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KHASA FAMILY LAW

A Thesis presented for the degree of Doctor of Laws
to the London University

THE
KHASA FAMILY LAW
IN THE
HIMALAYAN DISTRICTS OF THE UNITED PROVINCES INDIA

BY

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To The Honourable

Sir EDWARD GRIMWOOD MEARS,

Kt., K.C.I.E.,

Chief Justice of the High Court of

Judicature at Allahabad,

THIS WORK IS BY HIS LORDSHIP'S KIND PERMISSION

RESPECTFULLY DEDICATED.

PREFACE

WHEN Mr. A. Sabonidiere, I.C.S., Professor in Indian Law in the University of London, suggested to me that for the degree of Doctor of Laws I should undertake research in Kumaon land tenures and Kumaon customary law, I had not the least notion that I was embarking on an extremely interesting and profitable study. As a lawyer I was trained to regard Hindu law to a great extent as the common law of the people professing the Hindu religion, and the practice of the Kumaon courts did nothing to change that view. I looked with others on the peculiar rules of Kumaon customary law merely as isolated departures from Hindu law, found among all the Hindus in the Kumaon hills except a few families who had migrated there in historical times. After a study of some books on Historical jurisprudence, I began to feel that the Kumaon customary law has been viewed from the wrong end of the historical telescope. Subsequent studies confirmed this belief. A careful and searching analysis of the Kumaon customary law revealed a rich find of primitive Aryan social organization and family law among the Khasas.

Our notions of family and property law do receive a rude shock when dealing with communities whose social organization is archaic and different from ours. The customary law of an ancient tribe or people is greatly endangered and invariably suffers when it comes in contact with a socially progressive and politically powerful people. The Khasas are no exceptions to this rule. Some

of their well established customs have become obsolete as the British courts refused to enforce them. A mighty cultural awakening and an economic advancement have been going on among the Khasas at least during the last sixty years of British rule. Some of them are thus in a transitional stage and their ideas are slowly emerging from primitive conceptions of family law. The task of a Judge is thus very delicate. He must be ever on his guard to avoid confusion between shadows of past practices and living customs.

The Khasas are probably the descendants of early Aryan immigrants in India. Their family law has not been fully investigated or systematically studied in the past. I have undertaken that task in this study. I have not only exhausted all the published material on the subject, but have drawn on the information obtained by special local enquiries made for this study. I have endeavoured to show, not only what the Khasa Family law is and its organic character, but also how and why it differs from the present day Hindu law. My attempt has been to state the rules of the Khasa Family law, the origin and growth of peculiar customs and the legal ideas underlying them. The subject has been approached in the light of Historical and Comparative Jurisprudence, and the organic relation of the customary law to the life of the Khasas has been pointed out. Historical Jurisprudence is only ideological and not chronological.

Matriarchal survivals and polyandry among the Khasas have been specially dealt with and the nature and the juridical significance of the peculiar Khasa customs known as Gharjawain, Jethon, Jhantela, Sautia Bant and Tekwa have been discussed. The result of compara-

tive study has been twofold. The remarkable similarity of the Khasa Family law with the Punjab customary law, notably with the customary law in the Kangra hills, has been made out. In its relation to Hindu law the Khasa law proves itself to be a primitive version of the present day Hindu law. Though essentially secular, it is in a great measure a fair picture of the family law as found in some of the Dharma-Sutras and Dharma-Sastras. The similarity between the juristic conceptions underlying the Khasa law and the early Hindu law which I have attempted to show will, I hope, prove to be of more than mere local interest and particularly appeal to students of Hindu Historical Jurisprudence.

The Khasa Family law is still traditional in some points. In order to find out the true rule of customary law questions (Appendix A) were prepared and sent over to some gentlemen in the Kumaon division. I gratefully acknowledge the kind assistance which was received from Mr. N. C. Stiffe, O.B.E., Commissioner of the Kumaon division, and Mr. H. Ruttledge, Deputy Commissioner, Almora. They were so good as to ask Pandit Kailash Chandra Trivedi, Deputy Collector, to answer the questions after a local enquiry.

The following gentlemen answered the questions sent to them, and some of them made special enquiries for the purpose :—

(1) Rai Bahadur Pandit Badri Dat Joshi, Government Pleader, Naini Tal.

(2) Rai Bahadur Pandit Tara Dat Gairola, M.A., LL.B., Vakil Garhwal.

(3) Pandit Bhola Dat Pant, B.Sc., LL.B., M.B.E., Deputy Collector, Garhwal.

(4) Pandit Chandra Dhar Juyal, B.Sc., LL.B., Deputy Collector, Almora.

(5) Rai Sahib Lala Jai Lal Sah, Vakil, Naini Tal.

(6) Pandit Kailash Chandra Trivedi, Deputy Collector, Lohaghat, Almora.

(7) Lala Har Kishan Sah Thulgharia, Pleader, Lohaghat, Almora.

(8) Pandit Ghana Nand Joshi, Assistant Inspector of Schools (retired), Almora.

I am conscious of the trouble that these friends and relations took in the matter and sincerely thank them.

My thanks are due to my dear brother, Pandit Bhairab Dat Joshi, for sending over books not available in England, with the greatest promptitude. I am obliged to Mr. V. Stowell, O.B.E., for reading my notes on the Khasa Family Law. I have to thank Pandit Kishan Lal Nehru, M.A., LL.B., of the Meerut Bar, for reading through the proofs and helping me in the preparation of the index. I am conscious of the strain that the manuscript copy of this book caused to the staff of the Government Press, Allahabad, and I take this occasion to express my thanks to it. My last pleasant duty is to thank the librarians of the Middle Temple and India Office, where I mostly worked in England, for invariable courtesy and consideration received.

LAKSHMI DAT JOSHI.

High Court, Allahabad.
22nd May, 1929.

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CHAPTER I

INTRODUCTION

SCOPE OF THE STUDY

IN the following pages an attempt has been made to state the customary law of a people resident in the Himalayas, and known as the Khasas or Khasiyas. They are the lineal descendants of a wave of immigrants probably pre-Vedic in date but Aryan in race.

It would appear that in ancient times the Khasas occupied a large area from Kashmir to Nepal in the Himalayan region of India. This study is confined to the family law of the Khasas in the Himalayan districts of the United Provinces in India. The classical designation of "Khasa" has been chosen to indicate the present day "Khasiyas" and "Khas-Brahmans" in these hills.

The interest of this study is twofold. It reveals a body of law which though applicable to a Hindu people, differs from the recognized systems of Hindu law in certain vital points. It also helps to illustrate the tenacity of traditional customary law in the absence of external cultural forces and gives us a fair picture of the family law of the early Hindus.

We begin our study with matriarchal survivals among the Khasas, and the curious community of the Nayaks rivets our attention in that connection. The Nayaks invariably bring up their daughters as prostitutes and so their family organization is of great interest. It is patri-lineal and matri-lineal at the same time. The polyandrous Khasas form in a way another exceptional community with their barbaric ideas of marital relationship.

But this study is chiefly confined to the family law of the non-polyandrous Khasas. Primitive ideas based upon the absolute dependence of women run through the entire social system. A woman was little better than a chattel, and marital rights were in a great measure rights of property. Marriage among the Khasas is not a sacrament but a secular transaction in which, apart from contract between the parties or their guardians, the main features are the transfer of dominion over the woman for consideration and her actual or constructive appropriation as wife. Divorce and widow marriage are practised without any social odium. A Khasa marriage substantially resembles a "Free" Roman marriage and is as easily dissoluble. The primitive ideas of paternity are disclosed by the custom of keeping a Tekwa, which is a rude sort of Niyog, and the children of the widow by a "Tekwa" are affiliated in law to her deceased husband. Another peculiar affiliation is that of the *Jhantela* or the infant son who follows his mother to her second husband's house. The influence of Brahmanism has given a touch of social inferiority to the children of a remarried woman, but has not affected their legal position.

The incidents of a Mitakshara joint family are not observed. The Khasa family was essentially patriarchal and the father exercised despotic powers over his children in the past and has even now a pre-eminent position. The sons are not entitled to demand a partition of the family land against the wishes of the father, but have a vested interest in ancestral land and can restrain its unjust alienation by him.

As succession is strictly agnatic, daughters and their sons are excluded from inheritance; but in the absence of male issue they can inherit provided the daughter with her husband lives in her father's house. We have considered the juridical significance of this "Gharjawain" institution and find it is analogous to the "special appointment" of a daughter in early Hindu law.

The Khasa Family law regarding adoption, succession, widow's estate, separate property of women and maintenance has been next discussed. Its remarkable similarity with the customary law of the agriculturists in the Punjab and the minor variations from the latter have been noticed.

This study attempts to find out the customary law on each point discussed, to see the legal ideas it discloses, and to explain the custom and trace its origin where it is possible to do so. The family law of the Khasas has also been compared with the main features of the Punjab customary law. Tribal law in the Punjab varies, but there are some basic ideas which are common to most agriculturists. The rules of customary law in both places operate to preserve a higher organism, i.e. the village community. The Khasa Family law has also been compared with Hindu law and reference has been made to relevant

texts of the Hindu sages to show how far the Khasas disclose the early juridical ideas of the Hindus. The conclusion reached is that the Khasa customary law is a primitive version of the present day Hindu law and substantially represents a stage of Hindu society anterior to that later growth and development of the law of the Hindus which occurred under the influence of the Brahmans.

HIMALAYAN DISTRICTS DEFINED

The Himalayan districts of the United Provinces of India in this study signify the British districts of Almora, Garhwal, the hill pattis of Naini Tal, tahsil Chakrata of Dehra Dun and the independent state of Tehri or foreign Garhwal. It is the tract within the Himalaya bounded by the Tons on the west and the Kali or Sarda on the east. These districts with the Dehra tahsil in Dehra Dun district and the Tarai tahsils of Naini Tal district form one of the natural divisions of the United Provinces, and are called Himalaya west in the census reports of the province since 1901. The Tarai tahsils of Naini Tal belong geographically, ethnically and socially to the Rohilkhand division[1].

Area and population.—The area, the number of towns and villages, occupied houses and the population of the Himalayan districts are shown in Tables I and II, Appendix B. According to the census taken on 18th March, 1921 the area is 16,060 square miles and the total population is 1,449,572. At the census of 1865 the number of Khas-Rajputs or Khasiyas was shown separately. The Khasiyas were returned as Sudras in Garhwal and as Kshatriyas in Kumaon, i.e. Almora district and

[1]Census Report, N.-W. P., 1882, p. 31.

the hill pattis of Naini Tal district. They numbered 311,817 in Kumaon and Garhwal, and formed nearly half the entire population of these districts[1]. Since 1881 all the Khasiyas are shown as Rajputs. The Khas-Brahmans have never been shown separately in the Census Returns. They are included in the column of "Brahmans without distinction" in Table 3, Appendix B. As the Khasas form about 90 per cent. of the entire Brahman and Rajput population in the Himalayan districts, they would number over 820,000 at the present day[2].

VILLAGES OF THE KHASAS AND THEIR OCCUPATION

The Khasas live in a mountainous country which adjoins Tibet on the north. "The hills consist of a seemingly endless series of ridges and valleys, each ridge or spur leading up to another in a tortuous chain and each valley a stream bed leading down into a larger valley"[3]. The peaks and ridges vary in height, and cultivation in high altitudes is difficult or impossible. In the lower ranges land afforded by nature for cultivation is small. The hill people have tried to remedy this deficiency by cutting down the hill slopes into terraced fields[4]. A portion of every ridge, particularly at the top, does not repay the labour and expense of terracing. It is generally covered with forest, and is used for pasturage. The valleys are generally small and quite fertile. "Each village usually comprises a strip of the hillside of more or less width and running from the stream at the bottom of the valley up to the top of the ridge, where it meets

[1] Table III, Appendix B.
[2] Atkinson, XII, 430, 431, about the proportion of the Khasas to the entire Brahman and Rajput population.
[3] K.L.T., p. 9.
[4] Batten's Report, p. 3.

the boundary of some village in the valley beyond the ridge. From the villages that lie in the same valley on either side of it, it is divided by some natural boundary such as a torrent bed or a spur of the hill''[1]. ''From the nature of the arable land in this province (Kumaon) it rarely occurs that such quantity exists in any one spot as to require the labour of a large resident population; the villages are consequently, with a few exceptions, universally small and are in fact nothing more than detached hamlets, scattered along the sides and bases of the mountains, wherever facilities for cultivation are afforded''[2].

The country is thinly populated. With the exception of the hill stations of Naini Tal, Ranikhet, Almora, Lansdowne and Chakrata, the population is entirely rural. The villages are generally very small. In 1921 the number of villages with population under 500 in Almora, Garhwal and Tehri-Garhwal was as follows[3]:—

District or state.	Total inhabited towns and villages.	Total population.	Towns or villages. Under 500 in population.	
			Number.	Population.
Almora	5,093	530,338	5,049	487,993
Garhwal	3,387	485,186	3 343	450,987
Tehri-Garhwal ..	2,736	318,414	2,734	313,224

There are less than 3 villages per 4 square miles, and this large rural population is supported by agriculture. More than 90 per cent. of the people in Almora, Garhwal and the Tehri State are agriculturists[4]. They are mostly

[1]K. L. T., p. 9.
[2]Batten's *Official Reports on the Province of Kumaon* (1851), p. 11.
[3]Census Report, 1921, XVI, Part II, Table III, p. 10.
[4]*See* Table 2 (Appendix B).

cultivating proprietors. "The Almora district, like the rest of Kumaon, is a land of small proprietary holdings, each man owning and tilling his own land. There are very few large zamindars, and those that exist in the Pali pargana approximate more to the type of superior proprietors with few legitimate rights beyond the collection from the real owners of the soil of an allowance for malikana"[1].

HINDU POPULATION OF THE HIMALAYAN DISTRICTS

According to Mr. Atkinson[2] the Hindu population of these districts consists of—

1. The aboriginal or at least long-settled tribes of Khasiya Brahmans and Rajputs and their followers the Doms.
2. The Hindu immigrants from the plains belonging to all classes.
3. The Tibetan immigrants in the Bhotiya tracts.
4. Mixed classes.

By the mixed classes he means the natives of hills who have been converted to Christianity or Mahomedanism. The Tibetan immigrants in the Bhotiya tracts are called the Bhotiyas. Their Tibetan origin or admixture with Mongolian blood is unmistakeably written in their physical features.

"Personal appearance, language, religion, customs and tradition all unite in pointing to the origin of the present inhabitants of Bhotiya mahals to the adjoining Tartar province of Tibet"[3].

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[1] *Almora District Gazetteer*, p. 54.

[2] Atkinson's *Gazetteer*, Vol. XII, p. 420.

[3] Batten's *Official Reports on the Province of Kumaon* (1851), p. 89.

BRAHMANS IN KUMAON.

The Hindu immigrants from the plains consist of the Vaishyas, Brahmans and Rajputs who are called the high castes in order to distinguish them from the indigenous Khasas. Mr. Atkinson has given details about the immigrant Brahmans in Kumaon (Vol. XII, pp. 421—428). The traditions about the settlement of many such families are amply confirmed by pedigree tables and grants from the early kings of Kumaon. Nearly all the high caste Brahmans and Rajputs claim to have migrated to these parts, at the earliest, a thousand years back, with the exception of Suraj Bansi Thakurs who have a tradition that they came from Oudh 2,000 years back[1]. Most of them have retained in practice the rules of orthodox Hinduism and intermarry accordingly; but some have given up those rules and by intermarriage with the indigenous Khasas are reduced to just high class Khas-Brahmans or Khas-Rajputs.

KHAS-BRAHMANS IN KUMAON

Mr. Atkinson says that his lists give some 250 septs of Khasiya Brahmans of whom the majority are cultivators and plough the land themselves. Whereas Brahmans in general may not touch a plough. "Nearly 90 per cent. of the Brahmans in Kumaon belong to the Khasiya race and are so classed by the people themselves. The Khasiyas never tried to connect themselves with the plains until of late years, when they see that such connection adds to their personal dignity, and they now prefer to be thought 'Normans' and 'Saxons' rather than

[1] *See* note and statement of Captain Fisher, Senior Assistant Commissioner, dated 18th March, 1866, in Plowden's Census Report, 1865, Appendix B, pp. 27-28.

'Britons' ''[1]. The septs of these Brahmans are either occupational or named after their villages.

BRAHMANS IN GARHWAL

The census statistics of 1872[2] showed 81,038 Brahmans in Garhwal, of which 62,803 were Gangaris (Gungadi). The highest position in the social order is assigned to the Sarolas. The Gangaris are inferior to the Sarolas, but there is no marked line of difference between the two classes. The two sub-castes intermarry.

Political power in Kumaon and Garhwal, as in many other places, has been to a great extent the foundation of social eminence. In saying that "the pretensions of the several sub-castes to social positions are mainly due to political causes"[3] Mr. Gairola is in substantial agreement with Mr. Atkinson, and there is no reason to doubt the correctness of these remarks on the evidence available at present[4]. For the purposes of this study the point to notice is that "the names in the long list of so-called Brahman castes in Garhwal may be divided into indigenous or Saka, comprising those recorded as Sarola, Gangaris and Khasiya, and the immigrants from plains"[5]. The names of the sub-castes are mostly derived from the *that* or village of origin of the sub-division[6].

RAJPUTS IN KUMAON AND GARHWAL

The Khasiyas recorded in the census of 1872 came to 124,383. In Kumaon, since 1881, the Khasiyas or

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[1]Atkinson's *Gazetteer*, Vol. XII, p. 430.
[2]Census, N.-W. P., 1872, 1872, Vol. I, p. 170.
[3]Mr. Gairola's "The Castes and Sub-castes in Garhwal" in the *Journal United Provinces Historical Society*, May, 1922, p. 44.
[4]Atkinson, XII, 269.
[5]Atkinson, XII, 272.
[6]Atkinson, XII, 268.

Khas-Rajputs are shown as Rajputs only. "Here as in Garhwal more than 90 per cent. of the Rajputs are Khasiyas and belong to that race as distinguished from the immigrants from the plains"[1]. Rajputs who claim descent from the immigrants from the plains are in Kumaon (1) the Suraj Bansi Katyuris represented by the Rajbars of Askot and Jaspur, the Manurals and others, (2) the Raotelas, i.e. the legitimate and illegitimate descendants of the Chands. The great mass of the Rajputs both in Kumaon and Garhwal are Khasiyas or Khas-Rajputs, and they are called after the villages inhabited by them. In some cases the special names of the septs are occupational and connected with the services rendered to the Raja, e.g. the Darmwals provided pomegranates (*darim*) to the Raja and Batanniyas sifted the flour[2]. The immigrant Rajputs came mostly as soldiers of fortune to seek service under the Hindu kings in Kumaon. "The native princes had never enlisted any strangers as sepoys in their armies, but the brave and warlike tribes, invited by them from time to time from other countries for this purpose, settled here permanently in villages granted to them for their service as soldiers, and as a militia force, to be available in time of war"[3]. A large number of them by intermarriage with the Khasas adopted their customs and family law.

THE KHASAS AND DOMS FORM THE MAIN HINDU POPULATION OF THE HIMALAYAN DISTRICTS

"In the hills, excluding castes from the plains and immigrants from Tibet, three main castes are found—

[1] Atkinson's *Gazetteer*, Vol. XII, 431.
[2] Atkinson's *Gazetteer*, Vol. XII, 439.
[3] Pandit Ganga Dat Upreti, *Descriptive List of the Martial Castes of the Almora District*, p. 2.

the Brahmans, Rajputs and Doms. The two first of these are divided into Brahmans and Rajputs proper and Khas-Brahmans and Khas-Rajputs. Popular opinion considers the Khas-Brahmans and Rajputs as partly the original inhabitants of Kumaon and partly as degraded Brahmans and Rajputs''[1]. We are concerned in this study with the family law of the Khasas only.

The Doms.—According to the census of 1921 there were 285,872 Doms in the Himalayan districts. They are treated as untouchables and are unusually black for residents of a cold country. The Doms or hill depressed classes are divided into many occupational sub-castes and are named accordingly[2]. Before the British conquest their position was one of abject servility. ''They are found wherever the Khasiyas are found, living with them in a state even now not far removed from serfdom''[3]. They are not allowed to use and befoul the water meant for their betters[4]. The Doms form a distinct community and have a quarter to themselves in the village called Dumaura or Dumtola. ''They represent the aborigines of Kumaon and claim to have been in the country before either the Khasiyas or immigrants from the plains were known''[5]. Mr. Crooke says, ''In the Himalayan districts of these provinces the Dom has been recognized as a descendant of the Dasyus of the Veda, who are supposed to have held Upper India before the advent of the Naga or Khasa race''[6].

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[1] *Census of India*, 1901, Vol. XVI, p. 216.
[2] Census Report, 1921, Vol. XVI, Part II, 228, Table IV (Appendix B).
[3] *Garhwal Gazetteer*, p. 62, Dunlop, ''Hunting in the Himalaya,'' p. 183.
[4] *Garhwal Gazetteer*, p. 64.
[5] Oakley, *Holy Himalaya*, p. 42.
[6] W. Crooke, *The Tribes and Castes of the N.-W. P.*, Vol. II, p. 332. *See* R. G. Latham, *Ethnology of India* (1859), p. 11; J. F. Watson and Sir J. W. Kaye, *The People of India*, Vol. IV, p. 174.

The physical characteristics of the Doms, their animistic religion[1] and the state of abject slavery in which they were found in the beginning of the British rule fairly suggest the conclusion that they are the aboriginal inhabitants of these hills whom the Khasas conquered and reduced to slavery in the remote past[2].

KHASAS IN THE PURANAS AND EARLY LITERATURE

The word "Khasa" is familiar to the students of Puranic and epic literature. "Khasiras" are mentioned in the Vishnu Purana. It is thought that Khasas are indicated thereby[3]. In Markandeya Purana Khasas are mentioned in four places. They are mentioned as a mountain tribe with the Niharas and Gurganas[4]. Mr. Pargiter suggests that the Niharas may be the Newars of Nepal and the Gurganas, the Gurungs in that country. The Khasas seem to be the Khas of Nepal and the Khasiyas of Kumaon and Garhwal. It is interesting to note that the ancient name of these Himalayan districts was Khas-des[5] (i.e. country of the Khasas). In Canto LVIII, 7, 12 and 51 of this Purana the Khasas and Sakas with other tribes are said to be living in Madhya-desa (the middle country, i.e. the basin of the Ganges from the Punjab as far as the confines of Bihar) and also in the north and north-east of India.

[1]Crooke, *ibid*, Vol. II, p. 333. "It is the Doms who preserve to the present day the pure demonism of the aborigines, while the Khasiyas temper it with the worship of the village deities, the named and localised divine entities, and furnish from their ranks the priests."

[2]Atkinson, XII, p. 277. Mr. Atkinson calls the Doms "The serfs of the Khasiya race from Afghanistan to the Kali. Wherever the one exists the other is sure to be found."

[3]Wilson's *Vishnu Purana* (1840), p. 195, note 157.

[4]Pargiter's *Markandeya Purana* (1904), Canto LVII, 56, p. 345.

[5]Atkinson's *N.-W. P. Gazetteer*, XII, p. 275.

The Bhagvata Purana mentions the Khasas as one of the outcast tribes which recovered salvation by adopting the religion of Krishna[1]. The statement probably refers to the gradual permeation of Brahmanical ideas among these people.

In the Vayu Purana the Khasas are one of the tribes which Sagara would have destroyed but for Vasishtha's intervention[2]. In the Brihat Samhita of Varahamihira the Khasas occur several times. The book at the latest belongs to 6th century A.D.[3] The Khasas are mentioned with the Kulutas (i.e. residents of Kulu), Tanganas and the Kashmiras[4]. The Khasas have been put by Varahmihira in Eastern India[5] in his famous Chapter on Geography, and then on the north-west[6]. North-east is an obvious mistake for north-west, as Kashmir and Kulu can hardly be put on the north-east of India.

The Hari Vansa[7], like the Vayu Purana, records the conquest of the Khasas by King Sagara, and they are said to have participated in the attack on Mathura by the Yavanyas (Greeks)[8].

The Rajtarangini or Kalhan's famous chronicle of Kashmir, which was written in 12th century A.D., is full of references to the Khasas. Sir Aural Stein has confined them to a comparatively limited region comprising

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[1] *Bhagvata Purana* II, IV, 18.
[2] Wilson's Works (1866), Vol. VIII, 292.
[3] Grierson's *Linguistic Survey of India* (1916), Vol. IX, Part IV, p. 5.
[4] *Brihat Samhita*, X, 12.
[5] *Brihat Samhita*, XIV, 6.
[6] *Brihat Samhita*, XIV, paras. 29—31.
[7] *Hari Vansa Purana*. Translated by Vishnu Sastry Vapat (1911), Chap. XIV, paras. 16—20, p. 60.
[8] *Hari Vansa Purana*. Translated by Vishnu Sastry Vapat (1911), Chap. LVII, para. 19, p. 241.

the valleys lying immediately to the south and west of the Pir Pantsal range[1].

KHASAS IN THE MAHABHARATA

The Mahabharata[2] gives a long account of the various gifts presented to Yudhistara by the Kings of India and neighbouring states at the Coronation ceremony (Raja Suya-Yajna). The Khasas and the Tanganas with others are said to have brought as tribute heaps of gold measured in *dronas* (jars) and raised from underneath the earth by ants and therefore called after these creatures. These people "endued with great strength" also brought "chamaras" (yak's tail) and also "sweet honey extracted from the flowers growing on the Himavat".

The gold-digging ants mentioned here are now shown to be the Tibetan miners[3]. It appears that the Khasiyas traded in gold dust with the Tibetan miners at that early time[4]. A considerable quantity of gold was procured by gold washings in Garhwal in the past[5] and it was probably in fine particles and of the same kind as produced by the Tibetan miners. The honey of the Sor valley is in high repute for its richness[6], and the Yak, too, is imported to Kumaon in the Bhotiya mahals or villages north of the culminating range of the Himalayas[7]. The character of the presents indicates the Khasiyas of Garhwal. The

[1]Sir Aural Stein, *Kalhana's Chronicle of the Kings of Kashmir* (1900), p. 47. Note to Book I, Verse 317.
[2]P. C. Roy's translation of the *Mahabharata* (1884, Cal. edition), Sabha Parva, LII, p. 144.
[3]Schiern, "The Tradition of the Gold-digging Ants," *Indian Antiquary* IV, 225.
[4]Atkinson, XI, 377.
[5]Atkinson, XI, 543.
[6]Atkinson, XI, 245.
[7]Atkinson, XI, 38.

