a mother, grandmother and great-grandmother, though they are not entitled to demand partition, are still entitled to share on a partition except in Southern India, where this practice of allotting shares to females is no longer in vogue. Now under the Hindu Women's Rights to Property Act of 1937, the widow of a deceased coparcener is also entitled to demand a partition of his share.

Division per stirpes and per capita.—Where a division takes place in a joint family consisting of sons, grandsons and great-grandsons, each branch takes *per stirpes* as regards the other branches, but the members of each branch take *per capita* as regards one another. If a joint family consists of a father X, his three sons A, B and C and A's three sons D, E and F, and if a partition takes place as between all these members, X will take ¼, A's branch will take another ¼, and B and C will each take ¼ of the property. But in the ¼ share allotted to A's branch consisting of A and his sons D, E and F, each of these will take ¼ of ¼ = 1/16 as against the other members of that branch.

(a) *Perraju* v. *Subbarayadu*, 44 M. 656 (P.C.).

Shares of sons, father and grandfather.—When a partition takes place between a son, his father and his grandfather, the grandfather is entitled to ½, the father ¼ and the son ¼ of the joint assets.

Adopted son.—In a partition between a father and his adopted son, each takes ½. But if there is also an after-born *aurasa* son, then the father will rank as an aurasa son for purposes of computation of shares and the adopted son will get ¼, ⅓ or ½ of the share of the father or the *aurasa* son according to the School to which he belongs as already mentioned when dealing with adoption.

Illegitimate son.—The illegitimate son of a Hindu belonging to any of the regenerate castes is not entitled to a share in the property. Even in the Sudra caste he is not entitled to demand a partition during his father's life-time, or even after that if the father had died undivided from his collaterals leaving no separate property[(b)]. But if the father dies divided from his collaterals and leaving a legitimate and an illegitimate son, the latter is entitled to get ½ of what he would get if he were legitimate. This would be so even if the father had died leaving a widow, daughter or daughter's son.

After-born son.—A son born after partition might have been conceived either before or after partition. If he was conceived after partition he is not entitled to reopen the partition if a share had been allotted to his father in a partition between the father and the other sons, though he will be entitled to reopen it if no share had been assigned to the father. But if the son was conceived even before partition, he is entitled to get his share by reopening the partition, if no provision has already been made for his share.

Minor coparceners.—A partition can be claimed on behalf of minors if the continuance of joint status is prejudicial to their interests. In a suit for partition on behalf of a minor, no decree for partition should be passed unless the Court finds that it will be for the minor's benefit. But minority of a coparcener is no impediment to a valid partition taking place in the family, though if such partition is prejudicial to his interests, he is entitled to set it aside so as to have those interests secured. If a suit for partition on behalf of a minor is instituted, the fact that he dies during its pendency does not make the suit abate, and the suit can be continued by his legal representatives and a decree obtained therein if it is shown that the suit at the time of its institution was one for his benefit.

(b) *Vellaiyappa Chetty* v. *Natarajan*, 55 M. 1.

Disqualified coparceners.—Under the Hindu Law a person suffering from a disability which disentitles him to inherit cannot claim a share on partition. But this disability is purely personal to him and does not attach to his male descendants. Again, if the defect be removed subsequent to partition, he is entitled to reopen the partition and have a share allotted to him. But now by the Hindu Inheritance Removal of Disabilities Act of 1928, which, however, is not retrospective, and does not apply to persons governed by the Dayabhaga School, it is only a person who has been a congenital lunatic or idiot that is disqualified from inheriting or claiming a share on partition. Such disqualified coparceners are, however, entitled to a provision for maintenance both for themselves and their wives and children.

Female sharers.—The wife the mother the grandmother and the great-grandmother, including stepmother or step-grandmother, are also entitled to share on partition. The wife or mother is entitled to receive a share equal to that of her son, and so also is a grandmother entitled to the share equal to that of her grandson if no son be alive at the time of the partition. In ascertaining the share any income-yielding property already given to the female sharer either by the husband or father-in-law must be taken into account. Now under the Hindu Women's Rights to Property Act of 1937, every coparcener's widow is entitled to demand and get a partition of her husband's share as against the surviving coparceners.

Purchasers from coparceners.—A person claiming under a valid sale of a coparcener's undivided interest is entitled to claim a partition of that share as against the other coparceners. His remedy is to have that share ascertained in a suit for general partition in which the whole joint family properties are included. In a suit of this nature, the Court in making the partition would endeavour to give effect to the alienation and allot the very property alienated to the purchaser, if the same can be done without injustice to others. The alience's share on partition is to be determined with reference to the alienating coparcener's share on the date of the alienation, but that share has to be worked out only by taking the properties actually existing at the time of the partition.(c)

Partial partition.—Partition may be general or partial. A general partition is that which is brought about in respect of the entire joint family property by all the members getting themselves separated from one another. A partial partition is that which takes place either in respect of only a portion of the joint family

(c) *Muthukumara v. Sivanarayana*, 56 M. 534.

property or in respect of only some of the joint owners.[d] A partition is presumed to be in respect of all the joint family properties, but there is no presumption that a partition is in respect of each member as against every other member of the coparcenary.[e]

Successive Partitions.—Where only some of the members of a joint family separate, leaving the rest joint, the ordinary rule is that a subsequent partition should be made *rebus sic stantibus*, as at the date of the partition, which according to the Madras High Court means "as at the date of the original partition"[f] while the Bombay High Court takes it to mean "as at the date of the subsequent partition."[g] Thus where there are two or more branches of a joint family and one member of one branch separates leaving the rest joint, according to the Madras view, the share already taken by him should be deducted from the share due to his branch at a subsequent partition, while according to the Bombay view that share has to be entirely ignored and the subsequent partition is to be effected as if it is in itself an entirely new and complete partition.

Reopening partition.—Partition once made cannot ordinarily be reopened. But if the allotment of shares has been vitiated by fraud or mistake, as when a property not belonging to the family has been allotted to a coparcener's share, or if it is prejudicial to a minor or absent coparcener, the partition can be reopened. In addition, there is the right of an after-born son and disqualified coparceners to reopen a partition as already mentioned.

Effect of Partition.—On a separation in status, the members hold the property as tenants-in-common and not as joint tenants. Subsequent births and deaths in the family do not effect any fluctuation in the quantum of shares taken by the divided coparceners. The special privileges of the manager and the father can no longer be exercised by them in respect of those members of the family who have become separate from them.

Re-union.—The members of a joint family who have separated may agree to again re-unite so as to form a joint family. The effect of reunion is to cancel the partition and remit the parties to their original status of jointness.[h] Such re-unions being rare, there is a presumption, though rebuttable, against their having taken place. Mere jointness in residence, food and worship, does not necessarily connote re-union in the same way as a separation in

(d) *Ramalinga* v. *Narayana*, 1922 P.C. 20=45 M. 489.

(e) *Balkrishna* v. *Kamkrishna*, 53 All. 300 P.C.

(f) *Narayana Sah* v. *Sankar Sah*, 53 M. 1.

(g) *Prajivandas* v. *Ichcharam*, 29 B. 734.

(h) *Palani Ammal* v. *Muthuvenkatachala*, 48 M. 254 (P.C.).

these respects is not conclusive proof of partition. A re-union in estate properly so called can only take place between persons who were parties to the original partition, and that too only with the father, a brother or a paternal uncle.(i) Since a re-union involves an intention to become once again joint in estate and interest, no agreement to re-unite can be made by or on behalf of minors.(j) But fathers by their re-union can carry their undivided minor sons into the re-united family.(k)

Partition and re-union—Presumptions.—A Mitakshara family is presumed in law to be a joint family until it is proved that its members have become separated. But once a partition is proved to have taken place, the presumption is that it was a partition of all the joint family properties. Mere separation in food and worship does not show separation in status. For a legal division in status there must have been an unambiguous indication of intention to become divided in status. But actual division of property is not necessary for a severance in interest. Where one coparcener is shown to have separated from the rest, there is no presumption either that the latter have also become separate from one another or that they continue joint. Where a coparcener who has sons separates from his brothers or ancestors, there is no presumption that he has separated also from his sons. Law always presumes against re-union on the ground that it very rarely takes place, and hence a re-union requires to be strictly proved.

JOINT FAMILY AND PARTITION UNDER THE DAYABHAGA

Dayabhaga Family—Constitution of.—Under the Dayabhaga there can be no coparcenary between a father and his sons. The son does not get any interest by birth in the ancestral property in the hands of the father and hence cannot claim partition against him. The father is the absolute owner of the property with absolute powers of gift and sale unfettered by any right in the son to restrain his unauthorised alienations. Unlike under the Mitakshara where the coparcenary springs up *on the birth of a son*, the Dayabhaga coparcenary comes into existence only *on the death* of the father. The Dayabhaga coparceners are in the position of tenants-in-common, and on the death of any one of them without leaving a son, his rights do not go to the other coparceners, but his own heirs, such as his widow, daughter, mother etc., who then become coparceners with the rest. Thus, unlike the Mitakshara coparcenary, the Dayabhaga coparcenary may consist of both males and females. Inasmuch as each coparcener takes a

(i) *Ram Narain* v. *Pan Kuer*, 14 Pat. (P.C.).
268 (P.C.). (k) *Babu* v. *Gokuldoss*, 55 M.L.J. 132
(j) *Balabux* v. *Rukhmabai*, 30 C. 725 =1928 M. 1064.

defined share in the Dayabhaga coparcenary, his powers of alienation in respect of his share are absolute and unfettered and he can call for partition at any time he likes. Under the Hindu Women's Rights to Property Act, on the death of a Hindu intestate, his widow, the widow of his predeceased son and the widow of a predeceased son of his predeceased son succeed to his property together as co-heirs along with his sons or even in the absence of his sons and can themselves call for partition.

Partition under the Dayabhaga.—A partition in a Dayabhaga joint family can only mean a division of the common property by metes and bounds among the coparceners who may be either males or females as already mentioned. Besides, a mother or daughter of a male coparcener succeeding on his death to his share, is entitled to call for partition. On a partition between sons the mother is entitled to a share equal to that of a son. But neither a mother who has an only son, nor a sonless stepmother is entitled to share on partition. But under the Hindu Women's Rights to Property Act this rule is abrogated and all the widows of a deceased Hindu are together entitled to a share which is equal to that of a son.

MINORITY AND GUARDIANSHIP

Age of majority.—Under the Majority Act of 1875 which applies also to Hindus, in the case of every minor of whose person or property a guardian has been appointed by any Court of justice and of every minor under the jurisdiction of any Court of Wards, minority terminates on the completion of the 21st year, and in all other cases on the completion of the 18th year. But in respect of matters of marriage, divorce and adoption, to which the Act does not apply, the age of competence is to be ascertained according to Hindu Law, which is the completion of 15 years according to the Bengal School and the completion of 16 years according to the other Schools.

Kinds of guardians.—Guardians are of four kinds: (1) natural guardians; (2) testamentary guardians; (3) Court guardians and (4) *de facto* guardians.

(1) *Natural guardian.* A natural guardian is one who, by virtue of his or her relationship to a child, has a claim to be its guardian. Such a guardian under the Hindu Law is either the father or the mother, and nobody else is entitled as a matter of natural right to be a minor's guardian. As between the father and mother, as a vestige of *patria potestas*, the father's right to have the custody of the person and property of his legitimate children prevails over that of the mother, and his right is so paramount that neither his loss of caste or religion, nor his remarriage, will

in itself be sufficient to dislodge it. He can appoint a guardian by his will even to the exclusion of the mother, though he cannot appoint a testamentary guardian in respect of the joint family property. But in the case of illegitimate children, the right of their mother to be their guardian prevails over that of their putative father.

In *Besant* v. *Narayaniah*. 38 M 807 (P.C.) it was held by the Privy Council that the father's guardianship is in the nature of a sacred trust, so as to preclude him during his life-time from substitute another as the guardian in his stead and that if the father, acting in his discretion, entrusts the custody and education of his children to another the authority that he thus confers is a revocable authority; but if that authority has been acted on in such a way as to make its revocation undesirable in the children's interests, then the court will interfere to prevent its revocation.

(2) *Testamentary guardian.*—No one can appoint a testamentary guardian in respect of a minor's person or property except his father, and even the mother of the minor cannot claim this right.

(3) *Court guardian.*—In making orders appointing guardians the most paramount consideration for a judge ought to be, what order under the circumstances of the case would be best for securing the welfare and happiness of the minors. No relation barring the parents is entitled as of right to be appointed the guardian of a minor. Even in the case of parents, there may be circumstances like the conversion of the minor or the conversion of the parents, which, taken with other circumstances, may make it necessary that the minor should be placed in the custody of some other person. Ordinarily the husband is entitled to be the guardian of his minor wife and the adoptive parent is to be preferred to a natural parent.

(4) *De facto guardian.*—A *de facto* guardian is one who is not a legal guardian in the sense that he is either a natural, testamentary or Court guardian, but who, being interested in the minor, takes charge of the management of the minor's property.

Powers of guardians.—A natural guardian can do all acts which are reasonable and necessary for the protection of the minor's property. He can transfer any portion of the minor's property by mortgage or sale in case of necessity or for the benefit of the minor's estate.[1] But he can in no case bind a minor by any personal covenant, and no decree can be passed against the estate of the minor on such covenant except when there is a liability on the estate by reason of a benefit or necessity including an

(1) *Hunooman Persaud* v. *Mussumat Babooee*, 6 M.I.A. 393.

obligation under his personal law. He cannot revive a time-barred debt, nor is he authorised to embark the minor's property in speculative transactions in order to liquidate his debts. Even a *de facto* guardian has the same powers as the natural guardian; but in the case of a Court guardian or testamentary guardian, he is to act within the terms of the order of appointment and the provisions of the Guardians and Wards Act if he is a Court guardian, and the conditions of the will if he happens to be the testamentary guardian.

Remedies and limitation.—Where a guardian is deprived of the custody of the minor he may apply under S. 491 of the Criminal Procedure Code or under S. 25 of the Guardians and Wards Act for getting back such custody. If the guardian acts in excess of his powers and alienates the minor's property, the minor can have the transfer set aside by instituting a suit within three years from the date of his attaining majority under Art. 44, Limitation Act.

MAINTENANCE

Persons entitled to claim maintenance.—The persons who are entitled to claim maintenance fall under two classes, (1) those whose claim to maintenance arises by virtue solely of the relationship with, and irrespective of the possession of property by, the person against whom the claim is to be exercised and (2) those whose claim is dependent upon the possession of property by such person. Every Hindu, irrespective of his possessing any property, is personally bound to maintain (1) his aged parents, (2) his wife, (3) his minor sons, whether legitimate or illegitimate and (4) his unmarried daughters, but he is under no such liability in respect of his grand-parents, his concubine or grandchildren. In addition to this personal liability, a Hindu is liable to maintain out of the property in his hands all those persons whom a deceased person from whom he has inherited that property was either under a legal or a moral duty to maintain. Thus a father-in-law is only under a moral and not a legal obligation to maintain his destitute and widowed daughter-in-law out of his self-acquired property, but if he dies and his property is inherited by his surviving sons, they would be under a legal obligation to maintain her out of that property.[m] Besides, the manager of a joint family is bound to maintain out of the joint family assets all its members, both male and female, and the widows and children of deceased coparceners. In case a coparcener is excluded from inheritance by reason

(m) *Rajani Kanta* v. *Sajani Sundari*, 61 C. 221 (P.C.); Now under the Hindu Women's Rights to Property Act, 1937, she is also entitled to a share.

of a disability he is suffering from, the property which he would have inherited but for that disability is liable for the maintenance of both himself and his family.

Maintenance of wife.—A wife is entitled to be maintained by her husband irrespective of his possessing any property, even when she lives away from the husband for a justifiable cause, as for instance, his cruelty or contagious disease, and after his death, any person who takes his interest, either by survivorship as his coparcener or by inheritance as his heir is bound to maintain her, provided she remains unmarried and chaste, in the same degree of comfort and with the same reasonable luxury of life which she had in her husband's life-time.(n) The widow of a coparcener does not forfeit her right to maintenance out of the joint family assets simply because she refuses to live with her husband's co-parceners, unless she does so for improper or immoral purposes. Under the Hindu Women's Rights to Property Act of 1937 the widow of a coparcener is entitled to the share of the husband, and hence cannot enforce her right to maintenance, if the surviving coparceners insist on her walking out with her husband's share in the family property.

Maintenance of concubine.—A concubine has no right to be maintained by her paramour, however long might have been the concubinage, but after his death, she acquires a right to be maintained out of his estate provided (1) she had been exclusively kept by him till his death, (2) had throughout remained faithful to him, though she did not reside in his family house(o) and (3) has no husband living.(p)

Maintenance liable to variation.—The rate of maintenance is liable to be increased or decreased in accordance with the means of the family, whether it is fixed by agreement of parties or by the decree of Court. But if the widow has been allotted a sufficient amount for her maintenance once and for all, she is precluded from claiming any further amounts even if she has dissipated the amount allotted to her.

Right of residence and maintenance.—The widow or the unmarried daughter of a deceased coparcener has a right of residence in his family dwelling house and this right cannot be defeated by the surviving coparceners selling the house to another with notice of that right. Even if the house is transferred to one without notice of her right, the transferee cannot eject her without providing her with some other suitable place of residence. But neither

(n) *Eradeshwari* v. *Homeshwar*, 8 P. 840=56 I.A. 123.
I.A. 153=50 B. 604.
(o) *Bai Nagubai* v. *Bai Monghibai*, 53 101
(p) *Anandilal* v. *Chandrabai*, 48 B. 203.

the wife nor the daughter is entitled to have her right of residence in the family dwelling house maintained against one who has purchased it either under a private sale from the husband or father, or in execution of a decree against him or against his estate. Nor is she entitled to claim this right where the father or the manager of the family sells away the house for a purpose which is binding upon the husband or father. In the same way a transfer of property for a debt incurred by the husband or father or by his father or by the manager of his family for purposes binding upon the family prevails over her right to maintenance, if her claim has not been already made a charge on the property.(q) But this right to maintenance cannot be defeated by a gift or devise of the entire property by the person liable to maintain.

GIFTS AND WILLS

Gifts and wills defined.—Gift is the transfer of certain existing property made voluntarily and without consideration, by one person called the donor to another called the donee and accepted by or on behalf of the donee. Will means the legal declaration of a testator's intention with respect to his property which he desires to be carried into effect after his death. A gift takes effect immediately, while a will takes effect only after the testator's death. A gift is irrevocable, while a will can be revoked at any time before the testator dies. A *donatio mortis causa* or a gift made in contemplation of death is also valid under Hindu Law.

Form of gift and will.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor, and attested by at least two witnesses. A gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. As regards wills, all Hindu wills and codicils executed before 1-1-1927 may be oral or in writing and if in writing does not require registration or attestation. But all Hindu wills and codicils made after 1-9-1870 in or relating to immovable property situate within the Province of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Madras and Bombay, and all Hindu wills and codicils executed on or after 1-1-1927 should be in writing and attested by at least two witnesses.

Capacity to make a gift or will.—Every person of sound mind and not a minor under the Indian Majority Act can dispose of his absolute property by way of gift or will. Thus a coparcener under the Mitakshara cannot dispose of his undivided interest in the

(q) See S. 39 of the Transfer of Property Act as regards transfers by other persons.

joint family property by gift or will, though he can do so in respect of his separate property or where he is the sole surviving coparcener. But a Mitakshara father can make a gift of immovable property to his daughter or for pious purposes within reasonable limits. So also can a widow who has inherited her husband's property.

Who can take under a gift or will.—A gift or bequest can be made to any person, though he be a minor, or one incapable of inheriting by reason of some personal disqualification. Under the Hindu Law, gifts and bequests to persons unborn are absolutely void. (r) But by the passing of certain recent enactments, they are declared valid if they do not offend the rule of perpetuities laid down in S. 14 of the Transfer of Property Act and S. 114 of the Succession Act. Where a gift is made to two or more persons some of whom are capable of taking and the others not, those who are capable shall take the whole as tenants-in-common.

Persona designata.—The question whether a gift or bequest to a particular person described as satisfying a particular description, such as an adopted or an aurasa son, is valid or not when it is found that he does not satisfy the description, is to be answered with reference to the intention of the donor or testator in making the gift to him. If the intention is that the donee should take only if he satisfies the description, the gift cannot take effect. But when the gift is made to a person absolutely as a *persona designata*, the addition of the description being merely a matter for identification, the donee takes the property even though he does not satisfy the description given. (s)

Creation of estates unknown to Hindu Law.—All estates of inheritance created by gift or will, which are unknown or repugnant to Hindu Law, are void and one of such estates is what is known to English law as an estate tail. Thus the creation of an order of succession which excludes the ordinary legal heirs is invalid and inoperative. (t)

Construction of gift or will.—In all cases the primary duty of a Court is to ascertain from the language used by the donor what were his intentions. "The Court is entitled to put itself into the testator's arm-chair" and must take into consideration the surrounding circumstances and the racial and religious influences operating on the mind of the testator in making the disposition. (u) In the case of a will of a Hindu in favour of a female relation it is possible by the use of words of sufficient amplitude such as malik,

(r) *Tagore* v. *Tagore*, I.A. Supp. Vol. 47.
(s) *Venkata Surya* v. *Court of Wards*. 22 M. 383 (P.C.).
(t) *Tagore* v. *Tagore*, I.A. Supp. 47.
(u) *Mahomed Shumsool* v. *Shewukram*.

etc., to convey to her in the terms of the gift the fullest rights of ownership including the power to alienate and it is not necessary to pass an absolute estate to a woman that the power of alienation should have been expressly conferred upon her.(v) When an absolute estate has been conferred on the donee by an earlier clause in the instrument a subsequent clause having the effect of restricting that interest is to be rejected as repugnant and ignored.(w)

Proof of will.—The burden of proving a will is upon the person who propounds the will and such proof relates to two things, (i) that the will was executed by the person by whom it purports to have been executed, and (ii) that he had executed it with a sound disposing mind.