Tanganas lived near Badrinath[1]. Mr. Pargiter, too, puts them in that region[2].

The Khasas are not mentioned in the great list of the armies which assembled on the battlefield of Kurukshetra, but they appear in the army of Duryodhan[3], and, armed with swords and lances, fought with stones against Satyaki[4]. Fighting with stones was well known in these hills. The folklore mentions such warfare, and we find relics of bygone days in stone heaps at the hill tops. Popular imagination now looks upon them as sacred to village gods[5]. We have survivals of inter-tribal fights with stones in the Bagwali or stone slinging festivals at Chaur and Silangi in Garhwal[6], Bhim Tal and Debi Dhura, and many other places in Almora and Naini Tal[7]; and also on the banks of Vishnumati in Nepal at the Sithi Jatra festival[8].

CONCLUSIONS FROM PURANAS, ETC., ABOUT KHASAS

The Puranas and Mahabharata give little details about the Khasas. It is, however, clear from the same that the Khasas were a people who were not confined to a particular locality. In Drona Parva (VII, para. XI, 17-18, p. 32) the Khasas are described as "arrived from diverse realms," and the same fact is borne out by Markandeya Purana (Canto 58, verses 7, 12 and 51) and other sources.

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[1]Atkinson, XI, 357.
[2]*Journal Royal Asiatic Society*, (1908), 309. Mr. Pargiter on "The Nations of India at the battle between the Pandavas and Kauravas." Map opposite p. 332.
[3]The *Mahabharata*, Udyog Parva, section 160, p. 470, and section 161, p. 474.
[4]The *Mahabharata*, Drona Parva, section CXXI, 40—43, p. 358.
[5]Jodh Singh Negi's *Himalayan Travels* (1920), pp. 92-93.
[6]Atkinson, XI, 823.
[7]Atkinson, XI, 870.
[8]Dr. Wright's *History of Nepal* (1877), p. 35.

In his interesting paper "On Mount Caucasus"[1] Captain Wilford has made an attempt to trace the Khasas from Kashgar through Kashmir and Kumaon to the Khassiya hills in Assam. Without agreeing with all his arguments and conclusions it can be safely said that the facts recorded by him and those mentioned above fairly bear out the theory of a very wide extension of a Khasa race in prehistoric times on the northern borderland of India.

The antiquity of the Khasas in the Himalayan districts is accepted by the eminent scholar Sir G. R. Grierson, and he observes that "the great mass of the Aryan speaking population of the lower Himalaya from Kashmir to Darjeeling is inhabited by tribes descended from the ancient Khasas of the Mahabharata"[2].

THE KHASAS IN NEPAL

The Khasas form a considerable portion of the population of Western Nepal. Mr. Francis Hamilton (formerly Buchanan) has shown the high proportion of the Khas between Nepal proper and the river Kali, i.e. the country of the Chaubisi Rajas and Baisi Rajas. The Khasiyas were prominent in Satahung, Gorkha Raj, Saliyana, which was called Khasant and Duti States[3]. The Khas are the predominant race of Nepal, and a good account of these people is given by Captain E. Vansittart[4]. It is enough for our purposes to note that "In Nepal the tribe (i.e. Khas) is much mixed. A great number of the

[1] *Asiatic Researches* (1801), VI, 455.
[2] *Linguistic Survey of India*, Vol. IX, Part IV, p. 8.
[3] Francis Hamilton, *An account of the kingdom of Nepal* (1819), pp. 242, 244, 277, 282.
[4] "The Tribes, Clans and Castes of Nepal", *Journal of the Asiatic Society, Bengal* (1894), LXIII, Part I, p. 213.

so-called Khas are really descended from the intercourse between the high caste Aryan immigrants from the plains and the aboriginal Tibeto-Burman population. But that there is a leaven of pure Khas descent also in the tribe is not denied"[1]. The Gurkhalis and western tribes of Nepal speak Khas, which unlike the other dialects is of Sanskrit origin[2]. Khas-Kura (or Khasa speech) is one of the names for the language of the Aryan rulers[3] of Nepal. It belongs to the Indo-Aryan family of languages.

THE KHASAS ON THE WEST OF THE HIMALAYAN DISTRICTS

The Kanets are the low caste cultivating class in the Kangra and Kulu hills. The whole question of their origin is elaborately discussed by General Cunningham. He identifies them with the Kulindas of the Sanskrit classics and is of opinion that they belong to the great Khasa race which occupied the whole of the lower slopes of the Himalaya from the banks of the Indus to the Bramaputra[4]. The Kanets are divided into two great tribes, the Khassia and the Rao. "It is probable that the Khassias (of Punjab hills) are really descended from intercourse between the Aryan immigrants and the women of the hills[5].

Sir James Lyall thinks the Kanets are a mixed race, and those who conform to Hindu observances are called the Khasiyas[6]. Some intermixture of the Khasas with the Tibetans has undoubtedly taken place in the Kangra and Kulu hills. The language of the people—Western

[1] *Linguistic Survey of India*, Vol. IX, Part IV, p. 8.
[2] *Encyclopaedia Britannica*, Vol. XII (1911). p. 379.
[3] *Linguistic Survey of India, ibid*, pp. 17-18.
[4] *Archaeological Survey of India Reports*, Vol. XIV, pp. 125—135.
[5] Sir Denzil Ibbetson, Punjab Census Report (1883), Vol. I, para. 487, p. 268.
[6] Lyall's *Kangra Settlement Report* (1876), para. 112, p. 150.

Pahari—belongs to Indo-Aryan family[1]. Sir Athelstane Baines says about the Kanets that "there seems reason to think that they belong to a very early wave of northern immigration, possibly Aryan, but not of the Vedic branch, which has received an infusion of other northern blood since its settlement in the Himalaya"[2].

KHASA ETHNOLOGY

For ethnology "in India where historical evidence can hardly be said to exist, the data ordinarily available are of three kinds—physical characters, linguistic characters and religious and social usages. Of these the first are by far the most trustworthy"[3], says Sir Herbert Risley. In the Himalayan districts there is practically no historical evidence of Khasa immigration, and it cannot be said when they came to occupy these hills. It is clear, however, that they came from outside and subjugated the dark aborigines (the Doms). "Physical characters are the best, in fact the only true tests of race, that is, of real affinity; language, customs, etc., may help or give indication, but they are often misleading"[4]

PHYSICAL CHARACTERISTICS OF THE KHASAS

The physical features of a Khasa are clearly Aryan. He does not show any physical characteristics different from the high caste people in the hills or the plains of Northern India. No anthropometrical data are available about these people. Both Messrs. Burn and Blunt in the census reports of 1901 and 1911 have doubted the value

[1] *Linguistic Survey, ibid*, p. 373.
[2] Sir Athelstane Baines, *Ethnography (Castes and Tribes)*, p. 49.
[3] Sir Herbert Risley, *The People of India* (1908), p. 6.
[4] Remarks of Sir William Flower quoted by Risley on p. 6.

of anthropometrical data in the United Provinces, for determining ethnic affinities as an undoubted admixture of blood has taken place.[1] The test must thus depend upon the opinion of those who have seen the people. Mr. Atkinson observes "Khasiyas of Kumaon are in physiognomy and form as purely an Aryan race as any in the plains of Northern India."[2] The Rev. E. S. Oakley, who lived for many years in Almora, notes that "the physical aspect of the Khasiyas of Kumaon is distinctly Aryan, their language is an almost pure dialect of Hindi, and there is little ground for the assumption that they have been mixed to any large extent with Mongolian tribes."[3]

In Garhwal the Khasas are more mixed, though the difference is scarcely noticeable[4]. "Garhwalis are as a rule very fair in colour, and some show a distinct Mongolian type of feature." This is probably due to the effects of Gurkha conquest and oppression.[5] It cannot be said that the Khasas in Garhwal represent on the whole the purest Khasa blood, though there is not such admixture with Mongolian blood as we find in Nepal or in the Punjab hills. The present population, however, also includes the descendants of Rajputs and Brahmans from the plains by the Khasa women. There may be some Indo-Scythian blood, too, as the royal house of Garhwal, Doti and Askot claim descent from Salivahana.[6] Watson and Kaye in "The People of India" note about the Khasiya Rajputs of Garhwal that "many of them have regular Aryan features and none are of a very dark

[1] Census Report (1901), p. 239, and Census Report, 1911, p. 360.
[2] Atkinson's *Gazetteer*, p. 379.
[3] *Holy Himalaya*, by E. S. Oakley (1905), p. 87.
[4] Atkinson, Vol. X, 29.
[5] *Historical Record of the 39th Royal Garhwal Rifles*, p. 7.
[6] *District Gazetteer*, Garhwal (1910), p. 111.

complexion. Many of the younger women are fair and handsome, with good figures."[1] "Mountaineer" says "The Pahari women have naturally very fine forms, and in youth many in this respect could hardly be surpassed."[2] The Khasiyas are somewhat shorter in stature than the men of the plains, a peculiarity observed in Europe, too, in the case of residents in the hills.[3]

LINGUAL DATA ABOUT THE KHASAS

Kumaoni and Garhwali with local variations are spoken in Kumaon and Garhwal. They form the central Pahari sub-division of the Indo-Aryan family of languages in Sir G. Grierson's Linguistic Survey.[4] The people adopted the language of the Gujars and Rajputs who entered Kumaon and Garhwal in later times, but there are peculiarities "which are sufficient to point to a relationship between the old Khasa language and the 'Pisacha' languages of the North-West Frontier—Kashmiri, Khowar, Shina, and so forth."[5] One of the principal dialects of Kumaoni is called Khas-Parjiya or "the speech of the Khasa subjects."[5] Dardic or Pisacha languages are a sub-family of Aryan languages.[6] Kumaoni and Garhwali are Rajasthani modified by the ancient Khasa tongue.

" Linguistic are far more variable than animal or vegetable forms, and in anthropology it is a generally

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[1] J. F. Watson and Sir J. W. Kaye, *The People of India* (1868), Vol. III, p. 170.

[2] "Mountaineer," *A Summer Ramble in the Himalayas*, p. 186; *see also* Dunlop, *Hunting in the Himalaya*, p. 184, "Young girls possess a complexion as fair as many Spaniards or Italians, and with very regular features.

[3] Risley, *People of India*, p. 31.

[4] *Linguistic Survey*, IX, Part IV, p. 101.

[5] *Linguistic Survey*, *ibid*, p. 109.

[6] *Linguistic Survey*, Vol. VIII, Part II, p. 2.

accepted principle that speech changes more readily and more rapidly than physical types."[1] The evidence of linguistic affinities must always be accepted with caution. Community of speech does not necessarily indicate community of blood. "Still, under ordinary circumstances, connection of speech does indicate more or less connection of ancestral race."[2]

RELIGION OF THE KHASAS

In India "the fundamental religion of the majority of the people—Hindu, Buddhist or even Musalman—is mainly animistic. The peasant may nominally worship the greater gods; but when trouble comes in the shape of disease, drought or famine, it is from the older gods that he seeks relief."[3] The Khasiya is undoubtedly animistic, and his animism has to some extent influenced the higher castes. The various gods, goddesses, ghosts and spirits which these people recognize are described by Mr. Atkinson.[4]

With the lower races, says Lord Avebury, religion is an affair of this world, not of the next. "Their deities are evil, not good; they may be forced into compliance with the wishes of man; they generally require bloody, and often rejoice in human, sacrifices; they are mortal, not immortal; a part, not the authors, of nature; they are to be approached by dances rather than by prayers."[5]

Judged by this standard the Khasas show primitive religious thought and practices, which are partly affected

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[1] A. H. Keane, *Ethnology* (1896), p. 159.
[2] Tylor, *Primitive Culture*, Vol. I, p. 44.
[3] *Imperial Gazetteer of India*, Vol. I, p. 432.
[4] Atkinson, XI, Chap. IX.
[5] Lord Avebury, *Origin of Civilization and Primitive Condition of Man* (1911), p. 218.

by Brahmanical precept or example in the case of educated members of the community. "Mountaineer" has given a faithful picture of the religion of the vast majority of Hindus in these hills. He says, religion of the Pahari (in Garhwal and Tehri) is a simple form of Hinduism. They speak of divinity not as such and such a god, but as the god of such and such a place. "Almost every remarkable hill has also an individual protector, and the small lakes and ponds are considered as particularly favourite places of the deity's abode. The principal sylvan deity is the Nag Raja, a god supposed to clothe himself in the form of a serpent. The spirits of the departed are believed to revisit the scenes of their mortal career and to possess the power of afflicting individuals of the family of which they were once members. . . . The great characteristic of Pahari worship is the number of sacrifices made and the manner of making them; sacrifice indeed is the universal and almost sole method of manifesting thanks given for benefits received, or making supplication to avert calamity. This would lead one to believe Hinduism in the hills had been grafted on some other religion, the rites of which were still blended with it. To see a Pahari family sacrificing in the forest the sheep or goat for a victim, the pastoral appearance of the people, the fire, and the rude altar of rough stones carry one back at once to early ages of the world. Sacrifices are made to the *depta* of the village, to the divinities of particular places, to the fairies, demons and spirits of the departed." In case of illness a goat or sheep is led round the sufferer and killed at the spot. Oracles are consulted by enquiry of the *depta* and the divinity is conjured up

for the purpose.[1] In Kumaon snake worship is not common now, but there are temples and places to show that it must have been practised extensively at one time.[2] We see in the popular religion a curious blend of animism, demonism, Brahmanism and Buddhism. The belief that the spirit of a person injured has power to cause misfortunes to the wrong-doer or his family and strong faith in the Karmic theory of Buddhism have considerable effects on practical morality, "one result of which is seen in the fact that hardly any police are required in the hills."[3]

CHARACTER OF THE KHASAS

Honesty and valour are possessed in ample measure by the Khasas. Their honesty is beyond question. A verbal bargain is seldom repudiated and theft is almost unknown.[4] Dr. Heber in 1824 noted "There was scarcely a more peaceable or honest race in the world,"[5] but Mr. Wilson's remarks on the whole are not so cynical as they may appear. "Their (Purbattees') honesty has been frequently extolled and is undeniable, but is more the effect of local causes than an inherent quality. In their small communities it is almost impossible to become dishonest, every man's action being patent to the rest; detection and disgrace or punishment would be certain; while away from home a Pahari has not cunning enough to be a rogue."[6] The military exploits of the Khasas in modern times are enshrined in the records of

[1] "Mountaineer", *A Summer Ramble in the Himalayas*, pp. 187–189.
[2] Atkinson, XI, 375 and 835.
[3] Burn's Census Report, 1901, p. 77.
[4] *District Gazetteers*, Almora, (1911), p. 110, and Garhwal (1910), p. 68.
[5] Right Rev. R. Heber, D.D., Lord Bishop of Calcutta, *Narrative of a Journey through the Upper Provinces of India* (1828), p. 471.
[6] "Mountaineer," 182.

the 39th Royal Garhwal Rifles, and we find that the descendants of the ancient Khasas "endued with great courage, unyielding and obstinate in battle"[1] do show the daring and valour of their ancestors on the field of battle. "Wherever they have been tried they have shown themselves almost equal to Europeans in bravery, and in every other quality of a soldier may certainly challenge any portion of the native army,"[2] for "each of these simple mountaineers has hidden away within his inner consciousness that little spark, perhaps dulled by disuse or oppression, which represents the fiercely burning flame of military ardour that burned in the breast of some old ancestor."[3]

CONCLUSIONS ABOUT KHASA ETHNOLOGY

Any conclusions about the ethnic affinities of the Khasas can only be an approximation to truth in the absence of reliable historical data. It is clear that they are not aborigines and represent a great martial race which extended from Kashmir to Nepal. The Khasiyas of Kumaon represent by far the purest Khasa blood and have on the whole Aryan features and an Aryan language. In considering their religious superstitions we must take into consideration their physical and cultural surroundings. Fear caused by solitude in the midst of huge forests, high mountains and roaring rivers is likely to induce nature worship and belief in supernatural powers, and the conquered Doms also seem to have contributed to the religious outlook of the Khasas.

[1] The *Mahabharata*, Karna Parva, section XX, 10-11, p. 61.
[2] "Mountaineer," 185.
[3] *Historical Record of 39th Royal Garhwal Rifles* (1923), p. 8.

In the Mahabharata[1] the Khasas are said to be as blameable in their practices as the Vahikas. The charges of Karna against the Vahikas are (1) freedom from the restraints of orthodox Hinduism as regards food, (2) laxity of morals among the females, (3) absence of sacrifices. This condemnation only shows that these people did not come under the influence of Brahmans and naturally excited the contempt and hatred of the Brahman writers, peachers and reformers. It is worthy of note, however, that Manu calls the Khasas offsprings of Vratya Kshatriyas.[2] "Those sons whom the twice-born beget on wives of equal caste, but who, not fulfilling their sacred duties, are excluded from the Savitri, one must designate by the appellation Vratyas."[3]

In considering the Khasiyas as Kshatriyas who had given up sacrifices and *Savitri*, the Hindu religious writers assume for their orthodox religious practices an antiquity which they did not possess. Dr. Muir says that "The epic and Puranic writers believed all the surrounding tribes to belong to the same original stock with themselves; though they, at the same time, erroneously imagined that these tribes had fallen away from the Brahmanical institutions; thus assigning to their own polity an antiquity to which it could in reality lay no claim."[4]

The degeneration theory was the pet child of the Brahman writers. Even objectionable practices of the past were attributed to the eminence of the ancients who practised them.[5] The Hindu sages pictured an ideal

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[1]The *Mahabharata*, Karna Parva, sections XLIV and XLV.
[2]Manu, X, 22.
[3]Manu, X, 20.
[4]Muir's *Sanskrit Texts* (1868), Vol. I, p. 488.
[5]*See Brihaspati Smriti*, XXIV, paras. 12—14, where Niyoga is deprecated in the Kali age. *Sacred Book of the East*, XXIII, p. 369.

past which was followed by a slow and steady all-round degeneration of mankind. The progressionist does not see in the unbrahmanical usages of the Khasas or other similar tribes a departure from orthodox rules, but a rich find of primitive customs, many of which the other Indo-Aryans probably at one time shared.

It seems that these isolated hill ranges, guarded by fever-haunted forests, offered no prospect of profit for an *en masse* migration of any tribes from the fertile plains of Northern India, and a colonization from the plains is doubtful unless we speculate that a later wave of Aryans drove the earlier immigrants to take shelter in these hills. A writer in the *Calcutta Review* says "The greater part of the present inhabitants of Kumaon belong to the tribe now called Khasiya, which is spread so widely through a great extent of the Indian Himalaya. That these Khasiyas are the same people called Khasa in the ancient Sanskrit books cannot be doubted. There is, moreover, direct evidence from inscriptions that have lately been deciphered in Garhwal that certainly not less than 1,000 years ago the king of these provinces called himself the king of Khasa. The term is now dyslogistic, but it evidently was not so when these inscriptions were written."[1]

For the purposes of this study it is sufficient to say that the Khasas settled in these hills appear to represent an early wave of Aryan immigrants, or a people whose features and language were very much like those of the Aryans.

Mr. Atkinson in his scholarly study of the subject states "that there seems no reason for doubting that the

[1] "The Himalaya in Kumaun and Garhwal", *Calcutta Review* (1852), Vol. XVIII, pp. 86-87.

Khasas were a very powerful race who came at a very early period from the *officina gentium*, Central Asia . . . and the Khasiyas of Kumaon are of the same race,[1] and further on he says "we may, therefore, assume for the Khasiyas an Aryan descent in the widest sense of that term much modified by local influences; but whether they are to be attributed to the Vaidik immigration itself or to an earlier or later movement of tribes having a similar origin there is little to show.[2] Sir George Grierson accepts the Aryan origin of the Khasas by saying that "Besides Tibeto-Burmans the lower ranges of the Himalayas were inhabited by various Aryan tribes, the principal of which was that of the Khasas."[3]

Sir Athelstane Baines regards the Khasiyas as the descendants of a "very early wave of northern immigration, possibly Aryan, but not of the Vedic branch."[4]

A SHORT HISTORICAL SKETCH OF THE HIMALAYAN DISTRICTS

It seems that the Khasas settled in Kumaon and the adjacent countries in remote antiquity after subduing the aborigines now known as the Doms. We do not know whether this event happened before or after the migration of the Vedic Aryans. Little is known about the early history of Kumaon. There are traces of an ancient civilization in what is now a dense forest in the Tarai at the foot of the hills.[5] We find, however, that "as early as several centuries before the Christian era the shrine

[1] Atkinson's *Gazetteer*, Vol. XII, p. 379.
[2] Atkinson's *Gazetteer*, Vol. XII, p. 440.
[3] *Linguistic Survey of India*, IX, para. IV, p. 279.
[4] Baines, *Ethnography* (*Castes and Tribes*), pp. 49-50.
[5] Cunningham, *Archaeological Reports*, Vol. II, p. 238. *Journal of the Asiatic Society, Bengal*, XXXVI, Part I, 154.

of Badari (in Garhwal) was celebrated as a seat of learning and as the abode of holy men."[1] Kumaon and Garhwal were probably included in the great Kosala kingdom in the sixth or seventh centuries B.C.[2] Ferishta, probably quoting a legend, tells us that the Raja of Kumaon named P'hoor (Porus) fought against the Greek King Alexander and was killed.[3] The Greek writers have said that Porus was not killed, but only wounded.[4] The statement of Ferishta at least shows that until about 300 years ago it was believed that one of the Kumaon Rajas named P'hoor had fought against Alexander.[5] From the evidence available we may safely conclude that these hills were occupied by the Khasas long before the Christian era.

The earliest ruling dynasty known to authentic history is of the Katyuris. The Katyuri Raja of Kumaon and Garhwal was styled "Sri Basdeo Giriraj Chakra Churamani" and "the earliest traditions record that the possessions of the Joshimath Katyuris extended from the Satlaj as far as the Gandaki and from the snow to the plains, including the whole of Rohilkhand."[6] Tradition gives the origin of their Raj at Joshimath in the north near Badrinath and a subsequent migration to Katyur valley in Almora district where a city called Kartti-Keyapura[7] was founded.

Some inscriptions of the Katyuri kings are available, one in Bageswar temple on stone which is supposed to be

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[1]Atkinson, XI, 274.
[2]*Holy Himalaya*, Oakley, p. 132. *See* Rys David's *Buddhist India*, p. 25, about the description of the Kosala kingdom.
[3]Briggs, *Ferishta* (1829), p. lxxiii.
[4]*Cambridge History of India*, Vol. I, pp. 359, 368.
[5]We are told by a recent writer that the songs about "Syura" and "Pyura" are still sung and well known in these hills. "Syura" is said to be a vulgarized form of Sikandar (Alexander) and "Pyura" of Porus or Puru, Pt. Manorath Pande Shastry, "Sankshipta Kurmanchal Raj—Varnan" (1925), p. 4
[6]Atkinson, Vol. XI, p. 467, and foot-note.
[7]Atkinson, Vol. XI, p. 468.

1,500 years old.[1] In 335 A.D. the kingdom of Kartripura was a semi-tributory state of the Gupta empire.[2] In the Allahabad inscription of Samudra Gupta this state is mentioned to the west of Nepal, Kartripura is identified with Katyuri Raj in Kumaon.[3] Ferishta again tells us of the defeat of the Raja of Kumaon "who inherited his country and crown from a long line of ancestors that had ruled upwards of 2,000 years" between the years 440 and 470 A.D., by Ramdeo Rathor of Kanouj. The Kumaon Raja gave his daughter in marriage to Ramdeo.[4] The Chinese traveller Houen Tsang refers to the kingdom of Brahmapura[5] and also mentions Govisana.[6] Mr. Cunningham identifies Brahmapura[7] with Lakhanpur in Kumaon, while Mr. Atkinson[8] thinks it refers to Barahat in independent Garhwal. Both agree that it refers to the Katyuria kingdom in the Himalayan districts. Govisana[9] is placed near Kashipur in Naini Tal district. In 853 A.D. Lalita-Sura, son of Ishtagana, son of Nimbara, was apparently reigning in Kumaon.[10]

After the decline of the Katyuris the Chand dynasty reigned in Kumaon for several centuries. It is doubtful when Som Chand, the first progenitor of the Chand dynasty, came to Kumaon. Mr. Atkinson[11] puts his reign from

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[1] *Journal of the Asiatic Society, Bengal*, VII, 1056.
[2] Vincent Smith's *Early History of India* (1924), p. 302, and Dr. Barnett's *Antiquities of India* (1913), p. 46.
[3] *Journal Royal Asiatic Society* (1898), p. 198.
[4] Brigg's *Ferishta*, p. lxxvii.
[5] Samuel Beal, *Buddhist Records of the Western World* (1884), Vol. I, p. 198.
[6] Samuel Beal, *Buddhist Records of the Western World* (1884), Vol. I, p. 199.
[7] Cunningham, *Ancient Geography of India*, p. 356.
[8] Atkinson, XI, 453.
[9] Cunningham, *Archaeological Report* (1871), Vol. I, p. 251.
[10] Dr. Barnett's *Antiquities of India*, p. 64.
[11] Atkinson's *Gazetteer*, XI, 507.

953—974 A.D. Som Chand began his rule in Kumaon over the small principality of Champhawat, and his descendents in course of time extended their power over the other chieftains who had come into being on the disruption of the Katyuria "Raj". It was when the Chand dynasty was in power that most of the Brahman and Rajput settlers, called the high castes, came to the Kumaon hills in Almora and Naini Tal.

The early history of Kumaon and Garhwal is identical. In fact the early seat of the Katyuri Rajas was in Garhwal, and it was there that the mountain kings ruled.

In Garhwal the disruption of the Katyuri Raj brought in existence many independent chiefs. "Every glen or hill, as formerly was the case in the highlands of Scotland, was subject to its own chiefs who have left no record behind except the moss-covered walls of their strongholds."[1] Ajaya Pal is credited with having reduced fifty-two of these chiefs under his rule, and he cannot be placed earlier than 1358-70 A.D.[2] Kank, the eponymous founder of the present dynasty, is said to have come from Gujrat. Mr. Atkinson thinks that some historic connection underlies the old Indo-Scythian dynasty and the Garhwal Rajas.[3]

The Gurkha domination of Kumaon and Garhwal lasted from 1790—1815. After the Nepal War these districts were ceded to the East India Company under the treaty of Sigoulee in March, 1816. The country was occupied in April, 1815 by the British. Raja Sudarshanshah received back part of his territory which had been

[1] Atkinson, XI, 527.
[2] Atkinson, XI, 448.
[3] Atkinson, XII, 265.

lost to the Gurkhas, and it now forms the present state of Tehri or independent Garhwal.[1]

CONCLUSIONS FROM THE HISTORICAL SKETCH

This short historical sketch has been put in to help us in viewing the Kumaon local custom in their true perspective. In order duly to appreciate and understand the customary law of a people, a student has to take into account all the factors which govern the social and political life of the people, and he must give due weight to cultural, political and religious forces among the people in the past or the present. "A nation's institutions are part of its history and must be considered as such if we are to understand them rightly."[2]

It has been shown that excluding the Doms and the Bhotiyas, there are two main classes of Hindu population in the Himalayan districts :—(1) The early settlers and conquerors represented by the Khasas, (2) the late settlers from plains who are a very small minority.

For the purposes of the lawyer the Khasas include not only the original members of the Khasa race but also the immigrant Brahmans and Rajputs and their issue by Khasa women who accept and follow the rules of Khasa Family law. Their family law is based on traditions and usages which are older than the Manusmriti. The fortunes of Hindu law in its development on a religious basis have left unaffected their primitive customs which, with probably some variations due to racial or cultural drifts, seem to represent an early stage of Indo-Aryan society.

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[1] *Collection of Treaties, Engagements and Sanads relating to India*, by C. U. Aitchison (1909), Vol. I, p. 34. Sanad no. XVIII, dated 4th March, 1820.

[2] Maine's *Ancient law*. Edited by Sir Frederick Pollock (1906 edition), p. 174, note 1.

The Rajputs and Brahman settlers from the plains came after Brahmanic law had fully developed in Northern India, and their outlook on life and secular transactions are affected by that religious hypnotism under which the Hindu law-givers completely put their followers.

There are thus three main landmarks in the history of the Khasa Family law :—

First the period preceding the 10th century, i.e. before the occupation of Kumaon by the Chand dynasty. At this stage all that we can say is that all the people had probably the same family law. If there were local or family variations, we have no means to say what they were. It can safely be maintained that Khasa law was the common law of the country.

Secondly, after the 10th century some immigrants brought with them their own family law, which was the developed Brahmanical law or the customary law altered or shaped by religious doctrines. Mr. J. D. Mayne, the author of the standard work on Hindu law and usage, holds the view that after the Aryans reached the plains of India their laws and customs were immensely affected, and most of all in Bengal, by Brahmanical doctrines evolved as time went on.[1]

From the rise of the Chand dynasty and the political and social supremacy of its adherents till the British occupation of Kumaon we have to see how far did the newcomers, i.e. the high caste Brahmans and Rajputs, affect the Khasa law by their example or precept.

When we think of eight centuries of political and social subjugation of the Khasas, we may be inclined to think

[1] *See* Mayne, para 5 "Hindu law is based on immemorial usage, which existed prior to, and independent of, Brahmanism", also ss. 6, 7.

that some changes of great magnitude took place in their customary law. It may seem paradoxical, but the evidence at our disposal does not show that any class appreciably influenced the family law of the other. Mr. Mayne takes a similar view about Southern India.[1]

To the political supremacy of the Chands we should not attribute that strong centralized government with which British rule has made us familiar. There were Katyuri and Khasiya Rajas or Chiefs in the time of many powerful Chand kings.[2] The frequent Khasiya revolts point to the same conclusion. The subjugation of the hill chieftains consisted ordinarily in levying tribute and recognition of vassalage. Broadly speaking the kingship was a tax-gathering agency. Centralized Courts of Justice as we know them now were unknown. It was mainly the system of judicial administration in those days which preserved the customary law of the Khasas from the inroads of Brahmanism. The disputes were decided by the village panchayats, and the village elders were guided by their traditions and sense of right and wrong.

The newcomers, who were in an extreme minority, had plenty of occupation in court intrigues or looking after the spiritual welfare of the king. They lived mostly near the kings and received grants in the vicinity of the capital. The supercilious exclusion which high caste Hindus assumed towards the Khasas barred the channels of active influence. Those who entered into matrimonial alliances with the Khasas were merged in them. The example of political and thereby social superiors, however, acted in other respects. The Khasas who rose

[1] Mayne, ss. 2, 6.
[2] Atkinson, XI, 510, 527, 553, 568, and Vol. XII, 41.

in prominence assumed some usages and customs of the late comers; many of them took to the mystic thread (Janeo) and introduced some religious observances in marriage.

We shall see that the Khasa Family law is entirely free from those religious dogmas with which Hindu law makes us so familiar. Marriage, paternity, adoption and inheritance in Hindu law have ceased to be mere secular transactions, but the great teachers of the Hindu Dharma-Sastras have succeeded in covering all these institutions with the steel frame of religious sanction.

The third and last stage was of great moment for the Khasa Family law in Kumaon and Garhwal. It began with the British occupation of these districts in April, 1815. The Gurkha domination was too short and tyrannical to leave any permanent impression on the family law of the people.

PANCHAYATS AND JUDICIAL ADMINISTRATION IN PRE-BRITISH DAYS

The political conditions and social organization in these hills conspired with the topographical features of the country to maintain for centuries the archaic rules of Khasa Family law. The forests at the foot of the hills made any intercourse with the plains difficult. The hillmen being thus shut up remained singularly free from the advance in the cultural and religious thought in other parts of India. "Settlements in a mountainous country naturally get fixed, and a small, secluded, easily defended valley may retain stiff tribal customs for thousands of years."[1]

Apart from other factors the system of judicial administration in the past appears to have contributed a good

[1]Paul Vinogradoff, *Historical Jurisprudence*, p. 230.

deal to the preservation of the primitive conditions. The disputes were mostly decided by the village panchayats. Local men dealt with the local disputes. The village panchayats have survived in these hills right up to the present day. The Padhan or Thokdar is the Sarpanch (in Jaunsar Bawar he is called Siana). "Their panchayats deal not only with social matters, but it appears that matters which would normally come before a law court, whether civil or criminal, are usually discussed in panchayat before the courts are moved, and frequently finally decided there. In Garhwal the panchayats also deal with the arrangements for periodical festivities. In Almora the panchayat is described as a primitive Court of Justice : the accused, if found guilty, has to sign a *Kailnama*, or admission of guilt, which is countersigned by all members of the panchayat and handed to the complainant . . . Persons dissatisfied with a panchayat's decision often have recourse to the courts; but it is not clear what occurs if the court should not agree with the panchayat's views."[1] About Jaunsar Bawar, Mr. Williams wrote in 1874 :— "The panchayat system is in full force. Until very recently, panchayats were officially acknowledged as a valuable administrative agency, and in practice they still govern the country. Each member of the jury receives a regular fee of Rs. 2 and upwards, called *bishtara* or *bishara*, from the parties concerned."[2]

The village government in Tehri (Garhwal) was noticed by the "Mountaineer," who says, "the affairs of a village are settled in panchayat, every grown-up male having a voice and being invited to attend."[3]

[1] N.-W.P. Census Report (1911), XV, Part I, para. 334, p. 345.
[2] G. R. C. Williams, *Memoirs of Dehra Dun* (1871), para. 127, p. 62.
[3] "Mountaineer," *A Summer Ramble in the Himalayas*, 168-69.

Mr. Hamilton noted that in Nepal the disputes were settled by the panchayat,[1] and he has also given an account of the law and government in the country to the west of the Kali, i.e. Kumaon, which at that time was under Gurkha rule. Foujdars "had authority to determine many small suits without appeal, but always with the assistance of a panchayat."[2] Mr. Hodgson, too, notes:—"Half the judicial business of the Kingdom (Nepal) is done by them (panches) to the satisfaction alike of the parties, public and the Government."[3]

The forms of investigation and decision under the Rajas and the Gurkhas were similar. A simple *viva voce* examination of the parties and their witnesses sufficed, or a special oath was administered by laying the Harivansa on the head of the deponent. Decision was made by ordeals where no ocular testimony could be produced to substantiate a claim or defence.[4] "Private arbitration or punchait" was frequently resorted to, more particularly for the adjustment of mutual accounts among traders or for the division of family property among heirs."[5]

The strength of the panchayats ordinarily wanes with the growth of a central government which is strong enough to impose its will and enforce its decisions. It was the absence of any such central authority which kept the panchayat system alive in the hills. We may say that the panchayats which are now usually assembled in cases of abduction or seduction of women or offences against caste[6] had much greater judicial authority in the past

[1]Hamilton's, *Nepal*, p. 102.
[2]Hamilton's *Nepal*, p. 114.
[3]*Asiatic Researches*, Vol., XX, p. 122.
[4]Batten's Report, p. 27.
[5]Batten's *Official Reports*, p. 28.
[6]Atkinson, XII, 265.

when the country was divided into petty chieftaincies and "practically the landholders in each village recognized no other authority than their own."[1]

BRITISH JUDICIAL ADMINISTRATION.

British rule brought to the people of Kumaon and Garhwal the benefit of centralized Courts of Justice and a strong central power which had the will and the means to enforce the decisions of these courts. A necessary incident of that system is the marked influence which the Judge has in preserving, shaping or killing the customary law. The fact that the Judge's personality can affect the law of the place may cause some surprise to those who live in the present. In the era of statutes and precedents the personal equation plays a minor part, but where the law is in the traditions of the people, the findings and interpretations of the Judge are the principal agents in the crystallization of legal rules and precedents. The history of English Common law bears out this fact remarkably. It is unfortunate that all the old files of the Commissioners' court down to the latter part of Sir Henry Ramsay's administration were destroyed;[2] much interesting and valuable material has thus been lost to us.

The history of the judicial administration of Kumaon under the British rule can be roughly divided into two periods for our purposes :—

1. The Patriarchal administration of Messrs. Traill, Batten and Ramsay. The Commissioner in the early days of British rule had a dual personality, as legislator and Judge. Under Mr. Traill the régime was "essentially paternal, despotic and personal, but though

[1]Atkinson, XI, p. 541.
[2]Stowell's K. L. T. Prefatory note, p. v.

arbitrary it was a just, wise and progressive administration''. He loved the people, and earned their sincere esteem and affection[1]. ''The orderly procedure and observance of fixed rules and principles'' were the chief features of Mr. Batten's administration. In Sir Henry Ramsay's time we find these two characteristics of his predecessors blended and the popular title of ''the King of Kumaon'' fitted him admirably[2].

When we find how the early administrators were reluctant to introduce violent changes in the social order of the people under their charge, so much so that ''claims for freedom or servitude'' of household slaves were heard like other suits till 1835[3]. We can have no difficulty in assuming that the cases were decided by them according to the customary law of the people. The decisions of Sir Henry Ramsay which have been preserved to us strengthen this conclusion.

2. The second period began when officers with some experience of revenue and judicial work in the plains began to apply the canons of Brahmanised Hindu law to the Khasas. Mr. Lall rightly says ''officers who have been long with these hillmen and those who come fresh from the plains approach these questions from widely different points of view. While to the former many things are more or less like axioms requiring no proof, the latter insists upon elaborate proof for every little thing that differs from the Mitakshara. This is especially so in questions of marriage, legitimacy and inheritance. The bulk of the people have never heard

[1]Dr. Heber's *Narrative*, 503.
[2]Atkinson, XI, pp. 683-684.
[3]Atkinson, XI, p. 687.

of the Mitakshara and have never been guided by it; yet it is applied to them rigorously . . . Legal practitioners also have contributed partially to this state of affairs by pressing forward considerations from the Hindu law when they suited their clients regardless of local custom''[1]. This tendency has been unfortunate for the Khasa Family law. It prevented a careful study and searching analysis of the organic principles of Khasa law. The popular conception of regarding the Khasas as socially degraded Brahmans or Rajputs was carried to the domain of law and their customs were viewed as isolated departures from Hindu law and the rules of the Mitakshara.

EVIL EFFECTS OF LOOKING TO THE MITAKSHARA FOR THE LAW OF THESE PEOPLE. FATEH SINGH *v.* GABAR SINGH DISCUSSED

The Kumaon division used to be a scheduled district, and the court of the Commissioner of Kumaon was the final appellate court on the civil side. Since April, 1926 the Kumaon division has been brought under the direct jurisdiction of the Allahabad High Court. Prior to this date no appeal lay to the High Court, but a reference was sometimes made to the High Court under rule 17 of the rules and orders relating to the Kumaon division. Such a reference was made in *Fateh Singh* v. *Gabar Singh* (special civil appeal no. 49 of 1915). This case[2] brought into clear relief the unfortunate effects of applying the doctrines of Hindu law to the Khasas. Fateh Singh was the son of Daulat Singh by Mst. Maina. The facts proved were that a bride-price of

[1] K.L.C. Letter to the Commissioner, para. 3, pp. i and ii.
[2] *Kumaon Rulings*, p. 47.

Rs. 200 was paid to Maina's father; that she was brought to Daulat Singh's house in a *dooly*, that the *biradari* was feasted, and that a ceremony known as Ganeshpuja was performed. Fateh Singh sued to set aside a sale deed and a deed of gift executed by his step-mother in favour of Gabar Singh. The counsel for the defendant, it seems, was not slow in taking advantage of the tendency of the courts to look to the Mitakshara, and the legitimacy of Fateh Singh was challenged. In all the three local courts of Kumaon Fateh Singh was successful. It would have been surprising if he had failed in the local courts. Officers with experience of local conditions knew that Mst. Maina was lawfully married, and sons by such a marriage do inherit among the Khasias. The Judges in Kumaon discharged in a way the functions of the village elders and not seldom relied upon their experience and knowledge of local conditions in deciding the cases before them. The conditions were changed when the case went before the Judges at Allahabad. They looked to the record for evidence of a custom which was opposed to the doctrines of Hindu law in which Saptapadi and Phera Bhaura ceremonies are ordinarily considered essential for a valid marriage and were not satisfied. When the case went back to the Kumaon courts, Fateh Singh failed apparently on his inability to establish in a court of law a custom which derogated from the Hindu law.

It will be shown that even feasting the *biradari* and the performance of Ganeshpuja are not essential for a valid marriage under the customary law. The payment of bride-price and formal entry as wife in the husband's house are enough for the purpose. A marriage

which was perfectly valid under the customary law was thus deemed invalid, simply because an adherence to the requirements of sacerdotal law was sought among the Khasas. Mr. Lall says that the decision when known was "disapproved throughout Garhwal"[1]. It shows that the parties in that case were governed by the customary law.

The observations of Mr. Wyndham, Commissioner, in this case clearly show the feelings of an officer who is conscious that the law sought to be applied is not in harmony with the custom and is sorry for it. "The persons are residents of Garhwal and probably have never heard of the Mitakshara law. However, calling themselves Hindus they have to abide by it when they come to court. While in the simplicity of their life they have never assimilated the mass of detail laid down in this formidable volume, yet the law strictly requires them to bring down from the hills a mass of evidence to prove they have never done so. To speak plainly, the law imposes an impossibility. Were this the ultimate court of appeal I would not hesitate to hold, what is no doubt held locally, that the son of Daulat Singh is quite legitimate enough to succeed to his father's farm. As, however, the directions given me are so drawn up, it is impossible for the courts of Kumaon to do so. I regret that I have to concur with the learned lower court and dismiss this appeal, and feel that in doing so we are acting quite contrary to public opinion in the valleys from which this case comes. We are, however, accomplishing a task which could not be

[1]K.L.C., para. 4, p. ii.

performed even by the most zealous of Hindu missionaries''[1].

THE KHASAS ARE HINDUS, BUT NOT GOVERNED BY THE HINDU LAW OR THE MITAKSHARA

The Khasas are undoubtedly good Hindus, but an attempt to apply the Hindu law to their family relationships will cause chaos in Kumaon. The case of *Fateh Singh* v. *Gabar Singh* is an ample warning against such a course. It has been shown that the Khasas settled in the Himalayan districts long before the present code of Manu or the Mitakshara were written. A student of Hindu historical jurisprudence finds in the Dharma-Sutras and Dharma-Sastras a gradual metamorphosis of customary law with the religious, ethical and social evolution of the Hindus.

The orthodox Hindu may regard the Vedas as eternal, the code of Manu as a direct emanation from Brahma himself and all the Sutras and the Smritis as equally sacred and equally true; but a student of social anthropology or historical jurisprudence can only look upon them as documents of antiquity which record the social conditions of the time and also the rules which the Hindu sages would wish to be followed. It cannot be doubted that the Dharma-Sastras, though they undoubtedly enshrine many genuine observances of the Hindu race, still in some measure are merely ideal pictures of that which in the view of the Brahmans ought to be the law[2].

The Khasas, however, have retained their primitive social and family organizaion and the Himalayan

[1] *Kumaon Rulings*, p. 51.
[2] *See* Maine's *Ancient law*, p. 15.

districts continue thus to be a repository of verifiable phenomena of ancient usages and juridical thought. The Khasa Family law is essentially unsacerdotal and secular. It is free from any flavour of Brahmanism.

The warning of Mayne about the limited applicability of Sanskrit law holds good for the Khasas :—"Races who are Hindu by name or even Hindu by religion are not necessarily governed by any of the written treatises on law, which are founded upon, and developed from, the Smritis. Their usages may be very similar, but may be based on principles so different as to make the developments wholly inapplicable"[1]. As long back as 1883 Sir Henry Maine observed "The impression in the mind of English judicial officers . . . manifestly was that the sacerdotal Hindu law corresponded nearly to the English Common law, and was at least the structure of all rules of life followed by Hindus. It is only beginning to be perceived that this opinion has a very slender foundation, for it is probable that at the end of the last century large masses of the Hindu population had not so much as heard of Manu and knew little or nothing of the legal rules supposed to rest ultimately on his authority"[2]. It will appear how truly these remarks fit the Khasas. For a true appreciation of the Khasa law we should not look to the institutes of Manu and later Smritis and commentaries. Only a careful examination of actual usages of the people is needed to determine the intrinsic coherence of and juristic conceptions underlying the Khasa Family law.

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[1]Mayne's *Hindu law* (1922 edition), para. 11.

[2]Sir Henry Sumner Maine, *Dissertations on Early Law and Custom* (1883), pp. 6 and 7.

THE SO-CALLED KUMAON CUSTOMARY LAW IS THE KHASA FAMILY LAW

It has been shown that the Khasas who form the majority occupied these hills in remote antiquity and the immigrant Brahmans and Rajputs who are a small minority came from the plains after Hindu law had developed there on a religious basis. The character of these two classes of the population is reflected in their family law. The higher castes who adhere to the orthodox mode of living as enjoined by the Hindu Dharma-Sastras are practically governed by the doctrines of the Mitakshara[1].

The vast majority in the Himalayan districts, however, follow the traditional customary law, which is the family law of the Khasas and those who were subsequently merged in them. In the Kumaon division of the United Provinces this customary law is sometimes called Kumaon customary law. There is, however, no such thing as a single body of customary rules which are properly applicable to all the Hindu residents of Kumaon. Primitive conditions in regard to marriage, paternity, adoption and inheritance are found among the Khas-Brahmans and Khas-Rajputs and those immigrants who have entered into matrimonial relations with them and adopted their usages.

The fundamental difference in the religious and ethical evolution of the two classes of people was missed by Mr. Panna Lall who was placed on special duty in May, 1919 by the United Provinces Government to report on Kumaon local customs. This omission appreciably diminished the practical utility of his report.

[1]K.R.C., p. 5.

Mr. Lall believed that the customary law was applicable to all the Hindu inhabitants of the Kumaon division. He enumerated on page 10, list A, certain castes and classes, amongst whom *Dhanti* marriages were not recognized, sons by *Dhanti* wives do not succeed, and marriage ceremonies take place. With these exceptions he regards the customary law as the common law for all classes of the Hindu population. This confusion reacted on a true and correct appreciation by Mr. Lall of the rules of Khasa law. The report naturally turned out to be a curious amalgam of the unsacerdotal Khasa law and Brahmanised Hindu law. It is obviously an attempt at a compromise between the two systems, which differ by centuries of religious, economic and ethical evolution and so does not fit, and cannot fit, either the Khasas or the higher castes.

It would take us beyond the scope of the present study to discuss how far the conclusions of Mr. Lall apply, or do not apply, to the higher castes in Kumaon. So far as the Khasas are concerned the conclusions of Mr. Lall will be discussed and tested under appropriate headings.

It is very unfortunate that Mr. Lall ignored the well-known distinction on the applicability of customary law and Hindu law in Kumaon. The result has been a sad mixture of distinct rules and legal principles. On the other hand, one can say without exaggeration that Mr. V. A. Stowell has given more thought to Kumaon customary law than any other officer of recent times. He knew the people intimately and had unique experience of the Kumaon division. "It is these Khasiyas and

Khas-Brahmans", says Mr. Stowell, "who follow the peculiar and often old-fashioned customs which form the subject of the special rulings and discussions relating to Hindu law in Kumaon. They form the bulk of the village population. The pure Rajputs, mostly immigrants of later times, and higher caste Brahmans generally follow the normal rule of Hindu law applicable to the twice-born classes. The real test in such disputes regarding custom should thus be whether the parties are of genuine Rajput or Brahman caste or are Khasiyas or Khas-Brahmans"[1].

THE KHASAS AND IMMIGRANT HINDUS :—DISTINCTIONS.

Mr. Panna Lall is conscious of the existence of the Khas-Brahmans and Khas-Rajputs in the hills. He remarks that the courts have held "tenaciously to the idea"[2] of the two groups in the Hindu population of the Kumaon division and refers to the recognition of the distinction by Mr. Stowell. In the Indian Antiquary, Vol. XL., p. 190, Mr. Panna Lall himself contributed a paper on some customs "of the Khasiyas of Almora." "The fact is", observes Mr. Lall, " that time has brought about a silent revolution. Economic and social changes have swept away these old landmarks. It is now often impossible to say with certainty whether a caste is Khasiya or not"[3], and therefore he "made no attempt to use these time-honoured terms or to classify castes into two such water-tight compartments"[4]. The fact is that the immigrants looked down

[1]Stowell, *Kumaon Rulings*, Commentary, pp. 4-5.
[2]K.L.C., para. 251, p. 66.
[3]K.L.C., para. 252, p. 66.
[4]K.L.C., para. 254.

upon the indigenous Brahmans and Rajputs. The Khasiyas in the past did not wear the sacred thread[1] and the Khas-Brahmans had to wear a brass bracelet[2]. The word Khasa in a sense came to indicate social inferiority. When freed from the social and political predominance of the immigrants, the Khasas were not anxious to retain the disagreeable epithet after the advent of British rule. In 1884 Mr. Atkinson noted "None will call themselves Khasiyas; all style themselves Rajputs, and many say they were settled in their present villages before Brahmans and Rajas came."[3].

Time is undoubtedly recasting the social order in the Himalayan districts. "Any person of means and education resents being designated a Khas and pretends to belong to a higher strata of society. There is a silent and steady social revolution going on and wealth, which in the past did not count very much in matters social, is now powerful enough to break all barriers and secure to its possessor a higher social position"[4]. In matters of social predominance the line between the immigrants and Khasas may be difficult to draw, but for purposes of lawyers and jurists the old landmarks have not been swept away; they have only shifted their position. The difficulty of drawing a sharp line between those who are governed by Hindu law and those who are subject to the Khasa customary law will cease to be insurmountable on some thoughtful consideration. It has been said before that there is probably no ethnic distinction between the Khasas and the higher castes. The only distinction is

[1]K.R.C., p. 4.
[2]K.L.C., para. 253.
[3]Atkinson, XII, 276.
[4]Per Pt. B. D. Joshi's note.

one of cultural and religious history and usages. There is no difficulty in distinguishing between a Khasa at one end and a Brahman or Rajput at the other end of the social ladder. The two classes gradually shade off into one another, and the difficulty is only felt where the influential and educated Khasas have adopted the rules of Brahmanical living or where some immigrant Rajputs or Brahmans have for one reason or other adopted the customs and practices of the Khasas. So far as the Brahmanised Khasas are concerned, the Hindu law seems to be properly applicable to them and not the Khasa law, for the main difference between purer Hindus and Khasas is that of culture and religion, and the remote ancestors of the purer Hindus had probably the same notions of family and property law as the purer Khasas have at present. Khasas cannot be denied the fruits and penalties of progressive evolution, simply because the ancestors of the high caste Hindus forestalled them in the race of life. Customary law admits of some elasticity, and Hindu law itself has been subject to variations in time and place, and tribes following varying customs have been admitted into the pale of Brahmanism.

OBJECTIVE STANDARDS WHICH DISTINGUISH THE KHASAS SUBJECT TO THE CUSTOMARY LAW FROM THOSE TO WHOM THE HINDU LAW IS APPLICABLE

The lawyer is not concerned with the social esteem in which a particular person is held. He must look to the family usages of the people to determine the stage of cultural and legal thought that they denote, as

institutions like forms of organic life are subject to the great law of evolution[1].

From the data acquired by a careful observation of characteristic practices an individual family or clan can be easily assigned to the group in which the Khasa law or the Hindu law prevails. "We should see clearly that laws are not the arbitrary product of human wishes, but the result of certain economic necessities on the one hand, and of certain ideas of justice on the other, derived from the moral and religious sentiment"[2]. It can be easily realized then that to inflict the Mitakshara on the ignorant agriculturist Khasas who have never heard of Manu or Vijnaneswara is as wrong as to judge the family institutions of Brahmanised Hindus by the unsacerdotal, secular and primitive Khasa law.