Revocation and alteration of wills.—All Hindu wills required by law to be in writing and attested as already mentioned can be revoked or altered only in accordance with the provisions of Ss. 70 and 71 of the Succession Act of 1925; all other wills can be revoked either orally or by writing, the only requisite being some act showing an *animo revocandi*.(x)

PRINCIPLES OF INHERITANCE

Foundation of the rules of inheritance.—The text of Manu "Sons take the property, to the nearest sapinda the inheritance next belongs" is the foundation of the rules of inheritance amongst the Hindus. Jimutavahana, the author of the Dayabhaga, considers sapinda relationship to mean "community in the offerings of funeral oblations", while Vignaneswara, the author of the Mitakshara, takes it to mean "community of blood". The word "sapinda" derived from two words, "Sah" meaning "with" and "pinda" meaning "a ball or body", is interpreted by Jimutavahana as "connected by the funeral cake or *ball*" and by Vignaneswara as "connected by the particles of the same body". Owing to this difference in the interpretation of the word, propinquity or community of blood is the test of preference under the Mitakshara, while spiritual benefit conferrable upon the deceased is the guiding test in succession under the Dayabhaga.

Exclusion from inheritance.—Disqualifications under Hindu Law which disable a person from inheriting to another may be (1) physical, (2) mental, (3) moral, (4) religious or (5) equitable. Congenital blindness, congenital deafness, congenital dumbness or want of any limb or organ which is congenital, or deformity and

(v) *Ramachandra* v. *Ramachandra*, 42 M. 283; *Shaliq Ram* v. *Charanjit*, 11 Lah. 645 (P.C.).

(w) *Saraju Bala* v. *Jyotirmoyee*, 59 C, 142 (P.C.).

(x) *Chellikni* v. *Appa*, 20 M. 297 affirmed in 25 M. 678 (P.C.).

unfitness for social intercourse arising from disease such as leprosy, would be such a disqualification. So also a person who is a lunatic or idiot is not entitled to succeed to another. All these disqualifications do not, after the Hindu Inheritance (Removal of Disabilities) Act of 1928, operate as disqualifications under the Mitakshara, except congenital lunacy and idiocy. Unchastity disqualifies a woman from inheriting to a male under the Dayabhaga but under the Mitakshara this disqualification operates only in the case of the widow.(y) So also illegitimacy of the claimant, except among Sudras, operates as a bar to inheritance. The religious disqualification imposed by the Hindu Law on an apostate has now been done away with by the Caste Disabilities Removal Act of 1850. In addition to the above disqualifications, Courts of law have laid down that on grounds of justice and equity no one should be allowed to succeed to the estate of the person whom he has murdered. All these disqualifications are, however, purely personal and do not affect the next heir even though he happens to claim through the disqualified heir.

Asceticism.—The adoption of asceticism operates as civil death of the ascetic, provided it takes the form of an absolute abandonment of all secular property and final withdrawal from earthly affairs. Such renunciation opens the succession to his property to his heirs. It has been held, however, that asceticism which would operate as civil death is not open to the Sudras.(z)

Vesting and divesting.—The right of succession to an estate of a deceased owner vests immediately on his death on his then nearest heir and cannot be held in abeyance except when a nearer heir is in the womb. Once the estate has thus vested on the nearest heir, it cannot be divested by the subsequent birth of a nearer heir unless the latter was in the mother's womb at the time the succession opened. The only exception to this rule is that an estate vested in another as heir of the last male holder becomes divested by an adoption introducing a nearer heir.(a)

Fresh stock of descent.—Inheritance is always to be traced to the last full owner who becomes a fresh stock of descent. Such owner may be a male or a female. But except in the case of Stridhana and in certain cases of descent in the Bombay Presidency, property obtained by a female by inheritance whether to a male or to a female is held by her as a qualified owner so that she cannot become a fresh stock of descent in respect of that property.

(y) Now under the Hindu Women's Rights to Property Act 1937, the unchastity of the widow is no bar to her claim to inherit.

(z) *Krishnaji v. Hanmareddi*, 58 B. 536.

(a) *Amarendra v. Sanatan*, 12 Pat. 642 (P.C.).

Modes of devolution—Survivorship and inheritance.—There are two modes of devolution recognised by the Hindu Law, succession by survivorship and succession by inheritance. Both the modes are operative under the Mitakshara law of joint family while only the latter mode is recognised in respect of a Dayabhaga joint family. But in the case of widows or daughters jointly inheriting to a male, they take the property with rights of survivorship both under the Dayabhaga and the Mitakshara.

Joint-tenancy and tenancy-in-common.—The general rule is that in case of obstructed inheritance two or more persons succeeding to an estate take the property as tenants-in-common and not as joint tenants and that the doctrine of survivorship is limited in its application to unobstructed succession. To this, the exceptions are these : co-widows in all schools, co-daughters except in the Bombay Presidency, sons of the same daughter living jointly except under the Dayabhaga, and coparceners under the Mitakshara succeeding to the self-acquired property of their paternal ancestor, father, father's father or father's father's father.

Principle of representation.—When a paternal ancestor dies, his son, his grandson who is the son of a predeceased son, and his great-grandson whose father and grandfather are both dead, succeed as coparceners, the grandson representing his father and the great-grandson representing his grandfather. This rule of representation does not apply to any other case of succession in Hindu Law.

Heirs under the Mitakshara.—The law of inheritance applies only to a person's absolute property. Under the Mitakshara, propinquity and not capacity to offer religious benefit to the propositus is the test of heirship, though the doctrine of religious benefit may be resorted to, to resolve doubtful questions of propinquity.[b] The heirs under the Mitakshara are classified under three heads : (1) Sapindas, (2) Samanodakas and (3) Bandhus. Sapindas are the six agnatic relations in the male line whether ascending or descending, the wives of the six paternal ancestors in the male line, the six male descendants in the collateral line of each of the six paternal ancestors, and the widow, daughter and daughter's son of the propositus, in all 57 in number. The Samanodakas of a person are his agnatic male relations in the ascending or descending line from the 7th to 13th degree, the male descendants in the male line upto the 13th degree of each of those ascendants and the male descendants in the male collateral line from 7th to 13th degree of the agnatic descendants upto the 6th degree, in all 147 in num-

(b) *Vedachala* v. *Subramania*, 44 M. 753.

ber.[c] A bandhu is a sapinda (ascertained according to the rules with reference to marriage) related to the propositus through one or more female links either directly or through a common ancestor paternal or maternal. A bandhu is thus a cognate relation and comes in the order of succession only after the technical sapindas and samanodakas.

ORDER OF SUCCESSION AMONG SAPINDAS

Heirs 1 to 3.—Son, grandson and great-grandson of a deceased ancestor inherit to him jointly taking the estate as a single heritage. Where a father was joint at the time of his death with some only of his sons, these take the father's property whether ancestral or self-acquired to the exclusion of the divided sons.[d]

Heir 4. Widow.—On the failure of the son, son's son or son's son's son, the widow, if not unchaste, succeeds to the estate taking only a limited interest therein.[e] On her death, the person entitled to succeed to the estate is the then nearest heir of her husband and not her nearest heir. If a widow who has succeeded to her husband's estate, subsequently remarries, she forfeits that estate even when she has married according to the custom of the caste,[f] but her mere unchastity does not entail such forfeiture.[g]

Heir 5. Daughter.—After the widow comes the daughter, also taking only a limited estate. When there are more daughters than one, unmarried daughters take to the exclusion of married ones, and if all of them are married, the daughters unprovided for exclude those who are rich. But an illegitimate daughter is not entitled to inherit even among Sudras.

Heir 6. Daughter's son.—After the daughter or daughters comes the daughter's son who takes the property absolutely. When there are two or more sons of daughters they take the property as tenants-in-common except that those who are sons of the same daughter and living as members of a joint family take the property with rights of survivorship *inter se*. The right of a daughter's son does not arise so long as any daughter is alive.

Heir 7. Mother.—Like the widow, she takes only a limited estate. The term "mother" includes "adoptive mother" but not

(c) *Atmaram* v. *Bajirao*, 62 I.A. 139= 1935 P.C. 57.

(d) *Narasimham* v. *Narasimham*, 55 M. 577; *Fakirappa* v. *Yellappa*, 22 B. 101. But contra in *Badri Nath* v. *Hardeo*, 5 Luck. 649.

(e) Under the Hindu Women's Rights to Property Act, 1937, a widow though unchaste succeeds to her husband's property along with his sons and is entitled to share as a son.

(f) *Santala* v. *Badeswari*, 50 C. 727; See contra in *Mangat* v. *Bharto*, 49 A. 203.

(g) *Moniram* v. *Kery Kolitani*, 5 C. 776 (P.C.).

a "step-mother". Under the Mayukha the father comes in before the mother. Neither her unchastity nor her remarriage prevents her from inheriting to her son.

Heir 8. Father.

Heir 9. Brother.—Where there are two or more brothers, they take as tenants-in-common, full brothers excluding half brothers and undivided full brothers excluding divided full brothers. Under the Mayukha brothers of the half blood come in only with the father's father.

Heir 10. Brother's son.—The rule of preference of the full blood over half blood applies also to brothers' sons and in the case of all other relations in the same degree.[h]

Heir 11 etc. Brother's son's son, etc.—There is no clear indication in the Sanskrit texts as to who is to succeed in the absence of the brother's son. But the recent decision of the Privy Council in *Buddha Singh* v. *Laltu Singh*[i] preferred Dr. Sarvadhikari's view to that of the Madras High Court in *Chinnasami* v. *Kunju*[j] and held that the brother's son in the texts included a brother's grandson also. According to this view, before ascending to the collateral line of the next remoter ancestor for purposes of ascertaining the heir, the three descendants of the nearer ancestor must be let in. Accordingly, the order of heirs, as given by Dr. Sarvadhikari are: (12) Father's mother, (13) Father's father, (14) Father's father's son, (15) Father's father's son's son, (16) Father's father's son's son's son, (17) Father's father's mother, (18) Father's father's father, (19) Father's father's father's son, (20) Father's father's father's son's son, (21) Father's father's father's son's son's son, (22) Son's son's son's son, (23) Son's son's son's son's son, (24) Son's son's son's son's son's son, (25 to 27) Father's S^4 to S^6, (28 to 30) Father's father's S^4 to S^6, (31 to 33) Father's father's father's S^4 to S^6, (34 to 37) F^4 and F^4's S^1 to S^3, (38 to 41) F^5 and F^5's S^1 to S^3, (42 to 45) F^6 and F^6's S^1 to S^3, (46 to 48) F^4's S^4 to S^6, (49 to 51) F^5's S^4 to S^6, (52 to 54) F^6's S^4 to S^6.

Statutory heirs.—The Hindu Law of Inheritance (Amendment) Act (II of 1929) introduced four more persons in the order of succession among sapindas, these being the son's daughter, daughter's daughter, sister and sister's son. These heirs in the order here given are entitled to rank in the order of succession next after the father's father and before a father's brother. There is a conflict of judicial opinion on the question whether the term "sister" includes a half-sister.

(h) *Garuddas* v. *Laldas*, 1933 P.C. 141. (j) 35 M. 152.
(i) 37 A. 604=42 I.A. 206.

In addition to the above, the Hindu Women's Rights to Property Act of 1937, has introduced two more heirs namely, the widow of a predeceased son and the widow of a predeceased son of a predeceased son, and under that Act, these two widows succeed along with the sons and widows of the propositus.

Order of succession among Samanodakas.—Among Samanodakas, succession is governed by the rules that a remoter line is excluded by a nearer line and a remoter kinsman in a particular line is excluded by a nearer kinsman in that line.

Bandhus.—A bandhu, meaning "one bound", is a sapinda related to the propositus through one or more female links either directly or through a common ancestor, paternal or maternal. This sapinda relationship should be traced according to the rules given for ascertaining that relationship for purposes of marriage, and in order to entitle a man to succeed to another as a heritable bandhu, there must be a mutuality of sapindaship between them.[k] These bandhus fall into three groups, (1) Atma bandhus, (ii) Pitru bandhus and (iii) Matru bandhus. *Atma Bandhus* are cognate descendants of the father's father or mother's father. Pitru Bandhus are such descendants of the father's father's father or father's mother's father and *Matru Bandhus* are similar descendants of the mother's father's father and of the mother's mother's father. In other words, *atma bandhus* are cognate relations of the propositus in (1) his own line, (2) his father's line, (3) the line of his father's father and (4) the line of his mother's father. All the other bandhus are either *pitru bandhus* or *matru bandhus* according as they are related through the father or the mother of the propositus. In ascertaining the order of succession among the bandhus, the following rules have got to be applied.

(i) *Atma bandhus* succeed before *pitru bandhus*, and *pitru bandhus* succeed before *matru bandhus*[k].

(ii) *Among bandhus* of the same class, propinquity or nearness of blood is the test of preference. Propinquity is to be determined by the proximity of the claimants' lines, and hence a claimant in a nearer line excludes one in a remoter line.

(iii) Where the degree of blood relationship furnishes no certain guide, the test to be applied is the test of spiritual benefit as explained under the Dayabhaga rules of inheritance. But the spiritual test is inapplicable where the test of propinquity does not fail to guide.[l].

(k) *Adit Narain* v. *Mahabir Prasad*, 48 I.A. 86=1921 P.C. 53.

(l) *Balasubramania* v. *Subbayya*, 1938 P.C. 34.

(iv) Among bandhus equally propinquitous, the half blood is excluded by the whole blood.

(v) Among bandhus equal in degree, a bandhu descended through a female is excluded by one descended through a male.

(vi) All other considerations being equal, a claimant between whom and the stem there intervene a less number of female links is to be preferred to one who is separated from the stem by a larger number of female links.

(vii) A male bandhu excludes a female bandhu.

Principles of succession in the Bombay School.—In the Bombay Presidency, by reason of the term "sapinda" in Manu's text being construed as 'sapinda, male or female," a number of females have been let in as heirs either as *gotraja sapindas*, widows of such sapindas, or bandhus. *The female gotraja sapindas* are the females born in the gotra or family, and these are the daughter, the sister, father's sister, son's daughter and daughter's daughter. These take the property absolutely and when two or more daughters, sisters etc., inherit together, they take as tenants-in-common and not as joint tenants with rights of survivorship *inter se*. *The widows of gotraja sapindas* are the widows of the sapindas and samanodakas of the deceased, such as (1) son's widow, (2) brother's widow, (3) mother, (4) step-mother etc. These are the females who are related to the family of the propositus by marriage. A widow of a *gotraja sapinda* can succeed only (i) if she has not re-married, (ii) after the sister and (iii) only if there is no qualified male *gotraja sapinda* within 7 degrees from the common ancestor in the line to which her husband belonged. When these conditions are satisfied she will succeed in the place occupied by her husband, that is, she will succeed only if there is no widow of a nearer gotraja sapinda, either in the same line or in a nearer line. The nature of the estate that a widow of a gotraja sapinda takes depends upon whether she inherits to a male or to a female ; if she inherits to a male she takes a limited estate, but if to a female, an absolute estate. The *female bandhus* are the daughters of descendants, ascendants and collaterals upto the 5th degree and the test to be applied in ascertaining their order of succession is the test of nearness of blood. (See the Table on p. 482).

Principles of succession under the Dayabhaga.—There are three classes of heirs under the Dayabhaga: (1) sapindas, (2) sakulyas and (3) samanodakas. This classification is based upon the significance of certain offerings to the ancestors at the ceremony called the *Parvana Shradh*. This is the *Shradh* performed during each conjunction of the Sun and the Moon when certain oblations are presented to the deceased ancestors in the shape of *pindas, pinda lepas* and *Udaka*

(water). *Pindas* are the entire balls of food addressed to the father, father's father, and father's father's father, their respective wives, and the mother, the mother's father, mother's father's father and mother's father's father's father. *Pinda* leaps are the remnants of those balls or *pindas*, which are offered to the paternal ancestors from the 4th to the 6th degree (F^4 to F^6). *Udaka* or water is then offered to the agnatic ascendants from the 7th to the 13th degree, that is, seven ancestors above the remotest ancestor to whom *pinda lepa* is offered. The sapinda relationship arises out of the capacity to benefit by the offering of the pinda, the *sakulya* relationship out of the capacity to benefit by the offering of the *pinda lepa*, and the samanodaka relationship out of the capacity to benefit by offering the *udaka*. Any-one of these relationships may arise in one of three ways, (i) by offer, (ii) by acceptance and (iii) by participation. A Hindu is said to participate in the benefit of oblations tendered to those ancestors to whom he himself is bound to offer them. Thus he who is bound to offer pinda to the deceased, he to whom the deceased was bound to offer pinda during his lifetime and he who is bound to offer pinda to one to whom the deceased himself is bound to offer it if alive, are all sapindas of the deceased. In the same way the sakulya relationship and the samanodaka relationship arise. Among these three groups of relations, the sapindas exclude the sakulyas and the sakulyas exclude the samanodakas. The following rules determine precedence among the sapindas: (see table on page 489).

(i) Those who offer to the propositus or to his paternal ancestors, and such paternal ancestors, exclude his maternal ancestors and those who offer only to the maternal ancestors.

(ii) An ancestor takes before his descendants in the collateral line.

(iii) Those who offer paternal offerings or first maternal offerings to the propositus exclude those who offer them to ancestors.

(iv) Those who make paternal offerings and first maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.

(v) Those who make paternal offerings exclude those who make maternal offerings.

(vi) Those who make 2nd and 3rd maternal offerings to the propositus exclude those who make them to ancestors.

(vii) Those who make such 2nd and 3rd maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.

(viii) Those who make nearer paternal offerings to the same ancestor exclude those who make remoter paternal offerings.

Note.—(*a*) Paternal offering here means an offering made to a paternal ancestor of the offerer, and, in the same way, a maternal offering means an offering made to a maternal ancestor of the offerer.

(*b*) First maternal offering means an offering made to offerer's first maternal ancestor. So also in the case of a paternal offering. Nearer offering, paternal or maternal, means an offering made by one who is nearer the ancestor to whom the offering is made.

Female heirs under the different schools.—The texts expressly mention the following females as heirs to a male, namely, widow, daughter, mother, father's mother and father's father's mother. All these come under the class of sapindas and are recognised as heirs in all the schools. In addition to these, the widowed daughter-in-law and the widowed grand-daughter-in-law are brought in as heirs under all the schools by the Hindu Women's Rights to Property Act of 1937, and the sister, son's daughter and daughter's daughter are brought in among the sapindas as statutory heirs in Provinces governed by the Mitakshara School as a result of the Hindu Law of Inheritance (Amendment) Act of 1929. Besides these, the Madras School recognises as heritable female bandhus the brother's daughter, sister's daughter and father's sister, and the Bombay School brings in a large number of females as heirs under the designation of female gotraja sapindas and widows of gotraja sapindas as already seen.

Non-relations as heirs.—In the absence of relations above mentioned, the preceptor, the pupil and the fellow student in respect of religious instruction, inherit in the order in which they are here mentioned[m], and where none of these exists, the property escheats to the Crown[n].

STRIDHANA

What is Stridhana.—Stridhana is property in the hands of a woman over which she has absolute powers of disposition. Such property may be :

(i) property gifted to a woman in her maiden state or at the time of her marriage or during her widowhood. Property gifted to a woman during coverture is also her Stridhana except that under the Dayabhaga and the Mithila Schools, property given by a stranger during coverture is subject to her husband's dominion and becomes her absolute property only after his death ;

(ii) the self-acquisition of a woman except that under the Dayabhaga such acquisition made during coverture becomes her absolute property only after her husband's death ;

(m) *Sambasivam* v. *Secretary of State*, 44 M. 704.

(n) *Collector of Masulipatam* v. *Cavaly Venkata*, 8 M.I.A. 500 ; *Gridhari Lal* v. *Bengal Government*, 12 M.I.A. 448.

(iii) property purchased by a woman with her Stridhana or its income;

(iv) property inherited by a woman in the Bombay Presidency as a *gotraja sapinda* from a male or as an heir to the Stridhana property of another female[o];

(v) property acquired by a woman by adverse possession;

(vi) maintenance awarded to a woman;

(viii) property allotted to mother or father's mother on a partition by way of absolute transfer to her; and

(viii) property acquired by a woman as the gains of her prostitution or under a compromise giving her property absolutely.

Note.—Except as mentioned in cl. (iv) above property inherited by a female is taken by her only as a qualified owner, whether the inheritance is to a male[p] or to a female.[q] So also a share allotted to a mother on the father's mother on partition, unless it has been transferred to her by way of absolute gift as Stridhana, is taken by her only as a limited owner.[r]

Powers over Stridhana.—A maiden and a widow, provided they are not minors, have absolute powers of disposition over their stridhana property, and can dispose of it by gift or will. But the rights of a married woman during coverture vary according as the Stridhana property is *saudayika* (gifts from relations) or not. *Saudayika* includes *yautaka* (gifts received at the time of the marriage) as well as its negative, *ayautaka*. In respect of *saudayika* she is the absolute owner, though in times of extreme distress, as in famine, illness or imprisonment, or for the performance of indispensable duty, the husband can take and utilise it for his personal purposes[s]. But in the case of *nonsaudayika* property, the husband's consent is a condition precedent to her power of disposal[t], and he is entitled to use it for his own purposes even in the absence of any compelling necessity. But after his death, her power of disposition becomes unfettered. Even during the life-time of the husband, the wife does not cease to be its owner, though the husband has the right above referred to, and if she dies during the husband's life-time, the property is taken by her Stridhana heirs and not by the heirs of her husband.[u]

Succession to Stridhana.—The principles regulating the devolution of Stridhana property are different from those applicable to the case of succession to the property of males. The religious element

(o) **Bhau** v. *Raghunath*, 30 B. 229; *Balwant Rao* v. *Baji Rao*, 48 C. 30 (P.C.).