A careful observation of the Khasas and Brahmanised Hindus discloses the following main distinctions, and these seem to the writer to be the objective standards by which a classification for the application of the correct law should be made :—

	Khasas.	*Brahmanised Hindus.*
1.	The existence of levirate. The brother's widow is received as wife.	1. No custom of levirate or widow marriage.
2.	Marriage is a secular transaction. Wife is mostly purchased and bride-price is taken.	2. Marriage is a sacrament. Bride-price is never taken.
3.	No religious ceremony is essential for marriage.	3. Kanya-Dan and Anchal ceremonies essential.

[1]Maine, *Early Law and Custom*, p. 302.
[2]*Primitive Property*, Emile de Leveleye. Translated by G. R. Marriott (1878), p. 5.

Khasas.	*Brahmanised Hindus.*
4. Marriage undoubtedly dissolvable by mutual consent.	4. Marriage indissoluble; no divorce is recognized.
5. *Dhanti* marriages recognized.	5. No *Dhanti* marriages recognized.
6. Thread ceremony is not deemed essential. No fiction of rebirth. Many Khasas have taken to the mystic thread now.	6. Thread ceremony indispensable.
7. Cultivate and use the plough themselves.	7. Even when engaged in agricultural pursuits do not plough the land themselves.

Tests nos. 1—5.—A student of Hindu historical jurisprudence knows that the practices of levirate and widow marriage relate to a stage of social organization earlier than the developed Brahmanised law when marriage came to be regarded as an indissoluble religious union, with perpetual widowhood. The existence of practices nos. 1—5 fairly indicate that the Khasa family law is applicable in such cases.

Test no. 6.—No one can contend that the Khasiya who does not wear the mystic thread can for a moment be classed among the Brahmanised Hindus in Kumaon. The non-existence of the sacred thread raises a strong, or rather a conclusive, presumption that Brahmanised Hindu law does not apply, but its existence leaves the question open, as many Khasas wear it now and under the influence of the Arya Samaj Shuddhi movement some depressed classes too have assumed it.

Test no. 7.—So far this is a fairly strong test. The political and social factors which resulted in a taboo on

the plough by Manu[1] have vanished. Still the indigent members of the higher castes pathetically stick to this survival of former social and political predominance.

In the case of immigrant Brahmans and Rajputs who have taken to primitive practices, the rule of law applicable seems to be the *ratio decidendi* in *Ma Yait* v. *Maung Chit Maung*[2]. So if it is found that a migrated family has given up its own religious and social usages and has adopted the family customs of the Khasas, then it should be governed by the customary law and not by Hindu law.

The finding must in such a case be that the Brahmanised Hindus have so far lost their main characteristic, by intermarriage, adoption of *Dhanti* marriage and levirate customs, etc., that they can only be reckoned as Khasas in the eyes of law.

MIGRATION AND APPLICABILITY OF LOCAL LAW

The doctrine of English jurisprudence that *lex loci* determines the devolution of immovable estate does not apply in India. In India a Hindu or a Mahomedan is governed by the law of his personal status[3]. The law of a particular school becomes the personal law and a part of the status of every family which is governed by it. Where any such family migrates to another province governed by another law, it carries its own law with it[4].

The fact that the migration took place 800 or 900 years back would not alter the law to be applied, except

[1]Manu, III, 64, X, 83-84.
[2]48 I.A., 553.
[3]Budansea Rowther *v.* Fatma Bi, 26 M.L.J., 260.
[4]Mayne, *Hindu law* (1924), para. 48.

in the case of those who have adopted the customs of their new domicile or usages different from those of their original personal law.

To determine the law *prima facie* applicable domicile is important. When once migration is proved, the personal law must be determined accordingly. When an original variance of law is once established, the presumption arises that it continues and the onus of making out this contention lies upon those who assert that it has ceased by conformity to the law of the new domicile[1]. Such presumption may be rebutted by proof that the individual or his ancestors adopted the law, usages and religious ceremonies of the country of his residence[2].

It seems that in the case of those who conform to the objective standards of Khasas customary law is the proper rule of decision, while the Brahmanised immigrants before or after the 11th century, or the Khasas, who have adopted the Brahmanical religion and social usages, are properly subject to the Hindu law. The onus would rest on one side or the other according to the point at issue.

NATURE OF CUSTOMARY LAW

It is beyond the scope of this study to enter into an analysis of "law" and to determine whether custom should be reckoned as "positive morality" only till its recognition by the courts or as "law" by itself. Students of jurisprudence know that under Austin's definition of law or positive law as a rule "set by political superiors

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[1]Soorendronath *v.* Mst. Heeramonee, 12 M.I.A., 81.

[2]Sir E. J. Travelyan's *Hindu law* (1917), pp. 26-27.

to political inferiors''[1] custom is classed as ''positive mortality'' only till the courts recognize and enforce the custom. Holland holds that the custom was law before it received the stamp of judicial recognition[2].

For our purposes it is necessary to bear in mind that the value of custom lies in tradition and immemorial usage. Its birth and growth are determined by the physical, economic and cultural environments of the community. No tribe can settle down to order without adopting consciously or unconsciously certain definite rules governing reciprocal rights and duties of families or individuals. Society cannot exist without rules of social order, i.e. some uniform practice and habits of life. These rules do not necessarily emanate from a political superior, but may be based on utility or social and communal necessity, and are enforced by the express or tacit sanction of the collective will of the people[3]. Naturally organized groups of men are obstinate conservators of traditional law[4]. The conservatism of the primitive mind and its appeal to tradition help to preserve the customary rules for ages. The natives of India do not necessarily require divine or political authority as the basis of their usages. ''Their antiquity is by itself assumed to be a sufficient reason for obeying them''[5].

The formation of law proceeds in many, if not in all, cases not from the command of a sovereign but from recognition by the parties. The primitive usages are

[1]Austin's *Jurisprudence*, Vol. I, p. 86.
[2]Holland's *Jurisprudence*, pp. 60 61.
[3]Holland, *Jurisprudence*, pp. 57-58.
[4]Maine, *Village communities*, p. 58.
[5]Maine, *Village communities*, p. 68.

neither haphazard nor unmeaning; even the rudest communities of men bring intelligence to bear upon their observances. Custom often grows and fashions itself according to the internal economy of the community. "The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being"[1]. Customs thus belong to the people and are best suited to, and in harmony with, their economic and cultural environments.

Doctrines foreign to custom even if wise and wholesome are out of place and incongruous. "Customs may not be as wise as laws, but they are always popular. They array upon their side alike the convictions and prejudices of men. They are spontaneous. They grow out of man's necessities and invention, and as circumstances change and alter and die off, the custom falls into desuetude, and we get rid of it"[2]. It is this aspect of custom which the Hindu Jurists appear to have recognized. Manu declared "immemorial usage is transcendent law" and did not allow deviation from it[3]. Yajna Valkya laid down that "customs, laws and family usages which obtain in a country should be preserved when that country has been acquired"[4]. Their lordships of the Privy Council in the famous Ramnad case observed :—"Under the Hindu system of law clear proof of usage will outweigh the written text of law"[5], and

[1]Maine, *Ancient law*, p. 16.
[2]Mr. Disraeli (Lord Beaconsfield) on the Irish Land Bill (11th March, 1870), Hansard, Vol. 199, col. 1806 at col. 1815.
[3]Manu, i, paras. 108 and 110.
[4]Yajna-Valkya, i, para. 342.
[5]Collector of Madura *v.* Mootoo Ramlinga, 12 M. I. A., 397.

thus confirmed one of the fundamental doctrines of Hindu jurisprudence.

It is interesting to see that the regard of Hindu sages for customs was shared by the Roman Jurists. The Roman Lawyers held that custom could not only interpret law, but also abrogate it. "The laws which every state has enacted undergo frequent changes, either by the tacit consent of the people (*tacito consensu populi*) or by a new law being subsequently passed"[1]. Under the English law no custom can be pleaded to bar the operation of a statute. It may also be said that as the Khasas are not governed by the Hindu law but by their own family law, there is no onus on a party to make out a custom which derogates from the Hindu law. *Chandika Bakhsh* v. *Muna Kuar*[2] has no application in their case. It would, however, apply to the immigrant Hindus and those subject to Hindu law.

LEGAL IDEAS UNDERLIE THE KHASA FAMILY LAW

Speaking of the Punjab, Mr. Tupper says :—"The customs of the country, so far as they spring directly from the tribal, village and family life, are by no means chance growths, but are founded on principles susceptible of ascertainment on enquiry and of statement as a fairly consistent whole"[3]. The present study will show that the observations hold good of the Khasa customary law.

In dealing with primitive institutions, a student should be on his guard to avoid the pitfalls of delusive analogies and *a priori* assumptions. The observed facts

[1] "Justinian's Institutes", Lib. I, Tit. II, para. 11.
[2] 29 I. A., 70.
[3] C.L. Tupper's *Punjab Customary law* (1881), Vol. I, p. 22.

must be carefully scrutinised and the historical order of the growth of legal ideas should be well kept in mind. "No conception can be understood except through its history"[1]. One cannot be too careful after the warning of Sir Henry Maine:—"The characteristic error of the direct observer of unfamiliar social or juridical phenomena is to compare them too hastily with familiar phenomena of the same kind"[2]. We shall see how this characteristic error and omission to stick to the historical order of the growth of property rights led Mr. Lall to say that a father under the customary law in Kumaon holds property as in the Dayabhaga school of law!

The attempt in this study has been to avoid a mechanical mass of disjointed details, but to deduce from our knowledge of observed facts the legal principles which underlie the Khasa Family law.

SOURCES OF THE KHASA LAW

Mr. Stowell laid down the requisite condition for a correct appreciation of the Kumaon customary law by observing "it is most necessary to keep in mind the very important fact that a great number of hill villagers, who bear Brahman or Rajput names, are not of genuine Rajput or Brahman caste, but are Khasiyas"[3]. His book on "The Land Tenures of the Kumaon division", however, dealt with those questions of the customary law which were of common occurrence in the courts.

[1]Tylor, *Primitive Culture*, Vol. I, p. 18.
[2]Maine, *Village communities*, p. 7.
[3]K.L.T., 53.

He thought that the Khasas had only a few exceptional customs which derogated from the Mitakshara[1] law.

Mr. Lall's enquiry brought out much highly valuable information which shows that the customary law in Kumaon varies in many other vital points from the rules of the Mitakshara. But he omitted the important distinction between the two classes of Hindu population in these hills and misunderstood the nature of the rights possessed by the sons in the family land. The books which deal with Khasas and their customs did not give adequate information for a detailed and complete study of the Khasa Family law, which in some points is still traditional and has not been the subject of judicial decisions. The difficulty has been met by preparing 122 questions and sending them over to some officials, lawyers and other persons in Almora, Naini Tal and Garhwal[2]. Replies were received from those gentlemen whose names are mentioned in the preface.

The answers are not unanimous, especially where primitive ideas of paternity and marital relationship are concerned. The writer has referred to these answers either in corroboration of published authority or when there is no other source of information.

There is good reason to believe that the old customs of the Khasa agriculturists in the Tehri State are preserved more or less intact[3]. Pandit Hari Shanker Raturi, Wazir and Second Member, Council of Regency, Tehri-Garhwal State, published " Narendra Hindu law" in 1918. He has dealt with the peculiar usages of the

[1] K.L.T., 48.

[2] *See* Appendix A.

[3] Panw, para. 36.

Khasas in Garhwal and in the Tehri State. His observations deserve great weight as the book was published "After thirty years judicial experience and with special reference to the usages and customs prevailing in the State, and its use as a work of reference and guidance by all courts" was authorized in the Tehri State[1].

Mr. Panna Lall and his assistant Thakur Salig Ram Singh, Deputy Collector, examined over twenty thousand people[2]. The enquiry also extended to the special customs of seven other classes, so we do not know how many Khasas were examined. Their number must have been considerable and the statements of fact in the report command great consideration and weight. The conclusions of law are not on the same level. The rules of customary law laid down by Mr. Lall are mixed questions of law and fact. The present writer endeavours to establish that some of them are misconceived, and adduces to this end cogent authority against them or intrinsic evidence of such misconception in the report itself.

[1] *See* Raturi .Preface by G. B. F. Muir, I.C.S., President of the Council of Regency.

[2] K.L.C., p. iv.

CHAPTER II

1.—MATRIARCHAL SURVIVALS. 2.—POLYANDRY 3.—LEVIRATE.

KHASA MARRIAGE DEFINED.

MARRIAGE as a social institution "may be defined as a relation of one or more men to one or more women which is recognized by custom or law and involves certain rights and duties both in the case of the parties entering the union and in the case of the children born of it"[1]. Marital union which in many parts of the world has come to have a religious as well as a social aspect has necessarily been so moulded in each human group as both to assign to each individual born into a society his place therein and to regulate the normal relations between men and women. Relationship and clan and also possible mates or forbidden members of the opposite sex become determined for a person at his birth. The moral aspect of marriage has to be distinguished from its other social functions[2]. In its second aspect "marriage may be an institution of the most definite and highly organized kind, although In its second aspect "marriage may be an institution of of a very lax and imperfect order"[3]

[1]Westermarck, *Short History of Marriage*, p. 1.
[2]Rivers, *Social Organization*, p. 37.
[3]Rivers, *Social Organization*, p. 38.

Marriage among the Khasas has no religious purpose behind it. It is an institution to regulate sexual relationship and an arrangement for bringing up children —a partnership for economic ends and social co-operation. Marriage under Khasa Family law may be defined as a means of legalising sexual union and of determining the legal paternity of any given woman's children.

THE ORIGIN OF THE MARRIAGE INSTITUTION

The vast literature on the subject of human marriage and the various permutations and combinations of sexual relations which are thereby disclosed to exist in different parts of the world show that it is a highly malleable institution. The question of its origin has divided eminent sociologists into two groups which hold opposed views on its evolution. "On the one side are those who regard monogamy as the original state from which the other forms of marriage have developed; on the other are those who believe that monogamy was reached by a gradual process of evolution from an original state of complete sexual promiscuity through an intermediate state of group marriage"[1]. "Bachofen, McLennan and Morgan . . . all agree that the primitive condition of man, socially, was one in which marriage did not exist, or of communal marriage, where all men and women were regarded as equally married to one another"[2]. In sharp contrast stands the scheme outlined by Westermarck and others. It starts from individual pairing on the ground that primitive man, like the gorilla and higher apes, was patriarchal through

[1]Hastings, *Encyclopaedia of Religion and Ethics*, Vol. VIII., para. 30, p. 432.
[2]Lord Avebury, *Origin of Civilization* (1911), p. 103.

sexual jealousy and the instinct of appropriation[1]. The better opinion among sociologists at the present day does not favour an attempt to outline a uniform rigid course as being followed by all mankind in the historical development of marriage law. The evolution of marriage, like that of other institutions, must be affected by the economic, political and social forces and environments among different races of the world. "It was recognized," says Dr. Rivers, "at any rate by many students, and the number is rapidly growing, that the existing institutions of mankind are not the result of a simple process of evolution, but that there has been in action a highly complicated process of blending and inter-action of cultures, often widely different from one another, the outcome of the inter-action being complex structures, not only containing elements derived from both the blended cultures, but also new products of the inter-action"[2].

Some knowledge of their history is necessary in order to understand social institutions properly. They do not stand isolated from the past and are often unintelligible without a knowledge of the past. The present attempt to discuss the rules of family law may also throw some light on the evolution of marriage among the Khasas and thus bring out a few points of contact between the present narrow field of study and the far more comprehensive subject of social anthropology.

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[1]Vinogradoff, *Historical Jurisprudence*, Vol. I, 165; Westermarck, *The History of Human Marriage* (1921 edition), Vol. I, Chap. I, pp. 27, 39; Westermarck, *Short History of Marriage*, p. 2. It has most probably developed out of a primeval habit. *See* also pp. 18—20 about masculine jealousy.

[2]Rivers, *Social organization*, 97. *See* also Lowie, *Primitive Society*, pp. 421-422.

THE KHASAS OF THE HIMALAYAN DISTRICTS SHOW VARIOUS KINDS OF MARITAL UNIONS

The marriage institutions of the Khasas provide an interesting study of some stages of the evolution of marriage in the Himalayan districts.

Beginning with the survivals of matri-local conditions in a patri-lineal and patri-potestal society, we find polyandry of the fraternal type in one region and the levirate in a pronounced form in other parts. Though marriage by purchase is the common form, it is also observed that Khasas who have risen in social eminence and culture refuse to take "bride-price" and simply give away their daughters in marriage and at times provide a dowry for them. This is evidence of custom altering as the desire to advance socially spreads.

The social conditions of those living in or near the capital towns vary a good deal from those of their brethren in remote and backward parts of the country. It must be noted that all the Khasas are not in the same cultural plane.

(1) *Survivals of mother-right*

SAUTIA BANT

"Survivals", according to Tylor, "are processes, customs, opinions, and so forth, which have been carried on by force of habit into a new state of society different from that in which they had their original home, and they thus remain as proofs and examples of an older condition of culture out of which a newer has been evolved"[1].

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[1]Tylor, *Primitive Culture*, Vol. I, p. 15.

The custom of Sautia Bant[1] deserves special attention under this head. This custom where it exists or is alleged means that the sons do not divide the inheritance of the father equally, but the division is made according to the number of wives, so that the sons, however few, by any one wife take a share equal to that of the sons, however many, by any other. Mr. Tupper thinks that the rule of inheritance *per stirpes* according to the number of wives is plainly incompatible with a patriarchal society and is characteristically a survival[2]. It does not exist in any definite clan or clans. It is set up in a family or village here or there and is expressly noted in some village records[3]. If the cases in which the claim is made are any evidence of the custom, then there can be no doubt that such a custom prevailed in many villages in these hills. Mr. Stowell in 1907 wrote :—"It (Sautia Bant) is often claimed, but seldom admitted by the courts, though the mere fact that it is so constantly alleged might suggest that it is probably more common as a genuine custom than the many decisions against it would seem to show"[4].

Customary law has a peculiar pathos in the combination of extreme tenacity and frailty which it shows. Custom dies hard; it lives on in full vigour for ages so long as it is only in the keeping of the people, and even when largely obsolete it manages to leave survivals. Customary law when it comes under the jurisdiction of centralized courts proves itself very frail. Decisions adverse to the custom succeed, in a generation or two,

[1]K.L.T., p. 25, Ex. D., cl. *f*.
[2]Tupper, Vol. II, p. 96.
[3]K.L.T., p. 49.
[4]K.L.T., p. 49. *See* Pauw, p. 44, about the custom.

in making it the subject of antiquarian research. When the courts refuse to enforce a custom it is discontinued, as the sanction which society or public opinion attaches to it is removed by the Sovereign authority. Many claims on the basis of Sautia Bant were made in the early days of British rule, but the courts rightly did not look upon it with favour and the custom has practically become obsolete now. "There is no doubt", says Mr. Lall, "that in the past it (Sautia Bant) must have been practised to a fair extent". Garhwal declared solidly for Bhai-Bant (division *per capita*) at his enquiry, and the reason given was that "Courts disapprove of Sautia Bant"[1]. The custom of Sautia Bant was found among Khasiyas or Khas-Brahmans[2]. Mr. Tupper thinks that this uterine apportionment takes us back to that state of ruder polyandry where the husbands being of different stocks, it was a wise child who knew his father, and the only rule of kinship and succession was through the mother. Each mother having a separate family, each family should have a separate share. He is of opinion that the *Chundavand* rule in the Kangra hills is a relic of the state of society which had begun to be polygamous without having entirely disused polyandry[3]. The *Chundavand* rule is the same as Sautia Bant. Mr. Tupper traced the origin of the custom to what ethnologists now call group marriage or sexual communism.

Eminent ethnologists have discarded the theory of original promiscuity. "At present not only do we have

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[1]K.L.C., p. 71.

[2]*Naini Tal District Gazetteer*, p. 101.

[3]Tupper, Vol. II, pp. 96-97.

no knowledge of any promiscuous people, but there is no valid evidence that a condition of general promiscuity ever existed in the past''[1].

MOTHER-RIGHT AMONG THE KHASAS IN MAHABHARATA

Great laxity of morals among women is not synonymous with promiscuity or want of any marital tie. It is interesting to find that a careful reading of the Karna Parva in the Mahabharata, which is a rich record of Indian traditions, suggests by implication a fluid state of sexual relations among the Khasas and the existence of the mother-right. This canto contains a discourse between Karna and Calya in which the practices of the Bahikas, the Khas and other tribes in the Punjab are stigmatized as disgraceful[2]. The country where the Bahikas dwell is thus described :—''Let every one avoid these impure Bahikas who are outcasts from righteousness, who are shut out by the Himavat, the Ganga, the Sarasvati, the Yamuna and Kurukshetra, and who dwell between the five rivers which are associated with the Sindhu (Indus) as the sixth''[3]. ''The regions were called the Arattas and the people residing there the Vahikas; the lowest of Brahmans also are residing there from very remote times.'' The Vahikas, we are told, do not observe the rules of Brahmanism in the matter of food and sacrifices and their women are severely censured for loose living. ''Their women intoxicated with drink and divested of robes, laugh and dance outside the walls of houses in cities, without (*sic.* with)

[1]Dr. Rivers in Hastings' *Encyclopaedia of Ethics and Religion*, Vol. VIII, para. 30, p. 432. *See* Lowie, p. 59, to the same effect.

[2]Roy's *Mahabharata*, Karna Parva, section XLIV-XLV, pp. 152—160.

[3]Muir's *Sanskrit Texts* (2nd edition), Vol. II, p. 482.

garlands and unguents, singing all the while drunken and obscene songs of diverse kinds . . . in intercourse they are absolutely without any restraint"[1].

We are again told that "these degraded people number many bastards among them"[2]. The last and important verse in that chapter is "The Prasthalas[3], the Madras[4], the Gandharas, the Arattas[5], those called Khasas, etc., are almost as blamable in their practices"[6]. The practices of the Vahikas held among the Khasas too, and we find specific mention of mother-right among the Arattas. It is said to be the result of unchastity among the women. A chaste woman, says the story, was abducted by robbers hailing from Aratta and was sinfully violated, and thereupon she cursed the Aratta girls to a life of shame[7]. "It is for this that the sisters' sons of the Arattas, and not their own sons, become their heirs[8].

A passage in some copies of the Rajtarangini confirms the loose practices attributed in the Karna Parva to the Ghandharas, who are one of the tribes anathemized with the Arattas and the Khasas. "These sinners (i.e. the Gandhara Brahmanas) sprung from M'lechhas", says the Rajtarangini, "are so shameless as to corrupt their own sisters and daughters-in-law and to offer their wives

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[1] *Mahabharata*, Karna Parva, XLIV verse 12-13, p. 153.
[2] *Mahabharata*, *ibid*, V, 37, p. 155.
[3] Prasthalas is identified with Patiala, *see* "Geographical Dictionary of Ancient and Medieval India" by Nundopal Dey, M.A., B.L., in *Indian Antiquary*, Vol. LIII, Sup., 159.
[4] "Between the Rabi and the Chinab". *Indian Antiquary*, Vol. CI p. 116 (Supplement).
[5] "Aratta region was the Punjab", *Indian Antiquary*, XLIX, p. 10 (Supplement), was famous for horses. *Artha Sastra*, p. 166, Chap. XXX.
[6] *Mahabharata*, p. 156, verse 46.
[7] *Mahabharata*, *ibid*, section XLV, V. 11-12, p. 157.
[8] *Mahabharata*, *ibid*, verse 13, p. 157.

to others, hiring and selling them, like commodities, for money. Their women being thus given to strangers are consequently shameless."[1] The general conclusion is that marriage among these people co-existed with considerable sexual laxity.

The practices of the Khasas are said to be as censurable as those of the Arattas. We have thus a strong implication about the existence of mother-right among the Khasas. Referring to the statement about a man's sister's sons being his heirs among the tribes referred to, Dr. Muir says, "it is certainly remarkable, if not indeed unaccountable, that such words should be found in that book (i.e. the Mahabharata) if they do not owe their existence to the fact of such a custom being actually prevalent at the time when they were penned or not long previously."[2] Mr. Stowell thinks it probable that the custom of Sautia Bant is an old-fashioned survival from early times, connected with matriarchal ideas.[3]

THE NAYAKS

The loose practices of the Gandharas and the Arattas which are attributed to the Khasas in dim antiquity bring the curious community of the Nayaks forcibly to our notice. The Nayaks[4] own certain villages in the Himalayan districts and invariably bring up the

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[1]Muir's *Sanskrit Texts* (2nd edition), Vol. II, p. 483. *See* Stein's *Chronicles of Kashmir*, Vol. I, p. 46, note i—v, 307, to the effect that the verse was not found in some of the copies which he possessed.

[2]Dr. Muir, "On the question whether polyandry ever existed in Northern Hindustan", *Indian Antiquary*, Vol. VI, p. 315 at p. 317.

[3]K.R.C., para. 13, p. 17.

[4]Atkinson, Vol. XII, 448; *Naini Tal District Gazetteer*, p. III; *Garhwal District Gazetteer*, 64; *Almora District Gazetteer*, 102, K.L.C., pp. 13—15; Raturi, para. 171(*a*), p. 337; K.L.T., p. 8.

daughters of the family to a life of prostitution. During recent years an intensive propaganda for social reform is carried on to induce the Nayaks to give up this despicable practice, and a Nayak social reform committee was appointed by the Government.[1]

The chief places[2] where the Nayaks are found at present are the following :—

Naini Tal district.—Patti Ramgarh.

Almora district.—Pattis Giwar and Naya; village Katarmal in patti Malla Tikhun; pattis Khasparja, Pithoragarh, Son, Seti, Mahar, Gumdesh, Khilpati Phat and Regruban; pattis Gangol, Waldia and Malla Palbilon.

Garhwal district.—Pattis Malla and Talla Kaliphat, Langur and Udaipur Malla.

According to Mr. Atkinson, "they owe their origin to the wars of Bharati Chand (1437—1450 A.D.) with Doti, when the first standing armies in Kumaon took the field, and the soldiers contracted temporary alliances with the women of the place, whose descendants became known as Khatakwalas and eventually as Nayaks from the Sanskrit Nayaka 'a mistress.' The offspring of these professional prostitutes, if a male is called 'Nayak' and if a female 'Pata' (one who has fallen)."[3] This war of Bharati Chand with Doti hardly explains the existence of the Nayaks in all the three districts, much less the growth of this shameless practice of not marrying the daughters but bringing them up as dancing girls and courtezans. Even if the social conditions among the

[1]The *Shakti*, dated 3rd August, 1926, p. 2.
[2]K.L.C., para. 53, p. 13.
[3]Atkinson, XII, 448.