(p) *Bhagwandeen* v. *Myna Bace*, 11 M.I.A. 487.

(q) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 (P.C.)

(r) *Debi Mangal Prasad* v. *Mahadeo Prasad*, 34 A. 234 (P.C.); *Hemangini* v. *Kedarnath*, 16 C. 758 (P.C.).

(s) *Nammalvar* v. *Thayarammal*, 50 M. 941.

(t) *Bhau* v. *Raghunath*, 30 B. 229.

(u) *Salemma* v. *Lutchmana*, 21 M. 100.

is not a factor that enters into the question of preference among the claimants, the only ground of preference being propinquity. Female issue is preferred to male issue and co-heirs take as tenants-in-common and not as joint tenants. Heirs like daughters' daughters, daughters' sons and sons' sons take *per stirpes*. The order of succession to Stridhana varies according to the School to which its owner belongs, her status at the time of acquisition and the source from which it came and no general rules can be laid down for determining priority between two rival claimants. The Mitakshara divides Stridhana property into (i) maiden's property, (ii) sulka and (iii) other stridhana. The order of succession to maiden's property is (1) uterine brother, (2) mother, (3) father, (4) father's sapindas in order of propinquity and (5) mother's kinsmen in order of propinquity. *Sulka* differently defined as the present to induce the bride to go with her husband or as the amount paid as equivalent of the price of household utensils, ornaments etc., passes first to uterine brothers, then to the mother, then to the father and then to the father's heirs. The order of succession to other Stridhana is as follows: (1) unmarried daughters, (2) married daughters unprovided for,(v) (3) married daughters provided for, (4) daughter's daughters, (5) daughter's sons, (6) sons, (7) son's sons, (8) husband, (9) husband's sapindas,(w) (10) blood relations like mother, father, and their kinsmen (x) (11) the Crown. If the marriage of the deceased woman is in the unapproved form, the order of succession after son's sons is mother, father, father's heirs,(y) the Crown. The order of succession in other Schools is so confusing that this is not the proper place for its elaborate enumeration.

Gains of Prostitution.—Prostitution may be practised either by married women or by women who belong to a class or community like the Dancing Girl community, in which it is practised as an *achara* or customary rule. In the case of a family woman lapsing into prostitution, the gains of her prostitution and other Stridhana would pass according to the normal order of succession applicable if she were chaste and her legitimate son will exclude her illegitimate daughters, and her husband will exclude her illegitimate son.(z) But in the case of Dancing Girls amongst whom prostitution is practised as a sort of *kulachara* or rule of life, there is no distinction between legitimate and illegitimate issue.(a) The women among them being the chief earning members, they take the

(v) *Wooma Daee* v. *Gokoolanand*, 3 C. 587 (P.C.).

(w) *Kesserbai* v. *Hunraj*, 30 B. 431 P.C.

(x) *Ganput* v. *Secretary of State*, 45 B. 1106.

(y) *Raju* v. *Ammani*, 29 M. 358 ; *Govind* v. *Savitri*, 43 B. 173.

(z) *Hiralal* v. *Tripura*, 40 C. 650 ; *Meenakshi* v. *Muniandi*, 38 M. 1144 ; *Narayan* v. *Laxman*, 51 B. 784.

(a) See *Viswanatha* v. *Doraiswami*, 48 M. 941.

property inherited by them absolutely, and daughters, whether natural or adopted, exclude sons. Recently, even though there was no proof of specific instances of the usage asserted the Madras High Court gave effect to the consciousness of the Dancing Girl community in favour of such usage according to which a sister's daughter who remains unmarried to continue the profession of prostitution is allowed to succeed in preference to the sister who has married and left the profession to earn the life of a family woman.

WOMAN'S ESTATE

What is woman's estate. The term "woman's estate" is used in the sense of a limited estate taken by a female as distinguished from her Stridhana property in which she takes an absolute interest. Property in which a woman takes only a limited interest is either property inherited by a woman or property allotted to her in a partition in her husband's family. To the rule that property inherited by a woman either from a male or a female is taken by her as a qualified owner there are two exceptions recognised in the Bombay School, namely, (i) property inherited by a woman born in the *gotra* of the deceased, or the daughter of such woman and (ii) property inherited by a female from a female. Barring these two exceptions, every woman in whichever School she belongs takes on inheritance only a limited estate.(b) The distinctive feature of a woman's estate is that at her death it reverts to the heirs of the last full owner known as reversioners. She is absolutely entitled to the fullest benefit of her life-interest and is accountable to none in respect of its income. Her estate is not a life-estate, for, under certain defined contingencies, she can alienate the property absolutely. Of such limited estates taken by women, the estate of the widow is the typical and most important one and hence is alone considered in the following pages.

Widow's powers of enjoyment.—With the limits imposed upon her by law, a widow has the most absolute powers of enjoyment of her estate. She is accountable to none in respect of its income. As a corollary to her absolute powers of enjoyment, she is entitled to get possession of her whole estate and if she happens to be one of several co-widows and they cannot get on together amicably, she is entitled to a partition of the joint estate for purposes of separate enjoyment. She is not bound to economise or save from the income or pay out of it the debts of the husband. She has absolute powers over accumulations of income accruing after her husband's death and such accumulations do not form part

(b) *Collector of Masulipatam v. Cavaly Venkatanarayanamma*, 25 M. 678 (P.C.). *Venkata*, 8 M.I.A. 529; *Venkayamma* v.

of the husband's estate so as to be descendible to his heirs after her death unless she indicates her intention to treat them as forming accretions to her husband's estate.[c] In addition to her absolute powers over the income of the estate, she has also got the power to sell or mortgage or give away her life-interest to whomsoever she likes, and if the income of the estate is insufficient for her maintenance, she is even entitled to alienate the corpus so as to pass to an alienee an absolute interest in the property alienated.

Her powers of management.—Being the owner of the estate vested in her by inheritance, she is entitled to manage it as any prudent owner of property, her powers being similar to those of the manager of an infant's estate as defined in *Hunooman Persaud's* case. If her acts of management do not constitute a waste of the corpus or a danger to the reversion, she cannot be restrained thereform. As she fully represents the estate for the time being, she is entitled to enter into transactions for the proper management of the estate and can incur debts for the necessary purposes, and the fact that the debts are simple debts is no ground for holding that if the widow dies before a decree is obtained in respect of such debts, the debts are not binding on the reversioners.[d] A compromise or family arrangement entered into by her which is prudent and reasonable under the circumstances and in the interest of her estate will be binding upon the reversion.[e] She can sue to recover possession of the estate or a part thereof from trespassers, defend suits against the estate, incur debts in its management and do everything as the representative of the estate which any prudent owner would do. Any decree passed against her as representing the estate is binding upon the reversioners if the suit was fought out according to law and was not collusive or fraudulent.[f]

Her powers of alienation.—Though a widow can alienate her own life interest in the property irrespective of any question of necessity justifying the alienation, her powers of disposal over the corpus are limited. She can on no account dispose of her husband's estate by will and she can dispose of the property *inter vivos* only for legal necessity or benefit.[g] Such necessity or benefit may be either religious or secular. The actual obsequies of the husband and the periodical performances of the obsequial rites prescribed in the Hindu religious law, the marriage of his

(c) *Ayiswaryanandaji* v. *Sivaji*, 49 M. 116; *Soorjeemoney Dossee* v. *Denobundoo*, 9 M.I.A. 123; *Saudamani* v. *Administrator-General of Bengal*, 20 C. 433 (P.C.); *Akkanna* v. *Venkayya*, 25 M. 351; *Isri Dut* v. *Hanshutti*, 10 C. 324 (P.C.).

(d) *Dhondo Yeshvant* v. *Mishrilal*, 60 B. 311.

(e) *Ramsumran Prasad* v. *Shyam Kumari*, 1 Pat. 741 (P.C.); *Mata Prasad* v. *Nageshar*, 47 A. 883 (P.C.).

(f) *Rajlakshmi* v. *Bholanath*, 1938 P.C 254.

(g) *Collector of Masulipatam* v. *Cavaly Venkata*, 8 M.I.A. 529.

daughters, payment of husband's debts though barred, and any other indispensable act or duty which cannot be neglected without sinning come under the category of spiritual necessity justifying the alienation of even the whole of the corpus. Under the category of temporal or secular necessity come arrears of Government revenue, reasonable expenses of necessary litigation in preserving the estate or defending her title, expenses of maintenance of both the widow and other dependent members whom her husband was bound to maintain, marriage expenses of the girls in the deceased's family such as his sister or son's daughter preservation of property and necessary repairs thereto and the cost of legal proceedings in respect of the effective vesting of the estate in her, such as the cost of obtaining probate, letters of administration or succession certificate. An alienation of the corpus by the widow may also be justified on the ground of benefit to the estate. Here again the benefit may be spiritual or temporal. Spiritual benefit as distinguished from spiritual necessity justifies an alienation of only a reasonably small portion of her husband's estate. If the property sold or gifted for performing acts conducive to the spiritual benefit of the deceased bears a small proportion to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, the alienation is justifiable and cannot be impeached by the reversioners.(h) Dedication of a small portion of the husband's estate for the daily offering of food to the presiding deity at Puri or raising money upon a small portion of the property for excavating a tank for a temple founded by her husband, or a sale of a small portion of the estate for the thread and marriage expenses of her daughter's son will all be justifiable on the ground of spiritual benefit. So also performance of the shradh of the husband's relations which he himself was under a duty to perform, pilgrimage to Gaya to perform the husband's Shradh or pilgrimage to Sethuband but not to Benares, gift to the priest at Gaya etc., come under the category of spiritual benefit. But a widow is not entitled to alienate her husband's property for pious or religious purposes for her own spiritual welfare unless they are purposes conferring spiritual benefit on the husband also. An alienation is justifiable on the ground of secular benefit only if it is one for the benefit of the estate and such as a prudent owner would have made with the knowledge available to him at the time of the transaction.

Alienation and co-widows.—Where two widows succeed as co-heiresses to their husband's estate, one of them cannot alienate the property without the consent of the other even though the

(h) *Sardar Singh* v. *Kunj Behari*, 44 A. 583 (P.C.).

alienation is for the necessity of the estate. They are entitled to obtain a partition of separate portions of the property and deal as each pleases with her own life-interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together, they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the latter's right of survivorship by charging or selling any part of the estate and the mere fact that there has been enmity between the co-widows is no justification for the alienating widow omitting to ask the co-widow's consent for the alienation. But in cases where the concurrence of the co-widow has been asked for to an alienation for a necessary purpose and unreasonably refused, an alienation by the other co-widow would be binding in the whole estate.(i)

Widow's alienation and onus of proof.—An alienee from the widow is in the same position as an alience from the manager for an infant heir as defined in *Hunooman Persaud's* case. In order to get his alienation upheld, the alience must establish either that the alienation was in fact justified by necessity or benefit of the estate or that he made *bona fide* enquiries which made him believe that such necessity existed for the alienation even though such necessity was subsequently not shown to have existed in fact at the time of the alienation.(j) Where the presumptive reversioners consent to an alienation either of the whole or a part of the estate by a limited owner, in the absence of evidence to the contrary, their consent is *prima facie* evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity and which would be sufficient to bind the reversioner. This presumption of necessity arising out of the consent of the reversioners is, however, only a rebuttable presumption and ordinarily to get the benefit of this presumption, the consent of the whole body of reversioners constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.(k) Again, in the case of ancient alienations, recitals as to necessity contained in the deeds of alienations consistent with the probabilities and circumstances of the case would be sufficient to support the deed of alienation where evidence of actual necessity was not and could not be forthcoming.(l) Even where a deed of alienation by a widow does not contain recitals as to necessity, if the validity of

(i) *Gauri Nath Kakaji* v. *Mt. Gaya Kuar*, 55 I.A. 399=28 L.W. 378.

(j) *Hanumantha* v. *Subbayya*, 1936 P.C. 283.

(k) *Rangasami Goundan* v. *Nachiappa*, 42 M. 523 (P.C.).

(l) *Banga Chandra* v. *Jagatkishore*, 44 C. 186 (P.C.).

the alienation comes in question a long time after the alienation so that it is impossible to ascertain what were the circumstances in which it was made, presumptions are permissible to fill in the details which have been obliterated by time and it would be open to the Court to assume that the alienation was made for necessity so as to be binding upon the reversioners.(m) Where the presumptive reversioner has given his consent to an alienation, he is precluded from questioning its validity in on the death of the widow he happens to be the actual reversioner.(n)

Rights and remedies of reversioners.—A reversionary heir, although having only a contingent interest or *spes successionis*, is entitled to see that the estate is kept free from waste or danger during its enjoyment by the widow. He is entitled to institute a suit even during the life-time of the widow for a declaration that an alienation made by her is not binding on the reversion. He can also institute a suit to restrain the widow from committing waste. But such a suit should ordinarily be filed by the next presumptive reversioner, but if he refuses to institute the suit or has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the reversioner next to him would be entitled to sue.(o) But no suit lies for a declaration during the widow's lifetime that a will executed by her is invalid or that the plaintiff is the nearest reversioner.(p) The reversioners are also entitled to have a receiver appointed in respect of the estate if the widow's management shows reckless waste. Where a suit is brought by the presumptive reversioner against the widow and the alienee from her for a declaration that the alienation is not binding upon the reversion, the suit is one in a representative capacity and on behalf of all the reversioners, and hence a decree passed in that suit which is not vitiated by any fraud or collusion between the parties thereto will have the effect of *res judicata* between the alienee or his representatives on the one hand and the whole body of reversioners on the other.(q) These are the rights and remedies of the reversioners during the widow's life-time. But when a widow dies, the nearest reversioners who succeed to the estate are entitled to recover possession of the properties from all those in possession thereof under alienations not binding on them. This right to bring a suit for possession after the widow's life-time is not taken away

(m) *Kumarasami* v. *Narayanasami*, 36 L.W. 186; *Venkatareddi* v. *Rani Saheba*, 43 M. 541 (P.C.).

(n) *Ramakotayya* v. *Viraraghavayya*, 52 M. 556 (F.B.).

(o) *Rani Anand Kunwar* v. *Court of Wards*, 6 C. 764 (P.C.); *Lakshmi Ammal* v. *Ananthanama*, I.L.R. 1937 M. 948.

(p) *Janaki Ammal* v. *Narayanaswami*, 39 M. 634 (P.C.).

(q) *Mata Prasad* v. *Nageshar*, 47 A. 883 (P.C.); *Venkatanarayana* v. *Subbammal*, 38 M. 406 (P.C.).

by the reversioners' failure to bring a declaratory suit during the widow's life-time to declare the alienations invalid,[r] and in a single suit for possession all the alienees from the widow may be impleaded and relief obtained against all of them.[s]

Alienee's equities.—It is not always necessary, to uphold a widow's alienation, that it should have been justified by necessity or benefit, spiritual or secular. If the alienee establishes *bona fide* enquiry and honest belief as to existence of necessity or benefit, then he is entitled to have his alienation upheld against the reversioners. Besides, if the alienation itself is justified by legal necessity and the alienee acts in good faith and the consideration is fair and proper, the mere fact that a part of the consideration which cannot be regarded as inconsiderable has not been proved to have been applied for necessary purposes cannot invalidate the alienation.[t] Even where the alienation is set aside, the alienee is entitled to a charge upon the estate for all amounts advanced by him to the widow for purposes for which she would be entitled to alienate the property. Besides, the alienee would also be entitled to compensation for any improvements effected by him on the estate *bona fide* believing that his ownership would not be disturbed.

Surrender.—A Hindu widow can renounce the estate in favour of the nearest reversioners, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is called a surrender. The essentials of a valid surrender are: (i) it must be in favour of the whole body of the nearest reversioners and not in favour of only some of them,[u] (ii) it must not be partial and must be in respect of the entirety of the estate of which she stands possessed at the time,[v] (iii) it must be *bona fide* and not a device to divide the estate with the reversioners,[w] though a reasonable provision for the widow's maintenance even by way of absolute transfer of a small portion of the property would not render the surrender otherwise than *bona fide*.[w] A surrender in favour of remoter reversioners with the consent of the nearest reversioners is to be considered as a double surrender and held valid.[x] A surrender otherwise valid cannot be attacked on the ground that it was prompted not by proper motives. A surrender deprives the widow of only her husband's

(r) *Bejoy Gopal* v. *Krishna*, 34 C. 329 (P.C.).

(s) *Darbari* v. *Gobind*, 46 A. 822.

(t) *Suraj Bhan* v. *Sat Chain*, 105 I.C. 257 (P.C.) following *Krishna Das* v. *Nathu Ram*, 48 A. 149 (P.C.).

(u) *Rangasami* v. *Nachiappa*, 43 M. 523 (P.C.); *Radharani* v *Brindavani*, 1938 P.C. 27.

(v) *Man Singh* v. *Nowlakbati*, 5 Pat. 290 (P.C.).

(w) *Sureshwar* v. *Maheshrani*, 48 C. 100 (P.C.); *Bhagwat* v. *Dhanukdhari*, 47 C. 466 (P.C.).

(x) *Nobokishore* v. *Hari Nath*, 10 C. 1102 (F.B.); *Pandurang* v. *Ishwar*, 40 Bom. L.R. 1270.

estate and not her Stridhana property or her right to be maintained out of the husband's estate. Nor does the surrender enable the next reversioners to recover during the widow's life-time properties improperly alienated by the widow.(y)

Remarriage and divestment of estate.—A Hindu widow who has inherited her husband's estate must be held to forfeit that estate on her remarriage, though the remarriage is after her conversion to another religion(z) or under the custom of the caste allowing remarriage(a) as the expression "any widow" in S. 2 of the Hindu Widows Remarriage Act plainly means in the context any woman who was a Hindu when she was widowed and who remarries whether under or outside the Act. But the mere fact that the widow has become unchaste subsequent to her having inherited her husband's property does not divest her of that property.(b)

RELIGIOUS AND CHARITABLE ENDOWMENTS

Definition of endowment.—Endowment is dedication of property for purposes of religion or charity having both the subject and object certain and capable of ascertainment. A charitable endowment is the outcome of benevolence, e.g. an endowment for a hospital, an endowment for the advancement of education, an endowment for building tanks or wells etc. A religious endowment is the outcome of piety, e.g. endowment for the performance of Lakshmi Puja, building temples or mutts etc. An endowment becomes effective from the moment of dedication and becomes unalterable or irrevocable thereafter except that in the case of a dedication to a family idol, the endowment may be altered by the consensus of the whole family. To constitute a valid endowment what is given and to whom it is given must not be left vague and uncertain. Hence a gift to "Dharam", which means "law, virtue, legal or moral duty", is invalid, since the object of the gift is too vague for giving effect to the gift.(c) So also gifts for purposes of popular usefulness or benefit, for charitable and religious purposes, for "just and proper acts for my benefit," are all void for vagueness and uncertainty.

Who can endow.—Every Hindu who is of sound mind and a major can create a valid endowment in respect of the whole or part of his or her absolute property. Besides, a karta of the joint family

(y) *Sundarasiva* v. *Vijayami*, 45 M. 933; *Lachmi Chand* v. *Lachho*, 49 A. 334; *Jeka Bala* v. *Bai Jivi*, 1938 B. 37; contra in *Ram* v. *Kousalya*, 1935 C. 689.

(z) *Raghunath* v. *Lakshmibai*, 59 B. 417; *Vitta* v. *Chatakonda*, 41 M. 1078; *Matangini* v. *Ram Rutton*, 19 C. 289; contra in *Abdul Aziz* v. *Nirma*, 35 A. 466.

(a) *Santala* v. *Badaswari*, 50 C. 727; *Murugayi* v. *Virmakali*, 1 M. 226; *Mt. Suraj* v. *Atar*, 1 Pat. 706; contra in *Bhola* v. *Mt. Kausilla*, 55 A. 24.

(b) *Monlram Kolita* v. *Kerri Kolitani*, 5 C. 776 (P.C.).

(c) *Runchordas* v. *Parvatibai*, 23 B. 725 (P.C.).

and a widow having a limited estate, can dedicate a reasonably small portion of the estate for religious purposes.

Temples and mutts.—The temples and mutts which are by far the most important religious foundations in India are supplementary in the Hindu ecclesiastical system in furthering spiritual welfare, the former by affording opportunities for prayer and worship, the latter by facilitating spiritual instruction and the acquisition of religious knowledge. In the temple the presiding element is the deity, or idol, a juridical person, the management of whose property vests in a person known as *shebait* or manager; in a mutt, the whole assets of the institution are vested in the *mahant* in trust for the mutt, the *mahant* being the spiritual preceptor presiding over the mutt and superintending its affairs, both spiritual and temporal.