Khasas 600 years ago were the same as we find them to-day, then a girl, the fruit of temporary alliance, would not have found any difficulty in finding a husband.

The Mahabharata, as we find it, is about 2,000 years old. It was compiled before the Christian era and received subsequent interpolations,[1] and in it practices somewhat analogous to those found among the Nayaks are attributed to the Khasas. It is hard to determine whether the Nayaks came into being only 600 years back or whether they are degraded representatives of the ancient Khasas, who, owing to cupidity or other causes, have prepetuated primitive conditions among their women in a more disreputable form.

The Nayaks hardly get an opportunity to intermarry between themselves. "Marriage of girls are known, though they are not common."[2] Marriage of a daughter among the Nayaks is, however, a recent innovation. Where they are married, the Nayaks alone ordinarily take them as wives. These exceptional and recent cases being ignored, we find the Nayaks always got their wives by purchase from the Khas-Rajput families, and even now do so.[3] The obvious result is that though the daughters of the Khasiyas who are married to Nayaks are not prostituted, yet the daughters of those daughters invariably are. It is not a violent presumption that 2,000 years back the Khasas probably did not care for the moral well-being of their daughters just as they now do not care about that of their daughters' daughters, and the statement in the Mahabharata about

[1] *Cambridge History of India*, p. 258.
[2] K.L.C., para. 55, p. 13.
[3] K.L.C., para. 54, p. 135, Atkinson, XII, 448.

mother-right may be founded on fact. To what extent the practice prevailed then we have no means to judge.

The Nayaks form an interesting study for another purpose. Their family organization is half-way between a patriarchal and a matriarchal society, a curious mixture of mother-right and father-right. The position of a sister or daughter is very important in a Naik household. She is the chief worker for the family and the men are the drones who live on her earnings. The Nayaks marry and bring their wives to their houses, so that the family is in part patriarchal, and as the daughters of the house do not leave the family and have children born to them by illicit intercourse, the family is also matriarchal. The result is as follows for the purposes of inheritance[1] :—

A son	= a daughter.
A brother	= a sister.
A brother's son ...	= a sister's son or daughter.
A son's son ...	= a daughter's son or daughter.

But under the Khasa customary law, as the family is strictly patriarchal, succession is confined to male agnates and daughters are rigidly excluded from inheritance.[2]

It is interesting to notice that when a Nayak girl is married she loses all special rights of inheritance, and the rule of a boy being equal to a girl only applies to women who live by prostitution.[3] It is obvious that if in

[1] K.L.C., para. 58, p. 14.
[2] K.L.C., para. 16.
[3] K.L.C., para. 58 (*a*).

the future the present practice of prostituting the girls is rooted out among the Nayaks and all the girls get married, a daughter's position will be the same as among other Khasas, and succession and inheritance will be confined to male agnates only. The Nayaks, who now have a mixed patriarchal and matriarchal social organization, are in the process of being transformed into a fully patriarchal people. We can see and verify this slow and steady transformation at the present day. As to moral ideas, they grow like other institutions, and if the present wholesome movement takes root we may find the Nayaks, fifty years hence, rightly resenting any aspersions on the chastity of their daughters and sisters.

MOTHER-RIGHT MAY BE DUE TO MATRI-LOCAL RESIDENCE

The Nayaks have been mentioned particularly to show that when the women do not leave the family and their children are affiliated to the mother's family, then we find a matri-lineal, matri-local and matri-potestal society. The growth of mother-right may solely rest on this factor of not going to the husband's house. The existence of mother-right does not necessarily import the loose practices associated with the Nayaks. It is perfectly consistent with the existence of a marital union in which the woman receives her husband in her own family. When it is so, the position of the woman is naturally strong. She is not in the power of her husband, and the latter may have no assured position in her house. The wife may be able to dismiss him at her pleasure. A man occupies a different position under his own roof as regards not only parental but conjugal rights. His authority over his own children would be shared by the

brothers of the wife if he was a permanent guest in her family. Among the Khasis of Assam, with whom Captain Wilford tries to identify the Khasas of our study,[1] a woman does not go to her husband's house, but remains in her mother's family. "The most remarkable feature of the Khasi marriage is that it is usual for the husband to live with his wife in his mother-in-law's house and not for him to take his bride home, as is the case in other communities. . . As long as the wife lives in her mother's house, all her earnings go to her mother, who expends them on the maintenance of the family. Amongst the Khasis, after one or two children are born and if a married couple get on well together, the husband frequently removes his wife and family to a house of his own.[2] The superior position of the woman is also reflected in the custom of divorce. Divorce among the Khasis is common, and may occur for a variety of reasons such as adultery, barrenness, incompatability of temperament, etc. As a rule both parties must agree; there is no custom enforcing the restitution of conjugal rights, so when one party does not agree, compensation is assessed by the village elders."[3] It may be said that no ethnic affinities are suggested between the Khasis and the Khasas. The Khasis are said to have settled in Assam from the east and not from the west.[4] They have been mentioned as merely illustrating a people amongst whom mother-right exists.

The verse in the Mahabharata that we have been discussing clearly speaks of husbands, and this fact

[1] *Asiatic Researches* (1801), VI, 455.

[2] The Khasis, Lt.-Col. P. R. T. Gurdon (1915), p. 76.

[3] The Khasis, pp. 79—81.

[4] The Khasis, pp. 10-11.

negatives any idea of a marriageless state among the Khasa girls, as we find among the Nayaks. It is quite consistent with a matri-local marriage where the woman does not leave her mother's family, but receives her husband in the midst of her family. Under these conditions the woman may not be bound to strict conjugal fidelity in a primitive society and may possess the privilege of associating with other men too. This predominant position which the woman occupied among the Khasas in early times probably affected the binding nature of the marital union even when she began to go and live with her husband. We shall see that the right to dissolve the marriage was possessed by her, and no high standard of female virtue was imposed on her. Batten wrote "Little or no importance is attached to the breach of female chastity, excepting when the prejudices of caste may thereby be compromised."[1]

It is interesting to note that a conspicuous survival of the "Sautia Bant" rule, perhaps the most conspicuous in these Himalayan districts, is found in the Nayak village of Khilpati, patti Khilpati Phat in the Almora district.[2] It is not one of those Nayak villages in which stray instances of girls being married may be found, but there a daughter is equal to a son. Is this a mere coincidence? It seems to the writer that it is not a mere chance, but that the custom has clung fast at least to one seat of its origin, i.e. a matri-lineal family, in spite of the decisions of the courts.

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[1]Batten's *Official Reports*, p. 63. *See* Atkinson, XII, 510; he says adultery was common, but no compliant was made unless accompanied by the abduction of the adulteress; also Vol. XII, 255; "Mountaineer", pp. 170—172; The *Shakti*, dated 12th May, 1925, p. 6, col. 1; Fraser, 208, they do not see it (chastity) valued and of course do not preserve it.

[2]K.L.C., para. 58(c), p. 15.

It is easy to see, if mother-right was recognized previously among the Khasas, that on the wives coming to reside with their husbands, a division *per stirpes* according to the number of wives, i.e. Sautia Bant, would be readily recognized and enforced.

AVUNCULATE

Sautia Bant by itself may be due to cultural diffusion from the aborigines, but the existence of certain peculiar privileges of the maternal uncle among the Khasas discloses an earlier social grouping different from the strong patriarchal family that is observed at the present day. Ethnologists describe under the heading of "Avunculate" customs regulating in an altogether special way the relations of a nephew to his maternal uncle. "In their more serious aspect they involve an unusual authority on the uncle's part and the inheritance of the property not by the son, but by the sister's son."[1] It has been said that the social organization at present is eminently patriarchal, and the community is exogamous. There is no case of inheritance going to the sister's son except among the Nayaks, but some incidents which have clung to the most primitive and conservative of all human institutions, i.e. marriage, serve as windows which enable us to peep, albeit feebly, into dim antiquity :—

> "(1) Amongst the Rajput zamindars, who are chiefly Khasiyas, when people bring an offer of marriage to a girl's father, he asks for a certain price, and a part of it is fixed there and then as Mama-Jholi or the maternal uncle's share in the price of the bride."[2]

[1]Lowie, *Primitive Society*, p. 78.
[2]Mr. Lall in *Indian Antiquary*, XL (1911), p. 190 at p. 193.

This sharing in the bride-price looks to be a relic of the time when the mother's brother was head of the family and guardian of his sister's children. When the wife began to live with her husband in the midst of his people, the former privileged position of her brother was to some extent apparently preserved.

(2) Sexual intercourse with a wife of a sister's son is regarded with peculiar horror by even the most backward Khasas.[1] As the standard of sexual purity among the backward Khasas was by no means very high,[2] this particular taboo is striking and would seem to have originated at a time when the mother's brother, as the head and guardian of his nephews, was probably even in a barbaric society expected to refrain from undue familiarity with their wives.

MARRIAGE AVOIDED IN MOTHER'S CLAN

The Khasas do not observe all the Shastric injunctions about forbidden marriages. But they do avoid union with the daughters of father's and mother's agnates. A mother-in-law and her daughter-in-law cannot be from the same clan. And besides this there is a strict prohibition against marriage not only with a maternal uncle's daughter, but also with a mother's sister's daughter.[3]

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[1]Raturi's *Hindu law*, para. 548, p. 914; para. 94, p. 170.

[2]Atkinson, XII, 255; XII, 510; "Mountaineer", 170—172; Batten, p. 63.

[3]Raturi, *Hindu law*, p. 125.

Thus in an agnatic community an important rule about marriages is based upon kinship through women.

The Garhwali proverb, "*Mama Phupha ka Bhai, Kaka baron ka Dai,*" the sons of one's maternal uncle and paternal aunt are one's brothers, those of one's father's younger and elder brothers are one's enemies,[1] shows some preference for the maternal line, though it can well be that the proverb is due to the frequent disputes among agnates about inheritance, joint land, etc.

We have mention of mother-right among the Arattas in the Punjab. We find the *Chundavand* rule, i.e. Sautia Bant, there among some tribes in the plains[2] and in the Kangra district.[3] It is the ordinary rule of succession among all classes except Gaddis who generally follow the Pagvand (or Bhai-Bant of Kumaon) rule. We have seen that this rule of dividing the inheritance according to the number of wives existed in Kumaon and Garhwal, and is now practically obsolete. Though obsolete in other parts, it has survived among the Nayaks of Khilpati to declare as it were its true parentage with the last breaths of life left to it.

It is clear that there are some factors in Khasa Family law which are inexplicable in a strictly patrilineal, patri-local and patri-potestal society, and the customs we have cited point to a time when, at least, a married woman remained in her mother's house. Sautia Bant, which savours strongly of mother-right, may be due

[1]Census Report, 1911, U. P., Vol. XVI, Part I, 218 foot-note.

[2]Tupper, Vol. II, p. 138 (Gurgaon district); p. 175 (*Rohtak District Gazetteer*); para. 3, p. 195 (Jats of Lahore); p. 199 (Gujranwala); p. 201, para. 2, 214.

[3]Punjab Record 22 of 1902; *Kangra District Gazetteer* (1904), p. 189; Lyall's *Settlement Report of the Kangra district*, para. 74, p. 101.

to a strong infusion of outside culture, but, taken with other incidents of Avunculate, it fairly suggests that the present stage of marriage law, when the bride must come to her husband's house, was probably preceded by a marriage system in which the woman remained with her mother's family and was visited there by her husband or her lovers.[1]

(2) *Polyandry*

In speaking of polyandry we emerge from the region of survivals and speculation to the study of a living institution in some parts of the Himalayan districts.

Tibetan or fraternal polyandry exists in pargana Jaunsar Bawar[2] of Dehra Dun and in parganas Rawai and Jaunpur of Tehri State[3] which adjoins Jaunsar Bawar.

It may be said at once that except in the tract mentioned above polyandry does not exist among the Khasas.[4]

HOW WIVES ARE SHARED.

"In the Jaunsar district, when the eldest brother marries, the woman is equally the wife of his younger brother, though the children are (by courtesy?) called the

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[1]*See* Palaniappa Chettiar *v.* Alayan Chetti, 48 I. A., 539, where Patni-Bhaga or division according to the number of wives was upheld in a case from Madras.

[2]*Dehra Dun District Gazetteer*, p. 89; Burn's Census Report, 1901, for N.-W. P., para. 114, p. 121; Williams' *Memoir of Dehra Dun*, para. 125, p. 60; Dunlop, *Hunting in the Himalaya*, 180—182; Fraser, "Journal of a Tour through part of the Himala Mountains," 206—209, *Indian Antiquary*, VIII, p. 88; Atkinson, XII, p. 353; *Imperial Gazetteer of India* (1909), Vol. X, p. 125, and Vol. XI, p. 215; Balfour's *Cyclopaedia of India* (3rd edition), Vol. III, p. 246.

[3]Raturi, *Hindu law*, para. 72, p. 135.

[4]Batten's *Official Reports*, p. 22; Genl. Ramsay's remarks that polyandry and infanticide are unknown in Kumaon, para. 53, p. 27; Beckett's *Settlement Report*, 1874; Dunlop, *Hunting in the Himalaya*, pp. 180-181; "Mountaineer," p. 202.

children of the eldest brother. When much difference exists in the ages of the brothers of a family, as, for instance, when there are six brothers, the elder may be grown up, while the younger are but children; the three elder then marry a wife, and when the young ones come of age they marry another, but the wives are considered equally the wives of all six."[1] It is found that uterine brothers, and those who are the children of the same set of fathers, though by different mothers, share one or more wives in common between them.[2]

There is no prohibition against a brother taking a separate wife, but if he does so he can continue to enjoy the common wife or wives only if the other brothers do not object. He has the right to separate and set up his own exclusive family.[3] The idea is the same as is found among many other polyandrous people in the Himalayan borderland. Mr. Das notes about Jubbal State in the Simla Hills :—"A brother cannot claim to be the joint owner of a wife with other brothers and at the same time have a second wife all to himself. He must either share the second wife with all other brothers or must live separate from his other brothers and in possession of the second wife."[4] In the Jubbal State polyandry is the prevailing form of marriage among the Kanets. In other places, too, within the hills in the Punjab "It is a custom among the Sudras, such as Kanaits, that the eldest of four or five brothers marries a wife according to the customs of the country. The wife thus married is told that all the brothers shall treat her as their common wife, and the

[1]Dunlop, *Hunting in the Himalayas*, p. 181.
[2]Raturi, *Hindu law*, p. 135.
[3]Census Report, N.-W. P. (1901), XVI, Part I, para. 114, p. 121.
[4]H.C. Das Gupta in *Indian Antiquary*, Vol. L, p. 146 at p. 148.

wife also agrees to this and takes every one of them as her husband. Thus the woman is considered the common wife of all, provided the husbands are own brothers."[1]

In Jaunsar Bawar "One case was reported in which the family consisted of eight brothers, six being sons of one mother and two of another. The family first married three wives who were possessed in common, but subsequently one of them took another wife. Later the first six brothers appropriated the first three wives and the other two sons the new wife."[2] The eldest brother, however, has a primary right to the company of the wife. Marital jealousy does not exist among these people and the polyandrous woman apparently contrives to arrange things in a manner conducive to peace.

RIGHT OVER CHILDREN AND WIVES

Fraser wrote that the children were affiliated to their fathers according to seniority, e.g. the first child born was regarded as the property of the elder brother and the next in succession were supplied in turns.[3] Dustoor-ul-aml or record of customs for Jaunsar Bawar prepared in 1848 says :—"If, according to custom, four brothers have two, or perhaps one wife between them, and four or five daughters are born, and one of the brothers marries again, the children are not shared between them, but remain with the woman; and the woman cannot go to the younger brothers, but must live with the elder; but the children are entitled to equal shares from the four

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[1]Mian Durga Singh, "A Report on the Punjab Hill Tribes", *Indian Antiquary*, Vol. XXXVI (1907), para. 52 at p. 277.

[2]Census Report, N.-W. P., 1901, para. 114, p. 121.

[3]Fraser's *Journal*, p. 209. "The custom is the same in Jubbal State", *see Indian Antiquary*, Vol. L, p. 148.

brothers, which are paid to the elder."[1] The express mention of daughters and their disposition shows how economically valuable they are to these people and the custom of taking a bride-price has enhanced their importance. Mr. Williams says:—"Younger brothers legally have only the usufruct of their senior's wife, for she and her children are held to be the exclusive property of the eldest brothers. Hence he keeps both woman and children in the event of the household being broken up and the rest of the fraternity going to live elsewhere."[2] It seems that to call polyandry in Jaunsar Bawar merely the usufruct of elder brother's wife is not strictly correct. It is more than mere usufruct. The younger brothers are the husbands of the woman as much as the elder brother,[3] but to avoid the breaking up of the family and division of a joint holding, the junior members are denied the right to claim one or more joint wives, or joint children, exclusively. In the very nature of things a wife or a child cannot be divided like other property. The Dustoor-ul-aml contemplates a case where a man has married another woman and wants to share the joint wives too. This he cannot do as "none of the younger brothers are allowed to marry a separate or additional wife for themselves."[4] If he means to remain in the family he must share the new wife with his other brothers or forfeit his own right in the joint wives. If the family breaks up by amicable settlement, then if there are more than one wife, a division of the wives too is made.[5] As for the restitution of conjugal

[1] *See* Williams' *Memoir of Dehra Dun*, Appendix VIII, para. 12, cl. (1), p. xxviii.
[2] Williams, para. 125, p. 61.
[3] Dunlop, p. 181.
[4] *Indian Antiquary* (1879), Vol. VIII, p. 88.
[5] *See* the case quoted above about eight brothers in Census Report (1901) and Raturi's *Hindu law*, p. 497.

rights, one of the co-husbands can claim it; but if after separation there has been exclusive appropriation, then the one who receives the woman can claim it.[1] It is only when the elder brother does not agree to a division and a junior member wants to set up a separate household that he loses his rights over the joint wives, and this primitive society in that case has given the right of exclusive appropriation to the eldest brother. In practice the rule operates to keep families joint and indivisible for years. Mr. Raturi notes that families are met with who have continued their joint possession of land and of women for successive generations.[2] How strongly custom regards the wife of one brother as the wife of another will appear from what Mr. Williams says on the matter :— "The custom of polyandry is supposed to promote good feeling among brothers and is (or used to be) observed so consistently that if a mother-in-law dies leaving an infant son, the daughter-in-law is, properly speaking, bound to rear the boy and marry him herself when he attains the age of puberty."[3] The fact that at the time of separation, which is uncommon, the sons and wives are divided amongst the brothers together with other property,[4] goes to show that the right of the younger brothers is more than that of mere usufruct. The institutions and practices of a primitive people can at times be hardly expressed in the exact legal phraseology of a civilized community. We see that the children are all attributed to the eldest brother,[5] but that is a mere euphemism, for if a man dies his brother or brothers succeed in preference to the

[1] Raturi, 484, p. 817.
[2] Raturi, *Hindu law*, p. 136.
[3] Williams' *Memoir*, para. 125, p. 61.
[4] Raturi, 497-498.
[5] *Indian Antiquary*, VIII, p. 88.

sons[1] who are as much their own sons as of the deceased. In the strict sense of ownership the younger brothers may be said to have mere usufruct, for the marital and paternal power rest in a special sense with the eldest brother. But polyandry in these parts should properly be viewed as in reality nothing more than a mere custom of community of wives among brothers who have a community of goods, with a reservation that a member cannot enforce a division of the wives and children for exclusive appropriation against the wishes of the others.[2]

POLYANDRY AND ITS CAUSES

It has been supposed that polyandry is a result of the scarcity of women produced by infanticide. It has also been supposed that polyandry has been the result of inequality in the proportion of the sexes, due to scarcity of the food supply, this either producing a small proportion of female births owing to physiological causes or leading to the practice of infanticide.[3] McLennan and Morgan both regard polyandry as a phase through which human society has necessarily passed.[4]

Female infanticide was unknown in the Himalayan districts, for the usual temptations to female infanticide were not found in the hills. The wife, instead of bringing a large dowry, is usually purchased for a considerable sum from her parents, and there is no trace of female

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[1] *Dehra Dun Gazetteer*, p. 90.

[2] *See* Vinogradoff, *Historical Jurisprudence*, Vol. I, p. 200. "It (polyandry) is due to poverty and in many cases brothers form a joint-stock company for the possession of a wife".

[3] Hasting's *Encyclopaedia of Religion and Ethics* (1915), Vol. VIII, para. 9, p. 427.

[4] *Origin of Civilization* (1911 edition), p. 151.

infanticide having existed in Jaunsar Bawar[1]. The cause of polyandry in this region must be sought elsewhere. It is a curious fact that the proportion of sexes is adjusted by nature in this polyandrous community in a manner which causes scarcity of women. More males are born than females.

Speaking of these parts Dunlop says :—"It is remarkable that wherever the practice at polyandry exists, there is a striking discrepancy in the proportion of the sexes among young children as well as adults; thus in a village where I have found upwards of four hundred boys, there were only one hundred and twenty girls . . . . In the Garhwal hills, where polygamy is prevalent, there is a surplus of female children"[2]. Mr. Sherring, too, observes :—"It has been noticed in our own hills that where polyandry has existed the result has been small families with males preponderating"[3]. Tables V (*a*) and V (*b*) (Appendix B) show the male and female population at all the censuses since 1881 in Chakrata tahsil where polyandry exists. Except during the decade 1891—1901, the male population has increased more than the female population and there have been less than 80 females to 100 males.

"Nature's adaptability to national habit," which Dunlop observed is one of the causes which keeps the institution alive. Besides this, the people think that polyandry promotes good feeling between brothers, and

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[1]General Ramsay in Beckett's *Settlement Report* (1874), para. 58. p. 27; Dunlop, *Hunting in the Himalaya*, p. 182; Census Report (N.-W. P.), (1901), para. 114, p. 121.

[2]Dunlop, *Hunting in the Himalaya*, pp. 181-182.

[3]C. A. Sherring, *Western Tibet and the British Borderland* (1906), p. 88.

by this means land does not become sub-divided and quarrels are avoided[1]. The poverty of the people and the difficulty of paying the bride-price, their queer notions of family solidarity, want of marital jealousy and absence of any delicate conception of womanhood conspire with their environments to perpetuate the custom. A woman to these people is a mere chattel and capable of being held jointly like other property. In the absence of higher cultural thought and contact with the outside world they have continued primitive practices unabashed and unashamed to this day. "Jaunsar is a kind of 'sleepy hollow' within the hills in which the changes wrought in the outside world have had but little influence until the British Settlement Officer and Forest Officer[2] came amongst them."

Economic conditions primarily seem to have kept up this institution, which limits the population. When a wife is shared, the children will be less than if each brother had a wife. The small family property is saved from minute sub-division in a country[3] which has "the character of being one of the wildest and most rugged tracts, affording naturally very little level ground, and that only in small patches". Major Young wrote "there is not a single spot of one hundred yards of level ground in the whole pargana". Where "all is steep and difficult, toilsome rise or sudden fall", the cultivation is necessarily small and very laborious. The joint labour of adult brothers would be an economic necessity, and as a result of their peculiar mentality they preserve the

[1] Williams' *Memoirs*, para. 125; Raturi's *Hindu law*, p. 136; *Dehra Dun Gazetteer*, p. 89.
[2] Atkinson, XII, 353.
[3] Atkinson, XII, p. 341.

family from disruption by sharing a wife or wives in common. The influence of women in this barbaric society, queer as it may seem, is probably exercised in support of the custom. A woman indifferent to what civilized people regard as womanly virtue thinks that she will be much better looked after when there are more than one husband to care for her, and we find that a man with no brother finds it difficult to get a wife[1]. "That the female inclinations have played no insignificant part in the history of polyandry is all the more probable, as among polyandrous peoples women generally enjoy great sexual freedom and the men are little addicted to jealousy"[2]. Mr. Hartland, too, believes that polyandry results from the general absence of marital jealousy among backward races, and he suggests that women exercise a powerful influence in support of the custom[3].

POLYANDRY IN ANCIENT INDIA

Polyandry, to say the least, was not unknown in ancient India. A trace of this practice is to be found in a hymn of the Rig-veda which is addressed to the two Aswins :—"Aswins, your admirable horses bore the car, which you had unharnessed, (first) to the goal, for the sake of honour; and the damsel who was the prize came, through affection, to you, and acknowledged your (husbandship), saying : You are (my) lords"[4] Mr. Mayne is not prepared to accept that polyandry was practised

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[1]Williams' *Memoir*, para. 125; *Indian Antiquary*, VIII, 88.

[2]Westermarck, *History of Human Marriage*, Vol. III, p. 197.

[3]Hartland, *Primitive Paternity* (1910), Vol. II, pp. 162-163.

[4]Rig-veda Sanhita—Mandala I, Hymn CXIX, v. 5; Wilson's *Translation* (2nd edition, 1866), 6 322.

by the Aryans[1], but about the hymn says :—"this evidently points to the practice of *Svayambara,* when a maiden of high rank used to offer herself as the prize to the conqueror in a contest of skill, and in this instance became the wife of several suitors at once"[2]. Dr. Keith holds "while polygomy is recognized in the vedic period, though chiefly among kings and important Brahmans, there is no clear trace of polyandry, all the passages adduced from the Rig-veda (X—LXXXV, 37f) and the Atharva veda (XIV, i, 44, 52, 61; ii, 14, 17) admitting of more probable explanations"[3]. Whatever may have been the conditions in the vedic age, in the Mahabharata Draupadi's marriage to five Pandavas is a clear and unequivocal instance of fraternal polyandry. The story[4] in the epic when shorn of Brahmanical apologies and explanations is that Draupadi had been won at an archery tournament by Arjuna—one of the five brothers. He alone was entitled to the hand of Draupadi, but in fact she was married to all the five brothers. It is worth noticing that Drupada, King of Panchala, objects to the unusual demand of Yudhishthira that the former's daughter Draupadi should be the common wife of all the brothers. Yudhishthira, the eldest brother, however, claims the right of fraternal polyandrous union, on the ground that their mother had ordered so, and that it was a rule with them to enjoy equally a jewel that they may obtain. The fact that she was won by Arjun did not matter and they could not

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[1]Mayne, *Hindu law*, para. 63, p. 65.

[2]Mayne, *Hindu law*, para. 64, pp. 77-78.

[3]Keith in Hastings, *Encyclopaedia*, Vol. 8, para. 5, p. 453.

[4]*Mahabharata*, Adi Parva, pp. 539—559; Dr. Muir on "Polyandry in Ancient India," *Indian Antiquary* VI, 260—262.

abandon their rule of conduct[1]. We find, however, that when the Mahabharata was written, polyandry had long ceased to be practised among the higher classes in Northern India, for Drupada observes:—"It hath been directed that one may have many wives. But it hath never been heard that one woman may have many husbands" and calls polyandry "an act that is sinful and opposed both to usage and the vedas"[2]. A discussion on the propriety of polyandrous union follows[3], in which Vyasa says that the practice "opposed to usage and the vedas" was obsolete. Drupada regards it as sinful and of doubtful morality, while Dhrishta-Dyumna enquires how an elder brother can approach the wife of his younger brother and declares it is difficult for him to say "Let Draupadi become the common wife of five brothers." Yudhishthira, however, gives two instances of virtuous women, one of whom named Jatila had seven husbands, and the other was married to ten brothers! The fact is as Maine has said of traditional custom that "no law is better known by those who live under it in a certain stage of social progress, none is known so little by those who are in another stage"[4]. As Professor Max Muller remarks, the epic tradition must have been very strong to compel the authors to record a proceeding so violently opposed to the Brahmanic law. "The Brahmanic editors of the Mahabharata, seeing that they could not alter tradition on this point, have at least endeavoured to excuse and mitigate it"[5] Dr. Muir truly observes

[1]P. C. Roy's *Mahabharata* (Cal. 1884), Adi Parva, p. 549.

[2]P. C. Roy's *Mahabharata*, p. 549.

[3]P. C. Roy's *Mahabharata*, pp. 550-551.

[4]Maine, *Village communities*, p. 60.

[5]Max Muller, *A History of Ancient Sanskrit Literature* (1859), pp. 46-47.

"Although supernatural occurrences are introduced to explain and justify the transaction, its lawfulness as a recognized usage, practised from time immemorial, is also affirmed both by Yudhishthira and Vyasa. At the time when the Mahabharata, as we now have it, was composed or revised, the practice must have so far fallen into disuse, or have become discredited, as to require that special divine authority should be shown in order to render its occurrence among respectable persons conceivable even in earlier ages"[1].

Traces of polyandry are clearly found in the Law writers Brihaspati and Apastamba. Brihaspati[2] mentions "the highly reprehensible custom of a brother living with his deceased brother's wife, and the delivery of a marriageable damsel to a family" as being found in some countries. This statement occurs after the cousin-marriages in Southern India are recorded[3], and some people other than the Southerners appear to be indicated thereby. Apastamba[4] throws some interesting light on the matter. He speaks of the forbidden practice of delivering a bride to a whole family (Kula). A husband shall not make over his wife to others than to his gentiles in order to cause children to be begot for himself, for (they declare) a bride is given to the family of her husband and not to the husband alone (verses 2 and 3). The practice is forbidden at present on account of the weakness of men's senses (verse 4). Both Brihaspati

[1]Dr. Muir, "Social and Religious Life in Ancient India", *Indian Antiquary*, Vol. VI (1877) at p. 262.

[2]Brihaspati, XXVII, verse 20; *Sacred Book of the East*, Vol. 33, p. 389.

[3]Brihaspati, XXVII, para. 19; *Sacred Book of the East*, Vol. 33, p. 389.

[4]Apastamba, II, 10, 27, verses 2—4; *Sacred Book of the East*, Vol. II, p. 164.

and Apastamba are averse to the custom of Niyog, and it is obviously to something quite different that they refer[1].

The existence of polyandry in Ancient India among some tribes is undoubted, though it is not possible to determine the extent to which it prevailed[2].

(3) *The Levirate*

The word is used to denote two distinct customs about the association of a brother or cousin of a deceased person with his widow. The best example of real levirate is found in the Hindu Dharma-Sastras, when, as Niyog, it is limited to the case in which the deceased husband has died without leaving any male children and the motive of the union is to raise up seed for him.

The other custom is that of marrying a deceased brother's wife apart from any limitation or from the motives indicated in the sacred literature of the Hindus.

TWO CUSTOMS OF LEVIRATE IN THE HIMALAYAN DISTRICTS

In the Himalayan districts we find among the Khasas two types of union with the widow of a deceased person :—

(1) In one case the widow, not necessarily childless, lives in her deceased husband's house and her brother-in-law goes and visits her there, with the consent of the widow and other reversioners. Allied to this is the custom of keeping a Kathala or

[1]Dr. Jolly, p. 155.

[2]Dr. Muir in *Indian Antiquary*, Vol. VI, p. 315; C. V. Vaidya, *Epic India*, pp. 86, 97; *Indian Antiquary*, VII, p. 86, on Polyandry in the Punjab; *Cambridge History of India* (1922), Vol. I, p. 294; also p. 358 about Pandavas being a really polyandrous northern hill tribe.

Tekwa. A Kathala or Tekwa is a person who lives with the widow in her own house. The children born of such a union are affiliated to the deceased husband of the widow.

(2) The other custom is the common practice of taking to wife the widow of a deceased brother. The widow in this case leaves her own home and comes to the brother-in-law's house as his wife. The children are the legitimate (*Asal*) children of the second husband.

TEKWA OR KATHALA

A clear conception of the Tekwa[1] institution and its legal significance has been prejudiced by the growing moral consciousness of the people and the not infrequent attempt to test the validity of a custom by an ethical and legal standard other than that of the people. The custom is bound to die out with the moral evolution of the Khasas, as the practice of Niyog died out among the Hindus. In order duly to appreciate the custom, we have to bear in mind that among primitive societies legal paternity is not synonymous with biological paternity. This, we shall show, was the case in ancient India and is among the Khasas, when we discuss paternity and sonship. Mr. Pauw described the custom thus :—"Occasionally in some Khasiya villages the whole of the deceased's property is made over to another man, on the condition that he lives with the widow as his

[1]For some reference to Tekwa *see Almora District Gazetteer*, 105; *Garhwal District Gazetteer*, 68; Pauw, p. 44; Raturi, pp. 172—175 and p. 211.

wife. This second husband is known as 'Tekwa'. The reversioners by this arrangement give up their claim to any part of the deceased's property. The practice is regarded as a somewhat immoral one''[1]. The word ''wife'' and ''husband'' must be understood to have been used loosely here, evidently from the fact that this union is regarded as a ''somewhat immoral one''. As to the handing over of the property of the deceased to the Tekwa, we should remember that the Tekwa acts as a manager of the property. He acquires no interest in the property by this arrangement and can be turned out by the widow at her pleasure[2]. No transfer of the property can be made by the reversioners, as a sonless widow is entitled to it, and if the deceased has any sons of his own, then they are the owners of the property.

There are no decisions of the courts on the consequences of Tekwa relationship, and Mr. Stowell did not come across any instance of this practice[3]. Mr. Lall is surprised at this; he says :—''Tekwas are not very uncommon. Hardly a day passed when I did not come across one or two examples''[4]. He has a curious concep tion of the Khasiyas and higher castes in Kumaon, and so we need not take his observations seriously about Tekwas being observed among the higher castes too. Mr. Lall says :—''A Tekwa has no *locus standi*. He has no claim to any part of the estate of the first husband of the woman who keeps him. If he gets anything

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[1]Pauw, *Garhwal Settlement Report*, p. 44.

[2]Raturi, p. 174, and para. 92, p. 169, There is no marriage and there are no reciprocal rights and obligations between the man and the woman.

[3]K.L.T., p. 56.

[4]K.L.C., para. 307, p. 82.

it is by the consent of the reversioners[1]. It is true that the Tekwa has no *locus standi*. He is simply a man who helps the woman in the management of the land and enjoys the privileges of a husband without any of his rights or obligations. He is a protector and lover of the woman[2]. He can leave the woman at his pleasure without being liable for maintenance and himself holds a precarious position in the woman's house. We shall see that the reversioners have no concern with the property of the deceased so long as the widow lives in her house. But prior to the British rule a woman was no more than a mere chattel and was heritable property. When a man died sonless, the brothers or remoter agnates, who received the inheritance, got the widow with it, and the waiver of their rights by the immediate heirs was necessary for the due appointment of a Tekwa, as their rights were defeated by the arrangement.

WHEN IS A TEKWA KEPT

A Tekwa may be kept by a sonless widow, or a widow with minor sons. In the case of a sonless widow the interests of the heirs of the deceased were obviously affected by the appointment, so their consent would be deemed essential. When a man, who is fairly rich, dies sonless, leaving his own land and house, there seems a desire in the community to see that his line does not become extinct. The motive of the appointment is secular, to perpetuate the name and line of the deceased. No one has ever heard of a Tekwa being appointed in

[1] K.L.C., para. 307, p. 82.

[2] *Almora District Gazetteer*, p. 105.

the case of a pauper's widow. Dr. Jolly traces the origin of Niyoga among the Hindus to the desire to keep the estate of a rich and powerful person in his own line[1]. Vasishtha warns that no appointment shall be made through a desire to obtain the estate[2]; he however admits that according to others "one may appoint (a widow out of covetousness) after imposing a penance"[3]. But according to Dr. Jolly this is precisely one of those prohibitions affording a glimpse into the real state of things which the Indian moralists tried in vain to alter[1].

In the case of a young widow with minor sons, who have inherited land from their father, the equitable sense of the community is reconciled to some such arrangement as the appointment of a Tekwa. The widow, if she married again, would have to take her minor children to the new husband's house, and this is not to the interest of the minors. As women among the Khasas do not plough[4], they need a male helper. Hence the kinsmen appoint one of the kinsmen "who is a *bhai* of the deceased, or offer the choice of a man to the widow."[5] This man, who lives with the widow, is called a Kathala or Tekwa. The physical needs of the woman, a solicitude for the minors' interests and the economic environments of the community bring the Tekwa into existence. The local proverb[6] "*Tekwa Dharleen Chela Palleen*" (i.e. the women shall keep Tekwas and bring

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[1]Dr. Jolly, p. 154.

[2]Vasishtha, XVII, 65.

[3]Vasishtha, XVII, 66.

[4]*Almora District Gazetteer*, p. 105; *Garhwal District Gazetteer*, p. 68; "Mountaineer", p. 207.

[5]Raturi, para. 98, p. 173.

[6]Per Mr. G. N. Joshi's note.

up their children) shows the true foundation of the custom in the case of a widow with minor children.

Sometimes[1], Mr. Raturi informs us, the husband when he is physically unfit helps a Kathala to associate with his young wife. Among the Khasas and Doms this appointment of the wife to raise up seed for the husband is rare in British Garhwal or Kumaon. "The appointment of a mate for a wife" by the husband, as distinguished from the appointment of one for a widow, was also known to early Hindu law. Manu and Vasishtha speak of the appointment of a mate for a wife, and so do Gautama and Vishnu[2]. This custom, mentioned by Mr. Raturi, enables us to estimate the moral sense of the community and shows that legal paternity under the Khasa law is not synonymous with physical paternity.

It has been mentioned that a Tekwa or Khatala can be kept only with the consent of the *biradari*, and it could not be otherwise. A man, much less a helpless woman, cannot flout public opinion in a small, isolated village. Human individuality is not fully evolved in small, compact, social groups. In primitive societies "I dare not" is equivalent to "I must not". Those who have experience of these hills will easily realize how impossible it is for a man or woman to live together against the corporate will of the village community. People meet their social needs according to their own genius, and this simple agricultural community has solved a problem of not infrequent occurrence in its own way. For a correct

[1]Raturi, para. 98, p. 172.

[2]Manu, IX, 167; Vasishtha, XVII, 14; Gautama, XVIII, 11; Vishnu, XV, 3

appreciation of a primitive custom one should identify oneself with the inner thought and social life of the people, as it is likely to be misunderstood if judged by the ethical notions of a higher civilization.

LEGAL PATERNITY AND STATUS OF THE CHILDREN BY A TEKWA

We have said legal paternity does not necessarily depend on the physical act of procreation. The children begotten by a widow by her brother-in-law when he only visits her at her house, or by a Tekwa who lives with the woman, stand in the eye of the customary law on the same level. The brother-in-law in such a case is also called a Tekwa[1]. Public opinion and customary law make a world of difference between a child begotten by a man on his brother's widow in his own house and one so begotten in her house. The difference may seem idle or foolish on a superficial examination of the custom, but it is vitally connected with the fundamental concept of a valid marriage under the customary law, as we shall see when dealing with the essentials of a valid marriage under Khasa law. The custom was judicially recognized in *Kirpal Singh* v. *Partab Singh*[2] in 1891. In that case plaintiff Kirpal Singh claimed half of the estate of Chawanu, deceased, against Partab Singh, who was Chawanu's son by his own wife. Tejua and Chawanu were brothers. Tejua's widow did not leave her husband's house, but looked after her own son Mangal Singh by Tejua, and received visits from Chawanu, her brother-in-law, in Tejua's house. Kirpal Singh, plaintiff, was born of this union. On these facts it was found

[1]Per Mr. Gairola's note.
[2]K. R., pp. 12-13.

by the lower court that "by local custom, if the elder brother's widow went to live in the younger brother's house as his wife, her children by him were considered legitimate and inherited as such, but that if the widow continued to live in her former husband's house, she was regarded as only a concubine of the younger brother and her issue by him as illegitimate," and in appeal Mr. Giles, Commissioner, decided that "a son of a man by his brother's widow does not become his heir unless he has taken the mother into his house and treated her as of his family".

Mr. Lall says on this point "Enquiries show that the custom has now changed to some extent . . . There is now no distinction for purposes of inheritance in any of the three districts whether the *bhauj* (i.e. elder brother's widow) goes to live in the home of her husband's brother or cohabits with him in her own home"[1]. If it is so, it would be a unique case of a sudden transformation in the ingrained ideas of a valid marriage among these people. The answers of Messrs. Pant and Gairola and the observations of Mr. Raturi do not show that the custom has really changed.

When we consider the above case, it is found that Kirpal Singh's position as a Tekwa's son is not even that of a *Dhanti's* child. If his mother had been regarded even as a *Dhanti* of Chawanu, Kirpal Singh would have been entitled to inherit equally with Partab Singh. This remarkable distinction is due to the fact that under the customary law no relationship of husband and wife arises unless the woman has come under the

[1]K.L.C., para. 303.

power of her husband. It seems to the writer that Mr. Lall has clearly failed to appreciate the peculiar significance of this custom and its exceptional position in Khasa Family law. He has regarded a Tekwa union as synonymous with a *Dhanti* marriage. We are told "except with the consent of the reversioners, neither the Tekwa nor the children by him acquire any rights in the property held by the widow employing the Tekwa. Both she and such children have full rights in the Tekwa's property, if any"[1]. We saw in Kirpal Singh's case that when the brother-in-law acts as Tekwa, the son of the widow has no claim on his property, and obviously the position of the child would be weaker still when the natural father is a remoter relation. The legal paternity in this case rests with the deceased husband of the woman, and the position of the child is like that of a *Kshetraja* son, known to ancient Hindu law.

Question 10 (*b*) on widow's estate and Questions 1 and 2 on Inheritance to Hissadari in Appendix A deal with this matter. The custom is very rare in Kumaon[2] and Mr. Trivedi, too, says that no cases of Tekwa are known. The answers from Almora or Naini Tal thus reflect more the opinion of the correspondents on a custom which has decayed, than a statement of fact. This opinion naturally would not be in favour of a rule which suggests quite primitive notions of paternity and is not easily reconcilable with modern conceptions. Most of the answers from Almora and Naini Tal are that no affiliation to the deceased husband takes place. It is on this view alone that one can reconcile these answers

[1]K.L.C., para. 44, p. 6.

[2]Per Mr. B. D. Joshi's note.

with Mr. Gairola's statement. From what has been said above there can be no doubt that in Mr. Gairola's answers we have the true rule. He explicitly says that in the case contemplated in Question 10 (*b*) on Widows estate "The *Dhant* is called a Tekwa and the child born is considered as of her deceased husband and succeeds to the estate"[1].

Mr. Pant says "The child born of such connection is not considered to be the child of the deceased husband, but of the younger brother. He will inherit the property of the husband of the woman"[2]. Mr. Joshi's informants say "There was custom to deem the child of the first husband, but the law has not recognized it"[3].

It is undoubted that a Tekwa is often kept by a widow with minor sons. Nearly all the replies are to that effect. But on the affiliation to the deceased husband of the woman there is the same diversity of opinion. Mr. Gairola's answer to Question 2 on Inheritance is that the sons by the Tekwa are affiliated to the deceased husband and inherit the property of the deceased husband of the woman equally with their uterine brothers, i.e. the other sons of the deceased[4]. Mr. Joshi remarks "it was in some cases allowed by the village community in case a Tekwa was kept with the consent of the *biradari*"[5]. That the sons of the Tekwa acquire rights in the property held by the woman is undoubted from Mr. Lall's statement too, but he makes the consent of

[1]Per Mr. Gairola's answer to Question 10 (*b*) on Widow's Estate, Appendix A.

[2]Mr. Pant's reply to the above question.

[3]Mr. G. N. Joshi's reply to the same.

[4]Per Mr. Gairola's note.

[5]Per Mr. G. N. Joshi's note.

the reversioners a condition precedent[1]. We are not told when this consent of the reversioners is given. If it means that the consent of the reversioners must be to the appointment of the Tekwa himself, the statement is perfectly correct and reasonable, and is misconceived if it is suggested that his children's right to inherit depends on the sweet will of the reversioners. There is no case of the waiver of rights by the reversioners after the birth of a child. His status is determined by the fact whether or not the Tekwa was appointed with the consent of the reversioners. There is no custom among the Khasas that any child whatsoever of the widow is to be affiliated to the deceased husband. She has no licence to live as she chooses. It is true that so long as a widow lives in her husband's house her estate is not divested by unchastity[2], but casual products of her amours have no claim on her husband's estate or that of her paramour.

A Tekwa, it cannot be too often repeated, is kept initially with the consent of the reversioners. The word Tekwa, for a person who associates with the woman against the express or tacit consent of the relations, is a misnomer. In early Hindu law proper authorization for Niyog was essential and a son begotten on a widow who had not been duly appointed belonged to the begetter[3]. It would be monstrous for a community not to legitimise the children of a union which it expressly sanctions, and the children are certainly not the legitimate sons of the Tekwa under the customary law[4].

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[1]K.L.C., para. 44, p. 6.

[2]K.L.C., para. 39, p. 4, and para. 293, p. 78.

[3]Vasishtha, XVII, 63; Narada, XII, 85.

[4]Kirpal Singh *v.* Partab Singh, K. R., 12.

Mr. Raturi whose book is sanctioned for official use in the Tehri courts clearly notes that the issue by a brother-in-law when he visits the *bhauj* (elder brother's widow) at her own house inherit to the estate of the deceased husband equally with their other uterine brothers[1], and regards the sons by a Tekwa or Kathala as *Kshetraja* sons of the deceased; and says when this is the custom among these people, it is by no means proper to deny the legitimacy of such sons[2]. So far as the writer can see this is a correct statement of the legal position under Khasa Family law. Customs of this type change with the moral growth of the community, and the position at present is transitional. Some Khasas are ruled by the past practices, while others are anxious to live up to the modern conceptions of family relationship among their neighbours. A clear grasp of the custom among the uncultured Khasas is necessary before the courts can determine how far a village or circle has given up old practices and legal ideas.

TEKWA UNION IS ANALOGOUS TO RUDER NIYOG

A Tekwa union is not "marriage" under the customary law. The very fact that it offends against the growing moral sense of the community ought to leave no doubt in the matter, especially when we know that a Khasa widow is as free as any woman in the world to remarry without the least social stigma. Marriage creates at least some reciprocal rights and obligations between a man and a woman, and they are absolutely wanting in this case. If we seek an analogy, then it would be found in a sort of rude "Niyog" where the desires of the flesh

[1]Raturi, para. 116, p. 211.
[2]Raturi, para. 99, p. 175.

are not barred, and where association is not limited to the case of sonless widows or to the procreation of one or two sons only.

There are certain similarities between Niyog and Tekwa union. In Niyog[1] the brother-in-law was the primary person who should raise a son and heir to the deceased, and on his failure some other *sapinda* (near kinsman) was commissioned to visit the woman. So strong was the rule about the preference of the brother-in-law in early Hindu law that Gautama excludes from inheritance a son begotten by another relative on a widow whose husband's brother lives. Some declare, he says, that nobody but a brother-in-law shall cohabit with her.[2] Among the Khasas, too, the brother-in-law is preferred, but if he is not inclined to undertake the guardianship of the widow and her children, then a remoter relation who is a "*bhai*" of the deceased is appointed as Tekwa.

Then again Niyog did not depend on the mere will of the widow, she had to be authorized. Manu only speaks of an authorized widow, and we find from Vasishtha Dharma-Sutra[3] that this extraordinary commission was given by the Gurus or spiritual advisers and relatives of the deceased. Gautama and Narada require authorization by spiritual parents or by relations.[4] Where the avowed object of begetting the child was to minister to

[1]Gautama, XVIII, 4—14; XXVIII, 22, 23; Baudhayana, ii, 2, 4, 9-10, only mentions brother-in-law; Vasishtha, XVII, 14, 55—66; Vishnu XV, 3; Manu, IX, 56—63, 143—147, 164—167; Yajna-Valkya, II, 127-128; Narada, XII, 80—88. For an interesting discussion on the Niyoga, *see* Winternitz in *Journal Royal Asiatic Society* (1897), p. 716 *sq.*

[2]Gautama, XXVIII, para. 23, XVIII, 7.

[3]Vasishtha, XVII, 56.

[4]Gautama, XVIII, para. 5; Narada, XII, para. 86.

the spiritual needs of the deceased, the voice of spiritual preceptors or Gurus must necessarily predominate. But in a society where spiritual satisfaction is not the main object, the *purohits* (priests) would play an unimportant part. It is quite plain, however, that even the brother could not perform the act without some external authority.[1] "It appears that some time—six months according to the statement of Vasishtha—after the death of one deceased without male issue, a sort of family council, consisting of the next-of-kin and the spiritual advisers of the deceased, used to be assembled in order to be charged with the office of raising issue to the deceased."[2]

Eliminating the spiritual advisers among the unsacerdotal Khasas, we find a similar practice of the appointment of a Tekwa by the family council of the reversioners or next-of-kin.[3] We should remember, however, that the Niyog of the Dharma-Sastras is confined to a sonless widow and terminates when a child is begotten, while the appointment of a Tekwa is not confined to a sonless widow, but has secular needs in view.

The Smriti writers who permit Niyog vehemently protest that carnal desires[4] should have no place in the union, and a union impelled by amorous desire was to be punished by the king.[5] It is confined to a sonless widow only with the limitation of begetting one or at the most two sons to the deceased.[6] It is beyond the scope of

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[1]Mayne, para. 71, p. 85.

[2]Dr. Jolly, p. 153.

[3]Raturi, para. 98, p. 173.

[4]Manu, IX, 143, 147; Narada, XII, 82–84; Vasishtha, XVII. 61.

[5]Narada, XII, 88.

[6]Narada, XII, 81, 87; Manu, IX, 143; Manu, IX, 61, limits appointment to lawful procreation of two sons; Yajna-Valkya i, 68-69, allows cohabitation till the widow is with child.

this study to determine whether the limitations and prohibitions imposed by the Smriti writers were merely reformative on still ruder conditions, as we find among the Khasas. It is interesting to notice, however, that if we limit the duration of a Tekwa union to begetting one or two sons on a sonless widow only and decry the satisfaction of sexual desires, we transform it into Niyog as sanctioned by the Dharma-Sastras.

MARRIAGE WITH BROTHER'S WIDOW

The second kind of levirate does not need detailed consideration. It is a common practice among the Khasas in the Himalayan districts to marry a brother's widow.[1] The custom has been judicially recognized more than once. This custom must be sharply distinguished from the one in which the widow does not leave her husband's house, but is visited by the brother-in-law, who acts also as a guardian of the widow and her minor sons and is called a Tekwa. When the widow comes to live with the brother-in-law, the children are the legitimate issue of the brother-in-law and inherits his estate, but not so when the couple live apart.[2] The brother-in-law has not to pay any price for the widow, but if any one a stranger to the family marries her, he formerly had to pay a price and a deed of relinquishment was executed, the price paid being euphemistically called the price of jewellery, etc. The practice of taking a price for the widow is gradually dying out, and in Garhwal

[1]K.L.T., p. 53; K.R.C., Commentary, para. 8, p. 9; K.L.C., paras. 302-303, and para. 41 (c); Padua *v.* Bhawan Singh, K. R., p. 7; Kirpal Singh *v.* Partab Singh, K. R., p. 12; Raturi, para. 94, p. 170, *Indian Antiquary* (1911), XL, p. 192; *Garhwal District Gazetteer*, p. 68; *Almora District Gazetteer*, p. 105.