Powers of a mahant or a shebait.—It is competent to a *shebait* of a temple or a *mahant* of a mutt to incur debts and borrow money and even alienate the property of the institution for the proper expenses of keeping up the religious worship, repairing the debutter property, defending hostile litigation etc., and in these respects his authority is analogous to that of the manager of an infant's estate[d] as defined in *Hunooman Persaud's* case. Any alienation of the immovable property of the institution by a *shebait* or *mahant* which is not justified by benefit to the institution or its necessity is avoidable by his successor in office within 12 years from the date when the alienor ceased to hold the office by death or removal,[e] and a permanent lease stands on the same footing as an absolute alienation.[f] But an alienation, though not so justified, cannot be avoided by the alienor himself and is good so long as he is in office.[g] Where an alienation is questioned, the burden of proving benefit or necessity in justification of the alienation is on the alienee in the same way as it is in the case of an alienation by the manager of an infant's estate.[d] The property being the property of the institution, its income cannot be diverted for the personal purposes of the manager, and if he spends any money out of his private pocket, he is entitled to claim to have it reimbursed. He is not debarred from making self-acquisitions, and there is no presumption that property in the possession of a *mahant* or *shebait* belongs to the mutt or the temple.

(d) *Doorganath* v. *Ram Chunder*, 2 C. 341 (P.C.); *Abhiram* v. *Shyama Charan*, 36 C. 1003; *Prosunna Kumari*, v. *Golab Chand*, 2 I.A. 145.

(e) *Ram Charan* v. *Nauranji*, 12 Pat. 251 (P.C.); *Ponnambala* v. *Periana*, 59 M. 809 (P.C.).

(f) *Vidya Varuthi* v. *Balusami Aiyar*, 44 M. 831 (P.C.); *Ponnambala* v. *Periana*, 59 M. 809 (P.C.).

(g) *Sivaprakasa* v. *Manickam*, 1933 M. 181.

Alienation of office.—The rule of necessity justifying an alienation extends only to an alienation of the temporalities of the idol or the mutt and does not apply to an alienation of the office of the *mahant* or *shebait* which is *res extra commercium*, and hence a sale of such office either in execution of a decree or privately for the pecuniary advantage of the trustee, though sanctioned by custom and made coupled with an obligation to manage the property in conformity with the existing trust, is void and gives no title to the purchaser.[h] But no objection exists to a transfer of the office to a person in the line of succession by reversion, gift or will,[i] but if the gift or will is in favour of a stranger or a remoter relation in preference to nearer relation, the transfer is void and cannot be upheld unless it is sanctioned by custom and is to the benefit of the institution.

Removal of shebaits and Mahants.—A shebait of a temple is liable to be removed from his office if he is guilty of fraud or dishonesty in respect of the funds or property of the institution as when he misappropriates the temple funds or sets up a title to its property hostile to that of the institution. But mere mistake or error of judgment cannot operate as a ground for his removal. In the case of a *mahant*, he is incompetent to continue in office if he does anything inconsistent and irreconcilable with his position as the spiritual head of the mutt, as when he marries, takes to drink or leads a life of immorality and shame. But mere lunacy of the *mahant* is no ground for his removal, though during the time the lunacy lasts, a substitute from amongst those qualified to succeed him in the office may be appointed to function in his stead. Where a temple trustee or a *mahant* is removable by the majority vote among a body of persons entitled to appoint or remove him, the removal must be after due observance of the rules of natural justice and for a cause which is sufficient to justify removal, and the removal should be decided upon with reference to the votes of qualified voters given at a meeting duly summoned and conducted.

Devolution of the office of Mahant.—In the absence of any rule of succession laid down by the founder of the institution, the law relating to the devolution of the office is to be found in the custom or usage of the particular mutt. Mutts may be *mouroosi*, *punchaiti* or *hakimi*. In the first the office is hereditary, devolving on a *mahant's* death on his chief disciple. In the second the office is elective, the successor to a presiding *mahant* being elected by an assembly of *mahants*. In the third the appointment of the *mahant* is vested in the ruling power or the founder of the institution.

(h) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 (P.C.); *Gnanasambanda* v. *Velu Pandaram*, 23 M. 271 (P.C.).
(i) *Mancharam* v. *Pranshankar*, 6 B. 298.

Where a *mahant* has the power to appoint his successor, as he often has in the case of a *mouroosi* mutt, he cannot delegate or transfer that power to another, and must exercise it *bona fide* in the interests of the mutt, and not in furtherance of his own interests,[j] by nominating one who is competent to hold the office according to the usage of the institution. In the absence of a custom to the contrary, a nomination of a successor is not invalid merely because it is made by a will.

Devolution of the office of shebait.—Shebaitship is presumed to be vested in the founder or his heirs, in default of evidence that he has disposed of it otherwise or there is some usage or course of dealing showing a different mode of devolution.[k] The founder of a Hindu debutter is competent to lay down rules to govern the succession to the office of *shebait*, but he cannot create a line of succession unknown to Hindu Law,[l] nor can he alter the line of succession once laid down by him unless there is a reservation to that effect in the trust deed itself.[m] Where the line of succession prescribed in the deed of endowment fails, the *shebaitship* reverts to the founder or his heirs, whether they be males or females, though when they happen to be females, they have to perform the spiritual functions by appointing male deputies.

Diversion of endowment.—The property of a public religious endowment can never be converted into secular property by the *shebait* or the members of the founder's family,[n] but in the case of a private endowment, as in the case of a dedication to the family idol, the consent of all the members of the family interested can convert the debutter property into secular property.[o] Where the original object of a public endowment cannot be carried out in the manner and form intended by the donor or where the literal execution of the trust is or afterwards becomes inexpedient or impracticable, the Court will execute the trust *cy pres*, that is, apply the funds to other objects of a similar character.[p] But in the case of an endowment to an idol, the religious purpose does not come to an end with the mutilation or destruction of the image, and the endowment can be perpetuated and continued by installing and consecrating a new image to be worshipped as intended by the original founder.[q]

(j) *Nataraja Thambiran* v. *Kallasam Pillai*, 44 M. 283 (P.C.).

(k) *Gosami Sri Girdharji* v. *Romanlalji*, 17 C. 3 (P.C.); *Sethuramavamiar* v. *Meruswamiar*, 41 M. 296 (P.C.)

(l) *Ganesh Chandra* v. *Lal Behary*, 63 I.A. 448=1936 P.C. 318.

(m) *Manorama* v. *Dhirendranath*, 34 C.W.N. 1097.

(n) *Konwar Doorganath* v. *Ramchunder*, 2 C. 341 (P.C.).

(o) *Chandi Charan* v. *Dulai Chandra*, 54 C. 30—But see *Surendra Krishna* v. *Bhubaneshwari*, 60 C. 54.

(p) *Mayor of Lyons* v. *Advocate-General of Bengal*, 26 W.R. 1.

(q) *Bejoychand* v. *Chatterjee*, 41 C. 37.

IMPARTIBLE ESTATES

Creation and nature of an impartible estate.—An impartible estate might have been created by a grant of the Sovereign or by custom or by a family arrangement followed up in practice for many generations. The impartibility of an estate does not make it necessarily the separate property of the holder. No doubt even where an impartible estate is the property of a joint family, custom has deprived the members other than the holder of the estate of their right

(i) to claim a partition of the estate,
(ii) to restrain unauthorised alienations by the holder and
(iii) to claim maintenance.

But the right of survivorship is not inconsistent with the custom of impartibility and the birthright of the senior member to take by survivorship still remains.(r) But an impartible estate may also be the separate property of the holder. Where an impartible zamindari has been acquired by him or his branch as a self-acquisition, the other undivided members of his family take no interest in it and it descends as the separate property of the acquirer. Besides, a joint family impartible estate may become the separate property of the holder by all the other members renouncing their claims to it.(s) But in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint with reference to that estate, it is necessary to prove by strong and cogent evidence an intention, express or implied, on the part of the junior members to renounce their right of succession to that estate. Neither the fact that the junior members have been separate in food and worship for a considerable period of time nor the fact that they have exercised their right of partition over their partible property can divest them of their right of succession to the impartible estate.(t) But where the holder of an ancestral impartible estate, in the exercise of his absolute powers of alienation gives that estate absolutely to one of his sons to the exclusion of the others, that son takes it as his separate property as against his brothers, so that on his death without male issue, his widow is entitled to succeed to that estate to the exclusion of his undivided brothers.(t)

Incidents of an impartible estate.—(1) In the absence of a custom to the contrary, an impartible estate is alienable by will as well as by transfer *inter vivos*.(u) (2) Except the sons of the present

(r) **Baijnath v. Tej Bali, 43 A. 228 (P.C.).**
(s) **Konammal v. Jadaya Gounder, 51 M. 189.**
(t) **Ulagalum Perumal v. Subbalakshmi Nachiar, 1936 M. 721 affirmed by Privy Council in 49 L.W. 621.**
(u) **Shib Prasad v. Rani Prayag, 59 C. 1399 (P.C.).**

or the previous holder of an ancestral estate, a junior member of the family cannot claim maintenance in the absence of a custom in his favour.[t-a] (3) Immovable properties in the nature of improvements on the estate form part of the estate and descend with it to the person entitled to the main estate.[u] (4) Where the self-acquisitions of the holder consist of both movable and immovable properties, his power to make them accretions to the estate is confined only to his immovable properties and does not extend to the movable or the income of the estate.[v] (5) The estate descends to a single heir, primogeniture being the rule of succession. Primogeniture may be general or lineal. In the case of the former, a relation who is nearer in degree though in a junior line is to be preferred to one in a senior line who will be the preferential heir under the rule of lineal primogeniture. In other words, degree prevails in general primogeniture, while line prevails in the lineal primogeniture. But ordinarily an impartible estate is governed by the lineal primogeniture and not the general primogeniture.[w] Among sons of the deceased holder, the senior-most in age, though the son of the junior wife, excludes the others though they are born to the senior wives of the last holders.[x] But a younger son of the wife taken from a superior class excludes a senior son of an inferior wife[y] and an *aurasa son*, though junior in age, excludes the adopted or the illegitimate son.[z]

Position of females.—If an impartible estate is the family property of a joint undivided family, the person entitled to succeed will be designated by survivorship and no female can succeed so long as there is a male member of the joint family qualified to take. But if the estate is held by one who is the sole surviving coparcener or it is his separate property, though he himself is a member of a joint family, on his death without male issue, the estate passes to his widow, daughter or daughter's son as in the case of the ordinary separate property of a coparcener.[a] If a separated holder of an impartible estate dies leaving a widow and an illegitimate son, the former excludes the latter in the matter of succession. An impartible estate governed by the Dayabhaga law, though ancestral, partakes of the nature of the separate estate of its holder under the

(t-a) *Rama Rao* v. *Rajah of Pittapur*, 41 M. 778 (P.C.). This case has been explained by a recent Madras case where it is held that every junior member of the family including an illegitimate son of such member is entitled to maintenance: *Maharajah of Venkatagiri* v. *Rajeswara*, 49 L.W. 717.

(u) *Shib Prasad Singh* v. *Rani Prayag*, 59 C. 1399 (P.C.).