[2]Kirpal Singh *v.* Partab Singh, K.R., p. 12; *Garhwal District Gazetteer*, p. 68.

now is almost obsolete.[1] When a widow is taken by her husband's younger brother she is simply made over to him and takes up her abode with him without any formal ceremony.[2]

NO TABOO ON THE ELDER BROTHER

The rule against the marriage of an elder brother with the widow of a younger brother is not so rigorously enforced as among many other tribes, when a brother's widow is married. The marriages of elder brothers with the widows of younger brothers are not frequent, and the social sentiment among the Khasas on this point fluctuates between gross irregularity to a mere optional rule of propriety. The Khasas are not peculiar in this respect; among Delhi Jats, too, an elder brother can take to wife his younger brother's widow.[3] Looking only to the legal aspect of such marriages it is undoubted that there is no invalidity in the marriage of an elder brother with his younger brother's widow.[4] The local saying on the subject of junior levirate is interesting. "*Malbhir udhari talla Bhir men aundo*"[5] (i.e. the wall of an upper field comes down into the lower one). The analogy is drawn from terraced fields in the hills. As it is natural for the land to slide down and be supported by the lower wall and not to slide up, so it is natural for a woman to depend for her protection on the younger brother of the husband, not on the elder brother. This discloses a decided preference for junior levirate. As ordinarily an elder brother would die before the younger

[1] K.L.C., para. 302.
[2] *Garhwal District Gazetteer*, p. 68; *Almora District Gazetteer*, p. 105.
[3] Elliott, *The races of N.-W. P.*, Vol. I, p. 274, about Karao among Jats.
[4] K.L.C., para. 41(c), para. 305; Raturi, para. 94, p. 170.
[5] Upreti, "Folklore", p. 348.

brother, the normal condition would be for the younger brother to inherit the elder brother's widow. With the primitive mind the normal is apt to become the moral or legal, and that may explain the current sentiment. Besides this other things being equal the choice of the widow would usually be exercised in favour of the younger brother.

UNDUE FAMILIARITY BETWEEN A MAN AND HIS BROTHER'S WIFE

The proverbs common amongst a people on a subject indicate the crystallized thought of the masses on that topic. One of the Khasa proverbs is: "*Kai randa Diwara bhauj ni Suwawa*" (is she not a cursed woman who does not like her brother-in-law and vice versa?). Mr. Upreti notes "among lower classes of Hindus these persons are allowed much freedom of intercourse, and hence such conduct is approved."[1]

NOTE.—"Approved" is too strong a word, to say condoned or tolerated would be nearer the mark.

Mr. Raturi tells us that with the classes amongst whom dissolution of marriage is allowed there is no stigma attached to a woman for her misconduct with the brothers of the husband and the wife is entitled to maintain a suit for maintenance, even under such circumstances, till the husband has relinquished his rights over her. The replies which were received on Question 14 (Divorce and Maintenance, Appendix A) do not bear out this contention. Though it cannot be said that adultery with a brother-in-law has a special effect in law among the Khasas, "it is more often than not condoned."[2] It is

[1]Upreti, "Folklore", p. 350.

[2]Raturi, p. 831.

in the moral and social aspect of the question that we are interested just now. There is thus reason to believe that among the Khasas adultery with the brother-in-law is looked upon as a less serious moral wrong than adultery with a stranger. Mr. Lall notes :—"Even during the lifetime of her husband a woman's liaison with her husband's younger brother is not visited with the same punishment as with a third person."[1]

LEVIRATE A RIGHT RATHER THAN AN OBLIGATION AMONG THE KHASAS

So far as the Khasas in the Himalayan districts are concerned, there is no idea of duty or obligation on the part of a brother in taking to wife his brother's widow. The custom is in the nature more of a right than of a duty.[2] It is the special right of the younger brother, for if the widow goes to live with some other man, the younger brother can demand payment of the bride-price from the new husband.[3] It has already been said that in some cases social opinion just mildly disapproves of the elder brother's union with his deceased brother's wife. Under the custom marriage with the widow of a deceased brother is rather a right to appropriate her than a duty to raise issue for the deceased brother or to look after the widow.

So far as customary law is concerned, the custom is now invariably optional. The courts do not for a moment treat the widow as an inheritable chattel. The levir is not bound to marry the widow if he does not want

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[1]Mr. Lall in *Indian Antiquary* (1911), Vol. XL at p. 192.
[2]Answers to Question 12 (Marriage, Appendix A). Some say it is right and some it is more of right than of duty.
[3]*Indian Antiquary* (1911), p. 192.

to do so, and the widow is not bound to marry the brother-in-law if she wants to marry some one else or nobody. The position in fact is that "of all the men available to the widow as a possible second husband, the brother-in-law is merely *primus inter pares*."[1]

IS LEVIRATE AMONG THE KHASAS A SURVIVAL OF POLYANDRY OR AN INCIDENT OF THE LAW OF PROPERTY

We have shown that polyandry is practised by the Khasas in Jaunsar Bawar and in adjacent parganas in Tehri State. Jaunsar, according to Mr. Atkinson, is a truly representative Khasiya tract.[2] However, we see that amongst Khasas in general polyandry does not exist at present; we merely have Tekwas raising issue on the widow of a deceased person, children of such unions being affiliated to the deceased, and far more frequently the actual marriage, for all purposes, of a widow to her brother-in-law, with a tendency to regard adultery by a man with his brother's wife as pardonable.

Do these circumstances suggest the conclusion that polyandry was much more extensively practised in the Himalayan districts and that the levirate, as we find it at present, is merely a survival of earlier polyandrous conditions? The practice when a widow is taken as wife by the deceased husband's brother has been regarded by McLennan, Robertson Smith and many others as a survival of polyandry.[3]

"It is obvious," says McLennan, "that it could more easily be feigned that the children belonged to the

[1]Census of India (1911), Vol. XV, Part I, para. 222, p. 214.
[2]Atkinson, XII, p. 353.
[3]Rivers' *Social organization*, p. 81.

brother deceased, if already, at a prior stage, the children of the brotherhood had been accounted the children of the eldest brother, i.e. if we suppose the obligation to be a relic of polyandry.''[1] But against this Niyog is not a survival of polyandry,[2] although the legal paternity rests with the man to whom the mother belonged.[3]

The undoubted existence of polyandry among uncultured Khasas in one region of the Himalayan districts *primâ facie* suggests that the levirate may be a survival of polyandry. The very common custom of the levirate and other incidents noted are, however, well accounted for by the property rights over women in Khasa law.

A woman is a chattel, who is purchased for one of the sons by the father of the family. The nature of the transaction is more the acquisition of a valuable article for the family than a contractual relationship between a man and a woman. So that if a betrothal has taken place, and, after the part or full price has been paid, the boy who was to be married dies, the father of the bride is bound to marry the girl to some other boy in the family or refund the price.[4] Mr. Pant and Mr. Gairola say that generally the girl is married to the brother of the deceased, or money is refunded, and litigation ensues if the father of the girl refuses to take either course. The real nature of the transaction is that it is the boy's family, and not the boy himself, that have bargained for the girl; and

[1]McLennan, *Studies in Ancient History* (1886), p. 113.

[2]Jolly, p. 155; Mayne, para. 72, pp. 85-86.

[3]Mayne, paras. 70-71, pp. 83—85.

[4]Answers to Question 15 (*c*) (Marriage, Appendix A). *See* Manu, IX, 97, "If, after the nuptial fee has been paid for a maiden the giver of the fee dies, she shall be given in marriage to his brother in case she consents".

their right to get possession of her when she becomes marriageable remains, though the boy to whom she was first contracted may have died. The idea is analogous to what we find under the Punjab customary law.[1] The same legal conception is disclosed by a custom which is sometimes noticed among the Khasas. A girl may be betrothed to a boy, but owing to some astrological oddities, it may be inauspicious to conduct the marriage ceremony between the two, and then the girl is married to his brother, but is deemed the wife of the boy to whom she was really betrothed. If *Kanyadan* (i.e marriage by gift) has taken place, then she cannot be appropriated by any one other than the donee.[2] The custom clearly shows that marriage ceremonies have no legal significance in Khasa Family law. Appropriation of the woman effectually creates marital rights, and the real nature of the transaction is the acquisition of a valuable article by the family. The remarks of Apastamba[3], "They say a bride is given to the family of her husband and not to the husband alone", can well be applied to the Khasas in the proprietary nature of the rights acquired over the woman. She becomes by purchase, in a sense, the property of the family, but the son for whom she is procured has a right of exclusive appropriation. The very fact that she has been obtained in exchange for money provided by the family may, in the absence of finer notion of womanhood, condone an occasional user by a brother of the husband. A brother takes his brother's widow as a matter more of right than of obligation, because he re-

[1]Tupper, Vol. II, p. 118.

[2]Raturi, para. 73, p. 136.

[3]Apastamba, II, 10, 27, 3.

ceived her in the past with the other effects of the deceased.[1]

It is not suggested that polyandry among the Khasas was confined to the region in which it exists at present. It may well be that it was practised more extensively in the past among the Khasas, and the levirate may in their case, at least, be a survival of polyandrous conditions. It is intended, however, to emphasise the fact that levirate does not necessarily premise antecedent polyandry, and the custom can well originate where women are looked upon as heritable property.[2]

In the case of the Khasas the two conclusions are not mutually exclusive. It can be said, however, that the continuance of the custom has been due to the status of the women in Khasa law under which they were inherited like other goods of the deceased.

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[1] W. Crooke, "*The Tribes and Castes of N.-W. P.*," Vol. I, pp. CXC—CXCI", says about levirate, the widow is regarded as a kind of property which has been purchased into the family by the payment of the bride-price. As to levirate in Melanesia, Dr. Codeington says it obtains as a matter of course, "the wife has been obtained for one member of the family by the contributions of the whole, and if that member fails by death, some other is ready to take his place, so that the property shall not be lost". Frazer, *Totemism and Exogamy*, Vol. II, p. 79.

[2] Lowie, *Primitive Society*, pp. 32-33; Frazer, *Totemism and Exogamy*, Vol. II, p. 80; Westermarck, Vol. III, p. 210, *Origin of Civilization* (1911), p. 153; Spencer, *Principles of Sociology*, Vol. I, 649 (Wives may be inherited like other belongings).

CHAPTER III

LEGAL POSITION OF WOMEN AND A VALID KHASA MARRIAGE

POSITION OF WOMEN IN KHASA LAW

THE position of women in a tribe affects its social organization and its conception of marital rights and duties. A clear idea of the legal position of women among the Khasas is necessary to appreciate many rules of customary law in the Himalayan districts.

We have already anticipated some of our conclusions on this subject. A woman among the Khasas was a mere chattel, but her position has been materially altered under British rule. She has been emancipated to a remarkable extent in the eye of the law and can no longer, as formerly, be sold by her husband or his heirs[1].

Marriage among the Khasas is a simple affair—a mere question of purchase and sale of the girl. Bride-price is almost invariably taken, and it varies from 25 rupees to 1,000 rupees. The husband acquired by this contract a disposable property in the woman, and widows

[1]Atkinson, XII, 255, "The sale of wives by their husbands and of widows by the heirs and relations of the deceased were forbidden and made penal by the Government;" Atkinson, XII, 512.

were inherited like other goods[1]. A tax was levied under the Gurkhas on the sale of wives and widows[2]. Dr. Heber truly said in 1824 "A wife is regarded by the Khasiya peasant as one of the most laborious and valuable of his domestic animals"[3].

The real status of women among the Khasas is brought out by a custom, which fortunately is now obsolete, in Tehri State. It was the custom called *otali*, under which if a man died without leaving any male issue, then all his property together with his daughters and widows reverted to the Raja[4]. The custom was noticed by the "Mountaineer", and his severe strictures may have helped to bring about the reform. He tells us[5] :—"If a woman, on her husband's death, determines to remain a widow for life, she retains her nose ring; but if she takes it off, it is a token she intends to marry again. If she has a son, the choice rests entirely with herself and she generally marries some one who will leave his own home and live with her; but if she has no son, she is obliged to marry again, her purchase money going to the revenue of the country. A man's property at his death is divided equally amongst his sons. Should he have no male issue, it reverts to the Raja, together with his wife and any unmarried daughters. These are given in marriage as soon as possible, and the sums paid for

[1]Atkinson, XI, 687: XII, 255; *Almora District Gazetteer*, 104-105; *Garhwal District Gazetteer*, 67; Markham, *Shooting in the Himalayas*, pp. 110-111; "Mountaineer", 198—200; K.L.C., para. 310; Raturi, para. 71, p. 133; Williams' *Memoir*, p. 43; Fraser, 206-207.

[2]Atkinson, XII, 255.

[3]Heber, p. 498.

[4]Raturi, pp. 54, 624-625.

[5]"Mountaineer," p. 204.

them added to the district revenue. This is complained of as the greatest hardship of all the Raja's exactions, and no evil is so much dreaded as having no son to avert the possibility of such a calamity''. Nothing can be stronger evidence of the property concept in regard to women than this custom of escheat to the Crown of widows and their unmarried daughters.

It is also observed that occasionally a Khasa purports to make a gift of his wife to the Brahmans at the time of a solar eclipse at Bageswar and then at once receives her back on paying a price in cash[1]. The Khasas are evidently not guided in this matter by Hindu usages, as the gift of a wife is prohibited in the Dharma-Sastras[2]. This custom among the Khasas appears to have sprung from the clear conception that a wife is a valuable chattel and that some religious merit would be acquired if a symbolic gift is made of her.

That women under the Khasa customary law were no better than chattels is proved by other customs which Mr. Raturi says exist in Tehri State. If a man marries a grown-up girl without the consent of her father or his heirs, he is liable to pay the bride-price to them[3]. In some places in Almora and Garhwal public opinion is to the same effect[4]. Still more remarkable is the custom

[1]Per Messrs. J. L. Sah, Thulgharia, Trivedi, Juyal and G. N. Joshi on Question 17 (Marriage, Appendix A).

[2]Narada, IV, 4; Brihaspati, XV, 2. *See* Mandlik, pp. 35—37, and *Nilkantha Bhatta's* dissertation on a man's having no ownership over wife and children and reference to prohibition of the gift of wife even in *Visvajit* sacrifice when a man used to give away his entire property, but not wife, son or daughter.

[3]Raturi, p. 113. *See* Manu, VII, 366, If a man of equal caste makes love to a maiden he shall pay the nuptial fee if her father desires it. *See* foot-note to the verse by Buhler in *Sacred Book of the East*, XXV, p. 218.

[4]Mr. Gairola, Mr. Pant, Mr. Juyal on Question 15 (*a*) (Marriage, Appendix A).

in Tehri State, under which the second husband of the widow of a person who has died issueless and without any assets has to pay the creditors of the deceased the price which had been paid for the woman by her first husband. That the custom is founded on the proprietary rights over women is also made out by the fact that the same rule applies when a man dies indebted and has left unmarried daughters. The person who marries any such daughter has to pay a reasonable price for the girl to her father's creditors. The value is assessed according to the price paid for other girls in the family. Mr. Raturi clearly states that widows and unmarried daughters are regarded as assets[1]. We have already seen the effects of this conception in case of escheat to the Crown.

The legal position of the Khasa women in British territory has been quite different for about a hundred years, and the result is reflected not only in the practices but in the public opinion of the Khasas in that region. It is denied that a creditor can make the second husband liable for the debts[2]. The conditions in the past were not the same: on failure to pay his rent a tenant was sold into servitude and his wife was forcibly taken away[3].

It is interesting to see that the practices of the Khasas in Tehri Garhwal, in making the second husband of the widow liable for the debts of her first husband to the extent of the marriage expenses, find sanction in the

[1]Raturi, para. 421, pp. 748-749.

[2]Answers to Question 15 (*b*) (Marriage, Appendix A).

[3]Lala Devidas, "Kumaon ka Itihas," p. 34. *See* "Mountaineer," pp. 205-206, on the servitude of the family for the debts of a man. *See Artha Sastra*, p. 215, Wife could be caught hold of for debts of a herdsman; Atkinson, XI, 463, Owing to the exacting assessment of the Gurkhas balances soon ensued, "to liquidate which the families and effects of the defaulter were seized and sold."

Dharma-Sastras. The rules are founded on the same conception of proprietary rights over women, which the Khasas show. "He who has intercourse," says Narada[1] "with the wife of a dead man who has neither wealth nor son shall have to pay the debt of her husband, because she is considered as his property". Vishnu[2] makes the man who takes assets liable for the debts of a deceased person, and also the person "who has the care of the widow left by one who had no assets". After the anathema pronounced by the Smriti writers against the sale of daughters, i.e. against the Asura form of marriage, they could not consistently deal with the case of a man who left only unmarried daughters and no other assets.

The legal position of women among the Hindus in the past was very much like what it is among the Khasas. The ancient juridical thought of the Indo-Aryans is writ large in the pages of early Dharma-Sastras, which make wives heritable property[3] and exclude them from inheritance[4].

[1]Narada, 1, 22; Yajna-Valkya, II, 51, He who takes wife is liable for debt, I, Colebrooke's *Digest*, 326—329.

[2]Vishnu, VI, 29-30.

[3]Manu, VIII, para. 416, Women can hold no property; what they acquire is for the husband; Gautama, XXVIII, para. 47, Women shall not be partitioned, apparently points to a time when they were looked upon as family property; *Cambridge History of India*, p. 134, "Women were excluded from the inheritance. A woman had no property of her own; if her husband died, she passed to the family with the inheritance like the Attic epikleros; her earnings, if any, were the property of husband or father"; *Vyavahara Mayukha*, V. 4, paras. 16-17; In Sutras "Women are property" and come under the general rule of Vasishtha, XVI, 18; *Cambridge History of India*, p. 247. *See* Mayne, page 88, foot-note (*d*).

[4]Mayne, para. 522, pp. 759-760. For daughters, *see* paras. 519, 755-756, and *Cambridge History of India*, 134, 247.

Many incidents of Khasa Family law become intelligible when we bear in mind that the Khasas looked upon women as chattels and evolved legal rules accordingly[1].

A Khasa marriage is not a matter of affection or companionship. It is a mere animal and economic connection. The value of the wife lies principally in her services as a household drudge. She has to cook food, cut grass, gather wood, fetch water and do all the work in the fields except actual ploughing, and to produce children. This production of children is by no means the religious necessity which it is with Hindus governed by the Brahmanical ideas of *shradha*.

DIFFERENT KINDS OF MARRIAGES AMONG THE KHASAS

We have dealt with the polyandry in Jaunsar Bawar and some parganas of Tehri State among the Khasas and with the custom of marrying the deceased brother's widow.

It may be a relic of polyandry, but can well owe its origin to property rights over a woman which a family is deemed to acquire. Such marriages in British territory are now entirely optional. The widow can marry any one she pleases, provided the marriage is not otherwise illegal. No one can force his brother's widow to live with him against her wishes, even in Tehri State[2]. The conditions in Tehri are, however, still primitive to a certain extent. The widow is regarded as assets of

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[1] *See ante*, pp. 108-9, about the acquisition of a wife as valuable property for the family; Mr. B. D. Joshi says :—"The woman is treated as a field, and in deciding many questions in regard to them one would be safe in his conclusions by being guided with an analogy from the possession, control and other characteristics of land. Woman is not unoften called 'khet', i.e. a field".

[2] Raturi, pp. 839-840.

the deceased, and under Regulation 43 of 1896 certain relations are entitled to marriage expenses before the widow can remarry. In assessing the amount payable for the widow the dowry received by the husband is deducted from the bride-price paid[1].

Of the eight forms of marriage mentioned in the Dharma-Sastras[2] which were recognized among the ancient Hindus, only two are found among the Khasas—the Brahma and the Asura. The latter, called Taka ka Biyah, is by far the common form, while the former, called Kanyadan, is confined to cultured Khasas, who are Brahmanised in thought and practices and have attained certain social eminence. There may be a mixture of Kanyadan and Taka ka Biyah, e.g. bride-price is taken, but the money is spent in marriage expenses, i.e. in feasting, etc., and in supplying the ornaments and dowry to the girl.

The echo of Rakshasa from which Vaishtha[3] styles the Kshatra rite, i.e. the rite destined for the Kshatriyas or warriors, is found in a peculiar custom which Mr. Raturi says exists among the Khasas in some villages. It is called "*udal soot*" (i.e. abducting the girl) marriage. When the bargain is settled with the father or guardians of the girl and no auspicious date for marriage is found, the girl is sent to some village fair, and the husband or, in case of his minority, some people belonging to his family, abduct the girl from the fair and carry her to the husband's house. The relations of

[1]Raturi, para. 88, pp. 161—166.

[2]Manu, III, 21; Baudhayana, I, XI, 20, 1—16; Vasishtha, I, 28-29; he mentions only six rites and omits Prajapatya and Pisacha rites; Vishnu, XXIV, 18.

[3]Vasishtha, I, 34.

the girl do not accompany her and dowry is given when she leaves her father's house the second time. The mere carrying off from the fair constitutes a valid marriage provided the consent of the father or guardians has been previously obtained; otherwise it is a case of abduction and an offence under the criminal law[1]. The custom has not been mentioned by any other writer, though survival of "marriage by capture" is found among the Bhotiyas of Dharma, Chaudas and the Beas valleys in a marriage by elopement[2].

THE BRAHMA FORM OR KANYADAN

Kanyadan literally means the gift of the daughter and denotes a marriage in which no bride-price is taken by the father. It is confined to rich and cultured Khasas and seems to be a more or less recent innovation confined to those who are anxious to adopt the practices of the higher castes. When the girl is given away in marriage without any consideration some religious ceremonies are also introduced[3]. Anchal or the tying together of the couple is the principal and essential part of the ceremony and the bridegroom goes to the house of his bride to receive her as a gift. The form is of limited applicability and has nothing peculiar about it except perhaps a sentiment against its revocability.

THE ASURA FORM OR TAKA KA BIYAH, SAROL OR DOLA MARRIAGE

But the other form, Taka ka Biyah, or marriage for consideration[4], prevails among the Khasas and is not

[1] Raturi, p. 130.
[2] K.L.C., para. 107 (*b*), pp. 28-29.
[3] Raturi, para. 71, p. 133; K.L.C., para. 45 (1).
[4] *See ante* page, 112, foot-note (1), for references; unanimous answers to Question 14 (Marriage, Appendix A).

considered dishonourable or improper. Besides the payment of the consideration in money noticed by Mr. Panna Lall[1], a wife could be procured by rendering services in the house of the father-in-law and sometimes by "Sante ka Biyah," i.e. marriage by exchange.

Mr. Atkinson in 1886 wrote :—"The contract (i.e. of marriage) is entirely one of purchase and sale, conferring on the purchaser a disposable property in the women bought, a right that was recognized under the former governments, when a tax was levied on the sale of wives and widows. When the means of the suitor was insufficient to satisfy the demands of the parents, an equivalent is sometimes accepted in the personal services of the former for a given number of years, on conclusion of which he may take away his wife"[2]. The custom of acquiring a wife by rendering services to her father is found among various primitive peoples[3]. It has been suggested that among the Khasas in the past the husband probably went and lived with the woman in the midst of her family or paid her visits only[4]. The custom may be a relic of such times, but it is more proper to regard it as a mode of paying for the wife. The services are rendered by a poor suitor in lieu of the money payable[5]. Mr. Lall has not noticed this custom. There is no doubt that owing to the growing prosperity of people such marriages are rare now, if not obsolete.

[1] K.L.C., para. 45 (2).

[2] Atkinson, XII, 255.

[3] Westermarck, Vol. II, 360—375.

[4] *Ante*, pp. 76-77.

[5] *See* Campbell in *Journal of the Asiatic Society, Bengal*, Vol. IX, Part I, 603 (Limboos of Sikkim and Nepaul); Hodgson, *Miscellaneous Essays*, Vol. I, 402 (Kirantis of the Central Himalayas), for like custom.

"Sante ka Biyah" is nothing more than "exchange of girls" between two families. No price is paid in cash. Mutual stipulations are made at the time of the betrothal to this effect. A man marries his daughter in one family and gets a wife in exchange from it for his son. There is no religious significance in a Khasa marriage. Repudiation of the contract by one party entitles the other to refuse performance of his part of the bargain[1]. There are no decisions of the court on such marriages, and it would be an interesting question to determine how far a marriage which has been performed on one side can be avoided on refusal of the other party to perform his part of the bargain, as the analogy of Hindu law can hardly apply to a Khasa marriage. This custom is like the *adala badala* marriage among the Bhotiyas[2] or *bil mawazc* marriages in the Punjab[3].

MARRIAGE FOR CONSIDERATION WELL ESTABLISHED IN ANCIENT HINDU LAW

Vasishtha calls marriage for consideration the "Manusha" rite[4], i.e., rite destined for ordinary mortals. The treatment of Asura marriage in the Manusmriti throws a flood of light on this topic and on the character of the compilation itself. The Asura rite which is defined in (Manu, III, 31) is allowed to a Vaishya and Sudra in (III, 24), but in the very next verse it is said that "Asura rites must never be used." If verses (III, 51—54) warn Hindus against the penalty of taking any gratuity for a daughter, we have a rule[5] as to what

[1]Raturi, para. 71, p. 134.
[2]C. A. Sherring, "Notes on the Bhotiyas of Almora and British Garhwal" in *Memoirs, Asiatic Society, Bengal*, Vol. I, 98.
[3]Pollock and Mulla, p. 178. *See* Amir Chand *v.* Ram (1903), P.R. no. 50—Agreement not void.
[4]Vasishtha, I, 35.
[5]Manu, IX, 97.

happens when a nuptial fee has been paid and the giver of the fee dies, we are told that the girl should be married to the brother of the deceased, and yet the next three verses[1] are self-contradictory, the limit being reached when we are told that "Covert sale of daughter" or "Nuptial fee" had never been heard of (IX, 100). But in Chapter VIII, 204, Manu tells us that if "after one damsel being shown, another be given to the bridegroom, he may marry them both for the same price". "It proves that in spite of all directions to the contrary, wives were purchased in ancient India as frequently as in our days"[2]. The hopeless conflict is between Manu, the declarer of law, and Manu the reformer. The practice is anathemized by the reformer, but rules about nuptial fees deal with the actual practices of the people. We have seen how public opinion and practice among the Khasas agree with the rule laid down in Manu, Chapter VIII, 204. If the boy dies after betrothal, then the girl is ordinarily married to his brother or the bride-price is returned[3].

It cannot be doubted that the practice of taking bride-price was quite common in Ancient India, as in many other countries[4]. "It is quite clear", says Dr. Jolly, "that the most common among the lower forms, viz., the sale of a maiden, was by no means confined to the non-Brahmanical castes. The very vehemence of the attacks which are levelled against this practice by the Brahmans affords evidence in favour of its common occurrence among all castes. The following text occurs

[1]Manu, IX, 98—100.
[2]Note to Manu, VIII, 204, by Buhler in *Sacred Book of the East*, Vol. XXVI.
[3]*Ante*, pp. 108-9.
[4]Mayne, para. 81, pp. 95-96; Vinogradoff, Vol. I, 248; Westermarck, Vol. II, Chap. XXIII; *Artha Sastra*, pp. 186-187; Hastings, Vol. 8, para. 2, 451.

in two recensions of the Yajurveda, and is quoted by Vasishtha :—"She commits sin who unites herself with strangers, though she has been purchased by her husband". This text seems to indicate a state of society when the payment of the bride-price by the husband was necessary to constitute a valid marriage[1].