(v) *Debi Baksh Singh* v. *Chandraban*, 32 A. 599 (P.C.).

(w) *Ramalakshmi* v. *Sivanatha*, I.A. Sup. 1.

(x) *Ramaswami* v. *Sundaralingaswami*, 17 M. 422.

(y) *Jogendra* v. *Nityanund*, 18 C. 151 (P.C.).

(z) *Katama Natchiar* v. *Raja of Shivaganga*, 9 M.I.A. 539.

Mitakshara, and among claimants of the same degree of relationship, the full blood will exclude the half blood.(b)

THE LAW OF THE MALABAR TARWAD

Constitution of a Malabar Tarwad.—Malabar, popularly associated with magic and mysteries, differs in its law of joint family and succession from the rest of India, having a code of morals comparable to that of companionate marriage in the Western World. Marumakkattayam and the Aliyasantana are the two kindred systems of inheritance obtaining there in which descent is traced in the female line, both the words meaning inheritance to the sister's son. Another peculiar institution common to these systems is that of the tarwad which consists of a group of persons descended in the female line from a common ancestress.

The essential features of a tarwad are: (i) impartibility of the joint estate except by the conjoint will of all its constituent members (ii) non-recognition of marriage as a legal institution, (iii) descent being traced through females, (iv) the management being vested in the senior-most member, the others having only the right to maintenance and (v) exclusion from membership of the issue of the male members of the tarwad. Thus in the case of a woman belonging to a tarwad, all her daughters and sons and all the descendants, whether male or female, of such daughters in the female line will belong to that tarwad, but the descendants, whether male or female, whether in the male or in the female line, of her sons cannot claim to be members of the tarwad. A tarwad may consist of several tavazhis. A tavazhi means the group of persons consisting of a female, her children and all her descendants in the female line.(c) Thus some of the female members of a tarwad may each have a tavazhi of her own. Thus when a tarwad consists of a brother and his sisters, one of the sisters with her children and all her descendants in the female line constitute a tavazhi as distinct from the tavazhi of another sister consisting of herself, her children and all her descendants in the female line. Thus in one sense a tarwad is a larger tavazhi, because even a tarwad consists of members who trace their descent through the female line from a common ancestress.

Like the Hindu coparcenary the tarwad or the tavazhi is a creature of law and cannot be created by act of parties.(c) There cannot be a tavazhi consisting of a woman and only some of her children, and such a corporate unit being unknown to Hindu Law, it is not open to a person to create such a corporate unit. Even

(b) *Neelkisto* v. *Beerchunder*, 12 M. I.A. 523.

(c) *Moithiyan* v. *Puthiyapurayil*, 28 L W. 491 at 493.

marriage does not transplant a woman from the tarwad of her mother to the tarwad of her husband and the only means by which strangers can be made members of a tarwad is by adoption which can be resorted to only when the tarwad is threatened with extinction and the consent of all its members is obtained.[d]

In the following sections only the incidents of the Marummakkattayam system are considered, the Aliyasantana system differing from it only in some very minor particulars, these being :

(i) While under the Marumakkattayam law, the eldest male is the Karnavan or manager of the tarwad, under the Aliyasantana law, the eldest member of the tarwad, whether male or female, is entitled to be the manager ;

(ii) While under the former system, the separate property of a male member is on his death taken by his tarwad,[e] under the latter system it goes to his nearest heir ;[f]

(iii) While under the former system, the females generally reside in their own tarwads, in the latter they usually reside in the tarwads of their husbands, and

(iv) While inter-caste marriages in the former system are common and not disapproved, such marriages in the latter system are viewed with an amount of disapprobation and censure as being mere illicit relationships, though not involving degradation or excommunication.

Management of the tarwad.—The management of a tarwad vests in the eldest male member of the tarwad except that the eldest female member may be such manager when there is a custom to that effect or there is no male member of the tarwad. Such a manager, when a male is known as the Karnavan, and when a female as a Karnavathi. A Karnavan, who is in the position of the manager of a Mitakshara joint family, may administer the estate for the benefit of the family according to his own discretion, and is the representative of the tarwad in all transactions affecting it. His position is fiduciary in respect of the junior members, who are known as Anandravans, and he has no larger right of ownership than any such member. He can incur debts and alienate tarwad properties so as to be binding upon the whole tarwad for purposes of its necessity or benefit and the position of the alienee from him is the same as that of an alienee from the manager of a Mitakshara joint family. The rights of junior members are confined to maintenance, to preventing the Karnavan from wasting or improperly alienating the tarwad property, to suing for his removal for incom-

(d) *Thathamangalath* v. *Krishna*, 39 L.W. 370 ; *Vasudevan* v. *Secretary of State*, 11 M. 157 ; *Ramon Menon* v. *Raman Menon*, 24 M. 73.

(e) *Govindan* v. *Sankaran*, 32 M. 351.

(f) *Antamma* v. *Kaveri*, 7 M. 575.

petence or for bad or fraudulent management and to succeed to the Karnavanship by virtue of seniority on the death or removal of the previous Karnavan.

It is a matter of frequent occurrence in Malabar that members of a tarwad agree by means of Karars to have the rights of the existing Karnavan restricted in certain particulars either by compelling him to associate some other junior members with him in the management of the tarwad property or by putting other restrictions on his power.

Maintenance.—As an incident of a junior member's proprietary right in the property of the tarwad, there is in him or her the right to be maintained out of the tarwad income. This right cannot be denied by the Karnavan either on the ground of that member's misbehaviour or on the ground of his possession of separate property.(g)

Though the general rule is that a junior member is not entitled to separate maintenance, the rule is subject to exceptions.(h) Thus a junior member of the tarwad living away from the tarwad house for a good and proper cause is entitled to claim separate maintenance out of the tarwad estate; but the onus of proving such cause is on that member. The female members of a tarwad living away from the tarwad house with their husbands employed elsewhere are entitled to claim such separate maintenance for themselves and their children living with them, since their living away is one for proper cause. So also a junior member leaving the tarwad house to live elsewhere to practise a profession for which he has qualified himself should be taken to live outside the tarwad for a proper cause and it does not matter whether such member practises his profession in a place near the tarwad or far away from it. In addition to the above grounds which would sustain a claim for separate maintenance, there may be other grounds which, on social or economic reasons, may be considered proper.

Marriage.—Independently of any legislative enactment the law of Malabar does not recognise marriage as a legal institution, the relation being in truth not marriage, but a state of concubinage into which the woman enters of her own free choice and is at liberty to change when and as often as she pleases. The forms of such unions usually called sambandhams vary according to the custom of the locality or community, but owing to the general feeling against polyandry of which these are the modern survivals and considering the expediency of enabling persons following the Marumakkattayam or Aliyasantana law of inheritance to contract

(g) *Tegan* v. *Raghavan*, 4 M. 171. (h) *Peru* v. *Ayyappan*, 2 M. 282.

marriages which shall be recognised by Courts of law as legal marriages and to provide for the issue of such marriages the Malabar Marriage Act (Madras Act IV of 1896) was passed allowing registration of marriages, but so far as the people following the Marumakkattayam law are concerned, the said Act has been superseded by the provisions of the Madras Marumakkattayam Act, 1933.

Adoption.—Adoption is of rare occurrence in Malabar and is purely a secular act without any religious significance undertaken to perpetuate a tarwad which has approached the brink of extinction. Usually the adoption is made of a girl, for, the adoption of a boy does not subserve that purpose as his descendants cannot become members of a tarwad for purposes of perpetuating it. But there is no objection to the adoption of a male[i] or to the number of persons adopted[j] or to the age of the adopter[k] or adoptees. But an adoption can never be made to a member or branch of a tarwad but to the tarwad as a whole,[l] and though it is made by the Karnavan of the tarwad it can be made only after consulting all the members of the tarwad.[l] Where the adoption is made only of a member or some of the members of another tarwad, the adoptees lose their rights in the tarwad of their birth, but if all the members of a tarwad are adopted, the adoptees do not lose the properties of that tarwad but continue to hold them as their separate properties distinct from the properties of the adoptive tarwad.[m]

Partition.—Except when all the members of the tarwad consent there can be no partition of its properties.[n] If there are minors in the tarwad they have to be properly represented by other adult members and their interests protected. Otherwise on their attaining majority the partition is liable to be reopened.[o] When a partition does take place with the concurrent will of all the tarwad members,[p] the arrangement is not on the *stirpital* but on the *per capita* basis. Now under the Madras Marumakkattayam Act of 1933, which, however, applies only to persons governed by Marummakkattayam law, it is not necessary that all the members of the tarwad should consent for a valid partition. Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad provided that if there is an ancestress common to that tavazhi and any other tavazhi of the tarwad her consent is obtained for such separation.

(i) *Subramanyam* v. *Parameswaran*, 11 M. 116.

(j) *Moore's Malabar Law*, P. 33 S.A. No. 19 of 1874; *Kunja* v. *Aiyappan*, 9 Tr.L.R. 100.

(k) *Vallappa* v. *Paru*, 9 M.L.J. 196.

(l) *Raman* v. *Raman*, 24 M. 73=10 M.L.J. 245; *Chandu* v. *Subbu*, 13 M. 209.

(m) *Velayudhan* v. *Ramaswami*, 7 Tr.L.R. 66.

(n) *Veluthakkal* v. *Kalappan*, 31 M.L.J. 879.

(o) *Ibid. Narayani* v. *Achuthan*, 42 M. 292.

(p) *Ranga* v. *Unnikutti*, 24 M. 275.

Inheritance.—Religious efficacy not being a ground of preference in succession among the people governed by the Marumakkattayam law, the only test that ought to be applied to determine the preferential heir must be the test of propinquity or nearness of blood. But group succession being the rule among these people, the question arises whether when a person having separate property dies, his property should be taken by the tarwad of which he was a member or by the tavazhi to which he belonged. Applying the test of propinquity, it is the tavazhi that must succeed and not the whole tarwad. But while the separate property of a female member would be taken by her tavazhi[q] that of a male member would be taken by the tarwad[r] subject to the exception that if the property of the male member has been acquired with the help of the tavazhi property, that property would be taken only by the tavazhi[s]. When there are several tavazhis, they having separated from one another, on the extinction of a tavazhi by the death of its last member, the tavazhi from which the extinct tavazhi separated last succeeds to its properties in preference to others, though more nearly connected with it by blood[t]. [For changes effected in the Marumakkattayam law, see the recent Marumakkatayam Act of 1933 printed elsewhere at the end of the chapter on The Law of the Malabar Tarwad.]

(q) *Krishnan* v. *Damodaran*, 38 M. 48.
(r) *Raman* v. *Madhavan*, 1927 M. 244; *Govindan* v. *Sankaran*, 32 M. 351.
(s) *Komu* v. *Ittiatha*, 10 M.L.J. 57.
(t) *Gopala* v. *Raghavan*, 21 L.W. 215= 1925 M. 460.

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