The epic poems and Puranas contain many instances of a nuptial fee being paid to the father of the bride. Richika, a Brahman, had to pay a nuptial present of "a thousand fleet horses whose colour should be white with one black ear" in order to marry Satyavati, the daughter of King Gadhi[2]. In the Mahabharata we are told that Madri, the sister of the king, was obtained as a bride for Pandu by Bhishma after paying gold, jewels, elephants, horses, cars and various other articles[3], and that the purchase of women was the family practice of the king[4].

In course of time, with the moral evolution of the Hindus, the sale came to be merely symbolic, when a gift of real value was received and then immediately returned to the giver. Apastamba[5] says the arrangement is prescribed by the Vedas "in order to fulfil the law". "That is apparently," says Mayne, "the ancient law by which the binding form of marriage was a sale"[6].

[1]Jolly, p. 76. *See Cambridge History of India*, Vol. I, pp. 234, 268, 291, 292, about sale of daughters.

[2]Wilson's *Vishnu Purana*, p. 399.

[3]*Mahabharata*, I, 113, 14 sq.

[4]*Mahabharata*, I, 113, 9.

[5]Apastamba, II, VI, 13, para. 12.

[6]Mayne, para. 81, p. 96. *See* on purchase of wives McGrindle's *Ancient India*, pp. 70-71, Megasthenes Frag., XXVII.

MARRIAGE UNDER KHASA LAW UNCEREMONIOUS

The secular character of Khasa Family law is well demonstrated by the fact that no religious ceremonies are necessary to validate a marriage. An unfortunate omission to take account of this fact was responsible for the decision in *Fateh Singh* v. *Gabar Singh* (K.R., p. 47)[1] which undoubtedly is in conflict with the well established rules of customary law. Mr. Lall's careful enquiry on this point has put the subject beyond the reach of controversy.

In looking at the history of human marriage in other parts of the world we are faced with the remarkable fact that religious rites have not formed in the past an essential condition of a valid marriage. Celebration of marriage with the help of a priest or in the Church has been a very late development in human society.[2]

With the Hindus marriage, as we find it depicted in their sacred books (Grihya Sutras and Dharma-Sastras), was not a mere secular transaction. It partook of the nature of a spiritual union between the husband and wife. If follows "from the very nature of the marital relationship according to the Hindu conception that it cannot become complete until the religious ceremonies prescribed by the Sastras are duly performed, for the production of a non-secular condition involving the creation of a sort of spiritual union between the husband and wife must depend upon the mysterious force of Shastric ceremonies prescribed for the purpose; and these cannot possibly be dispensed with without affecting the

[1] *See ante*, pp. 39—42.

[2] *Marriage and Divorce Laws of the World*, by Hyacinthe Ringrose (1925), Introduction, 1—6.

validity of the transaction".[1] Circulation round the sacred fire (Sapta Padi)[2] has no place in Khasa law, but expression of mutual consent[3] is undoubtedly essential from the very nature of the contract.

A reference to some of the ways of celebrating a marriage among the Khasas is sufficient to show that no fixed ceremony is necessary under Khasa law for a valid marriage.

PRESENCE OF THE HUSBAND NOT ESSENTIAL AT THE CEREMONY

Sometimes when the husband is unavoidably absent, or astrological considerations render his actual marriage with the person of the bride undesirable, she is then formally married to a pitcher of water as representing him. This is called *Kumbh* (i.e. pitcher) *bivah*.[4] An image of a god may be substituted for the pitcher of water and then the name is *Pratima* (i.e. image) *bivah*[5], or she may be married to an *Ak* tree in *Arak bivah*.[6] It may also be that the couple go to a temple and take each other as husband and wife without any formal ceremony. The bride may go alone to the temple for marriage,[7] or a mere *Katha* of Satnarain may be recited and the couple go round the priest and the pedestal on which he is seated.[8] Instead of a *Kumbh bivah*, the bride is sometimes taken to a river or an ordinary spring and publicly married or declared to be the wife of the bridegroom.

[1] Sen, *Hindu Jurisprudence*, pp. 271-272.
[2] Manu, VIII, 227.
[3] Manu, III, 35.
[4] K.L.C., para. 45 (3).
[5] K.L.C., para. 45 (4).
[6] K.L.C., para. 45 (5).
[7] K.L.C., para. 45 (6), para. 46 (3).
[8] K.L.C., para. 45 (7).

Absentee soldiers are often married in this way.[1] It is also observed that sometimes the only ceremony is the formal entry of the bride into her husband's house (whether he is present or not). The entry is usually with an image of Saligram, or a pitcher full of water or *dahi* (i.e. junket) on her head, or holding the tail of a cow.[2] There need not be a formal entry or any pretence of performing a ceremony at all. An unmarried girl is bought just like a chattel for money, brought home and kept as wife [*chandi* (i.e. silver) *biyah hai*].[3] The presence of the bridegroom is not essential in any of these forms. The result is that no hard and fast ceremonies are necessary for a valid Khasa marriage. We have also noticed the custom by which a marriage ceremony may be gone through with one brother, but the bride belongs to the other brother.[4]

OBSERVATIONS ON MR. LALL'S REPORT

Mr. Lall's enquiry has brought out some interesting and valuable facts which throw light on the real nature of the marriage contract under the Khasa law, but he has not tackled the real problem of a Khasa marriage. It is unfortunate that Mr. Lall based his report on two entirely wrong premises. In the first place he thinks all the Hindus in the Himalayan districts are governed by the same law, and has ignored the clear distinction between Khasa law and Hindu law. In the second place he has misconceived the real character and historical

[1] K.L.C., para. 45 (8).
[2] K.L.C., para. 45 (9).
[3] K.L.C., para. 45 (12), para. 46 (4).
[4] Raturi, p. 73, p. 186.

order of Khasa law and its place in the evolution of juridical thought. While quoting with approval[1] Mr. Wyndham's remarks in *Fateh Singh* v. *Gabar Singh* (K.R.C., p. 47) to the effect that Khasas have "probably never heard of the Mitakshara," he has begun his report on Kumaon local customs by saying that "the Mitakshara law applies with the following modifications."[2] The Mitakshara or any other Hindu law book is entirely out of place in dealing with the Khasa Family law. The groundwork of this study rests on two main propositions :—

(1) Khasa Family law is self-contained and has its own legal principles. It is not permissible, in order to discover them, to look to Hindu law books, except for purposes of comparative study and to show that the early law books of the Hindus disclose similar legal ideas. The huge and inaccessible forests which isolated the Khasas from the Hindus in the plains of Northern India, also helped to perpetuate their primitive legal ideas, and their cultural awakening, such as it is, began since the British annexation. Therefore the practices and usages of the Khasas alone must be sifted and tested to find out the basic principles of their family law.

(2) Khasa Family law is unsacerdotal and secular in character, and is entirely free from the religious doctrines of Brahmanised Hindu

[1]K.L.C., para. 4, p. ii.
[2]K.L.C., p. 1.

law. It is of natural growth among the Khasas, and its principles reflect the patriarchal and tribal social organization of the Khasas at the present day.

The homogeneity and consistency of Khasa law, its simplicity and freedom from religious dogmas and prejudices, and the genuine stamp of natural growth which it bears will clearly appear from the various topics of family law discussed in this study.

MARRIAGE UNDER THE CUSTOMARY LAW

Mr. Lall has dealt with the topic of marriage under the customary law and some of its aspects with great lucidity and freedom from the fetters of Hindu law. "It should be noted", he says, "that all forms of marriage are equally legitimate, and there can be no question of one being more or less legitimate than the other."[1] The forms are mere superfluities. Marriage ceremony with a pitcher of water, "Ak" tree or image, etc., have no legal significance. The most general social object of marriage rites is to give publicity to the union.[2] "Publicity," says Miss Burne, "is everywhere the element which distinguishes a recognized marriage from an illicit connection."[3] The various ceremonies which have been noticed serve only this social object of publicity in this secular marriage of the Khasas. They indicate that the intention is marriage and not concubinage. The fetish of a Brahmanical marriage has ruled the Kumaon courts too powerfully to the prejudice of marriage under Khasa law. Mr. Lall has done real service to the cause of Khasa

[1] K.L.C., para. 299.
[2] Westermarck, Vol. II, 433.
[3] Miss Burne, "Handbook of Folklore," p. 203.

law by his emphatic statement that sons by a woman kept as wife (whether married or not) inherit fully like legitimate sons,[1] and that the position of a *Dhanti* wife is identical with that of a married wife.[2] In saying whether "married or not" Mr. Lall shows that he has missed the true nature of a Khasa marriage. The initial mistake lies in the definition of a "married wife" as "one in respect of whom an ostensible ceremony of marriage has been gone through with the object of making her a wife, whatever the nature of that ceremony may be."[3] It is true that Mr. Lall recognizes that a *Dhanti* wife has the same legal rights as a married woman, but this recognition owing to his saying (whether married or not) shows that he has failed to appreciate the essence of a valid marriage among the Khasas. A marriage, for our purposes, is that "exclusive relation of one or more men to one or more women based on custom, recognized and supported by public opinion and where law exists, by law"[4] which gives a certain status to the children born of such union with respect to the man.

When the children belong to some other person than the begetter, it is wrong to think that there is a marital tie in that case between the begetter and the mother of the child. Marriage is something more than mere sexual association.

So we have found that among the Khasas neither the presence of a Brahman nor any religious ceremony is in the least necessary for a perfectly valid marriage. Khasa law recognizes divorce and gives great latitude

[1] K.L.C., para. 14.
[2] K.L.C., para. 261.
[3] K.L.C., para. 41 (*a*).
[4] Lord Avebury, *Marriage, Totemism and Religion* (1911), p. 2.

to the parties to determine the marital bond at their pleasure, subject to certain restrictions. A remarried woman is called a *Dhanti*. The word "*Dhanti*" only denotes that the woman was either a widow or had been divorced when she remarried, and a *Dhanti* marriage in no way affects the legal status of the wife or her children.

The disinclination of the higher castes to widow marriage and the growing conception of the permanence of the marital tie have slightly lowered *Dhanti* marriages in public estimation. For the purposes of a lawyer and a judge *Dhanti* marriages are as legal as those celebrated with the chanting of scores of the vedic texts and hymns by a dozen or more Pandits from Benares.

THE ESSENTIALS OF A VALID KHASA MARRIAGE

We proceed to determine the conditions which must be satisfied before a marriage is regarded as valid by Khasa law. But as divorce and widow marriages are well established among the Khasas, their marriage system has no counterpart in Hindu law.

Jus connubii

(1) *Who may marry.*—There is everywhere an outer circle beyond which marriage is either definitely prohibited or considered improper, and an inner circle within which no marriage is allowed. The Khasas are endogamous and exogamous. The outer circle in their case is quite extensive and includes all Hindus who are not untouchables, i.e. a Khas-Rajput may take as wife a Brahmani or a Khas-Brahmani. Mr. Lall says "A *Dhanti* may be taken from any Hindu caste".[1] The

[1] K.L.C., para. 42.

statement is too wide if the depressed classes are meant to be included in "any Hindu caste". A Khasa cannot take to wife the daughter, widow or wife of a Dom. He would be at once excommunicated and social relations of "food, drink and *hukka*" would cease. Even occasional intercourse with a Dom necessitates purification and reinstatement in the caste.[1] The man or woman who associates with a Dom female or male loses his or her caste. Mr. Lall implies some such restrictions in paragraph 242 about adoption, but is not definite in dealing with marriage. It seems that he used the words "any Hindu caste" in a restricted sense and excluded the Doms in this nomenclature, for the least acquaintance with social conditions among the Khasas in the Himalayan districts would impress one with the horror that would be created by a mere suggestion that a Khasiya can take a Domni as wife or *Dhanti*. A Khasa can lawfully take a wife from any caste[2] except the depressed classes. Manu recognized mixed marriages on a hypergamous basis only.[3] He did not allow a girl to marry in a caste lower than her own. There is no such restriction concerning mixed marriages in Khasa law. The first condition of a valid marriage is that the parties must possess the *Jus connubii*, i.e. they must have the capacity to contract a valid marriage under the custom; and this right is possessed under the Khasa law by all Hindus except the Doms and depressed classes. A Khasa may

[1] Pauw, para. 13, p. 12; "Mountaineer," p. 173; Raturi, para. 79, p. 149; para. 545, p. 911.

[2] K.L.C., Para. 42, para. 298; "Mountaineer," p. 165, Different castes do not intermarry except occasionally Brahmans and Rajputs, but a member of one sometimes elopes with a partner of another, the higher in this case losing his or her caste; Raturi, para. 78, pp. 147-148.

[3] Manu, III, 12—19. 43-44; Mayne, para. 88.

lawfully take as wife a woman from his own class, or a higher class, or from any Hindu caste except an untouchable. The fact that a Khas-Brahman or a high caste Brahman or Rajput, ordinarily, does not give his daughter in marriage to a Khas-Rajput is quite distinct from the legality of such a marriage under the custom. *Dhanti* marriages of such a kind are pretty frequent.

(2) *Who may not marry.*—The parties, however, must not be within the prohibited degrees of relationship. Besides agnatic and cognatic relationship, customary law recognizes the bar due to *affinitas*, i.e. the tie created by marriage between each person of the married pair and the kindred of the other. No such bar is mentioned in Hindu law books, which condemn widow marriage and divorce. Where divorce is well recognized prohibitions due to *affinitas* must arise, and such is the case among the Khasas. Mr. Lall has noticed neither this point nor divorce in his report.

(*a*) The forbidden relationships of Hindu law are not fully recognized among the Khasas. There is no rule about the prohibition of marriage among *sapindas*, calculated according to the Dharma-Sastras.[1] Some of the correspondents state that the rule is the same as among the high castes. The conflict in the answers on this point shows, as Mr. Juyal says, "that there is no hard and fast rule on the subject". The better opinion appears to be that daughters of agnates and of maternal grandfather's

[1] *See* Mayne, para. 86, p. 104 as to how forbidden mates within six or four degrees are to be determined under the Hindu law.

agnates up to three degrees are at least avoided.[1] Mr. Pant notes that, in the past, the daughters of the mother's father's agnates up to 7 degrees were avoided. We find thus a tendency to narrow down the circle of prohibited mates. Mr. Atkinson notes about the Khasiyas :—"They call themselves Rajputs of the Bharadvaj Gotra, but really know nothing of the meaning of the word 'gotra' or of the intricate rules which govern the relations of one gotra to another. . . They form marriage with all Rajputs except those of their own village".[2] The objection to marriages within the village are due to the fact that mostly the villagers belong to the same stock, but if there are different stocks, then there is no such objection.[3] Mr. Raturi says that the restrictions of the Sastras do not apply. Marriages are avoided with the daughters of all ascertained agnates, and the clan of the mother, too, is avoided. And marriage with a maternal uncle's daughter, maternal aunt's daughter or paternal aunt's daughter and of course with a paternal uncle's daughter[4] is absolutely prohibited. This seems to be the correct account of current practice in this matter.

[1] Per Messrs. Trivedi, Juyal, Pant on Questions 1 and 2 (Marriage, Appendix A).

[2] Atkinson, XII, 439.

[3] Answer to Question 7 (Marriage, Appendix A).

[4] Raturi, para. 68, p. 125.

(*b*) *Affinitas.*—In *Dhanti* marriages apart from the prohibition, due to blood relationship, a further bar arises, owing to the tie created by the woman's first marriage. A *Dhanti*, as has been said before, is either a widow or a divorced wife. The following females cannot be taken lawfully as *Dhanti* wives[1]:—

1. Step-mother.
2. Mother-in-law. They both are regarded as a man's mothers, one as the wife of his father and the other as mother of his wife.[2]
3. Maternal or paternal uncle's wife or widow. The sentiment is an old one, as we find that Birdeo Katyuria Raja shocked the prejudices of the people by forcibly marrying his own aunt.[3]
4. Sister's son's wife or widow; undue familiarity with her is regarded with particular horror.[4]
5. Daughter-in-law.
6. Brother's son's wife or widow.

The word wife means divorced wife. Except among the polyandrous Khasas of Jaunsar Bawar and Western Tehri, a woman can have only one husband at a time. The prohibition of marriage with a step-mother's daughter by a husband other than the father of

[1]Unanimous answers on Question 13 (Marriage, Appendix A).

[2]*See* "Justinian's Institutes", Lib. I, Tit. X, para. 7, for similar prohibition.

[3]Atkinson, XI, 493.

[4]Raturi, para. 548, p. 914.

the bridegroom also comes under the same rule. It is undoubted that when the girl comes with her mother to the house of the man's father she is reckoned as his sister, so cannot be married by the man. On this point there is absolute unanimity in all the answers. The majority view, however, is that it is immaterial whether the girl remains with her own father or not and that she is not an eligible mate in any case. Mr. G. N. Joshi's informants, however, say that when the girl remains with her own father she can be married by her mother's step-son. This seems to the writer to be the correct rule and in consonance with Khasa psychology. There is no blood relationship with her and it is doubtful if the bar of *affinitas* is extended to such a length. Whether such a union should be avoided on the ground of decency is another matter. It may also be said that no woman who is otherwise prohibited by relationship or by her caste can be taken as a *Dhanti* wife.[1]

(3) The consent of parties in the case of adults or of their parents or guardians in the case of minors is obviously necessary for a valid marriage.[2]

(4) An essential element in a valid marriage is the transfer of dominion[3] over the girl, wife or widow to her husband. Khasa law regards women as chattels and subject to perpetual tutelage. No marriage was valid unless the husband acquired power over the woman in a proper manner. We have to consider separately the

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[1]Answers to Question 5 (Marriage, Appendix A).

[2]*See* Manu, III, 35.

[3]Vinorgradoff, *Historical Jurisprudence*, Vol. I, 248, In marriage by purchase the object of the transaction is in reality not a transfer of the person, but of power, Manus or Mund.

cases of an unmarried girl, a married woman, and a widow :—

(*a*) The unmarried girl is under the power of her father or his male agnates. They must duly part with their power in favour of the husband. This is done by taking the bride-price, and occasionally by making a gift of the daughter. So strongly does custom enforce this rule about price for the transference of power, that if a man marries an unmarried girl without the consent of her parents or the agnates of the father, he is held liable to pay a proper price to them for the girl.[1]

(*b*) A married woman is under the dominion of her husband. The marriage is undoubtedly dissolvable by mutual consent. The wife or her father have also a right to demand divorce on payment of the bride-price or a higher sum to the husband.[2] If the wife leaves her husband and terminates the marriage, the person who marries her must pay the price to her first husband. So long as the claim of the first husband has not been duly satisfied by proper payment or formal release without payment, the woman, and her children by a second marriage, have a social stigma attached to

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[1] Raturi, para. 60, p. 113. *See* Manu, VIII, 366. *See Artha Sastra*, p. 186, on Asura marriage—"it is to be sanctioned by both father and mother; for it is they that receive the money (*sulka*) paid by the bridegroom for their daughter".

[2] "Mountaineer", p. 201; Williams, para. 125, p. 60.

them. The community enforces the customary rules by its own coercive social processes, in the absence of that judicial authority which it possessed in the past. We see the working of this rule from the observations of Mr. Lall :—"Custom enforced the payment of the price by ruling that the woman and her children would be considered socially inferior until the price was paid. This could be done at any time; cases are known in which the *Dhanti's* children have themselves paid the price of their mother long after the death of the father. This was a simple and effective weapon".[1] Customary law is reluctant to recognize the validity of marriage and the legitimacy of children, unless due compensation has been made to the first husband. "So long as the marriage, or ornament expenses, are not paid, a *Dhanti* is treated as a *Dhanti*. *Biradari* will not take rice cooked by her. On its payment she will have the rights assigned to a regular married woman".[2] The idea underlying the customary law of the Khasas is analogous to that expressed by Narada concerning the sons of twice-married woman (*Paunarbhava*), and of disloyal wives. Narada says :—"Their offspring belong

[1]K.L.C., para. 302; K.L.T., p. 51,—"they are inferior to some extent until the price is paid. This can be done at any time: the children may themselves do it".

[2]Per Mr. G. N. Joshi's note.

to the begetter if they come under his dominion, in consideration of a price he had paid to the husband. But the children of one who has not been sold belong to her husband''.[1]

(*c*) A sonless widow is deemed to be under the power of her husband's agnates. They had the right to demand the price for the transference of that power, if any stranger married her.[2] In Tehri the widow has to secure her release from the family of her husband by paying the marriage expenses before she can remarry.[3] The courts in Tehri take cognizance of divorce and of the release of a widow. When a woman is permitted by the courts, then she is free to remarry.[4] As the widow was under the power of all the heirs of the husband, who took his property in pre-British days, no price was payable if any one of them married her. There is no transfer of dominion in such a case. The second husband has already a dominion over her, jointly with others, no doubt, but the widow could marry only one of them. Custom then shapes itself according to circumstances and no price was payable by the second

[1]Narada, XII, para. 55.

[2]*Indian Antiquary*, XL (1911), p. 192. *See* Barnes' *Kangra Settlement Report*, para. 272, p. 129,—the brother of the deceased is entitled to recover the value of the widow from the husband she selects.

[3]Raturi, para. 88, p. 165.

[4]Raturi, para. 96, p. 172.

husband to the others, if he was one of the nearest heirs of the deceased. The transfer of power over the woman in a proper manner, by taking bride-price, gift or deed of relinquishment (*ladawa*), is necessary to this extent that the man who takes her to wife is liable to make due compensation to the person or persons concerned. The non-payment of the bride-price in the case of an adult woman, whether unmarried, wife or widow, does not make the second marriage void. The children by her are legitimate for purposes of inheritance whether the price has been paid or not.[1] A valid marriage is thus effected at once when the formal transference of power has taken place, but in the case of an informal cohabitation a valid marriage seems to result by a sort of customary prescription if children are born.[2]

It may be well to see how far these rules of archaic society would hold good in British courts.

The case of a widow admits of no doubt. She has been freed from the trammels of primitive law and can marry whomsoever she likes. The courts in British India cannot treat her as an article of traffic and could not concede any right to the agnates of the deceased husband to claim bride-price from her second husband.

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[1] K.L.T., p. 51.

[2] *See* Vinogradoff, *Historical Jurisprudence*, Vol. I, 248-249.

MARRIAGE BROCAGE CONTRACTS.

A claim for the recovery of bride-price by a Khasa father, on an agreement to pay it, has a shaky position in law. A contract of this kind is void under the English law as a marriage brocage contract.[1] Taking of bride-price is common among the Khasas and is intimately associated with the right of divorce and remarriage. The broad considerations of public policy and social justice under a civilised Government, however, militate against the perpetuation of primitive paternal rights which conflict with a duty to see that the girl is married to the most desirable person rather than to him who will pay the most. It has also to be realized that a tinkering reform imposed from without, if far in advance of public opinion, may defeat its purpose. All the High Courts in India, except that of Allahabad, hold that a promise to pay money to a father in consideration of his daughter's marriage is void as being opposed to public policy.[2] The High Court of Allahabad holds that as the Asura form of marriage is allowed by Hindu law, an agreement to pay consideration for the consent of the father is not *per se* unlawful, and each case has to be judged on its own merits. "Where the parents of the girl are not seeking her welfare, but give her to a husband, otherwise ineligible, in consideration of a benefit to be secured to themselves, an agreement by which such benefit is secured is, in our opinion,

[1] C. G. Addison, *Law of Contracts* (1911), pp. 1310-1311; a promise to pay money to a man in consideration of his consent to his daughter's marriage cannot be enforced under the English law; the contract is contrary to public policy. *See* Stephens' Commentaries (18th edition, 1925), Vol. III, 52-53. [Hermann *v.* Charlesworth (1905), 2 K. B., 123].

[2] *Indian Contract and Specific Relief Acts*, by F. Pollock and D. F. Mulla (5th edition, 1924), 175—178.

opposed to public policy and ought not to be enforced."[1] This view of the law would well harmonize the usages of the Khasas with the practical needs of public policy. If the consent to the marriage of a minor girl is *mala fide* and not an honest exercise of the paternal discretion, then the contract must be void on grounds of public policy. The analogies of English law, where the contracting parties are the husband and wife, can hardly be applied to the Khasas in full force. It need not be said that the courts in British India would find it difficult to decree a claim for bride-price when an adult daughter has married without her father's consent, and the provisions of the criminal law are drastic enough to protect the rights of the father or lawful guardians over a minor child. As marriage under the Khasa law is purely a civil transaction, a minor's marriage without the consent of the guardians would be a nullity, just as fraud or force would avoid it.

HUSBAND'S REMEDY.

The right of the husband to be compensated for the loss of his marital power requires careful consideration. Under the Khasa law a *Dhanti* marriage is equal to any other kind of lawful wedlock. The social sentiment of the Brahmanised Khasas or of the higher castes against divorce and remarriage should not be allowed to interfere with an impartial judgment as to the legality of a marriage under customary law. Mr. Lall has shown that the *Dhanti* wife inherits jointly with other wives. She has full rights of inheritance and maintenance and her sons inherit to collaterals too. It remains to be seen

[1]Baldeo Sahai *v.* Jumna Kunwar (1901), 23 All., 495 at pp. 496, 497.

whether the courts will perpetuate the anomaly of calling a *Dhanti* marriage lawful wedlock on the civil side and treating it as mere concubinage on the criminal side. It seems to the writer that by founding a claim on custom or seduction or on both a husband ought to be able to get damages when his wife (whether *Dhanti* or otherwise) leaves him and goes to live as the *Dhanti* wife of another person.

TRADITION OR DELIVERY OF THE BRIDE.

The most essential condition in a Khasa marriage is the tradition or delivery of the woman in the house of the husband. A Khasa marriage is more than a consensual contract and partakes of the nature of a real contract in Roman law. The intention of the parties or their guardians to create a marital union must be manifested by an overt act which indicates the transfer of the woman to the possession of the husband. The marital tie itself is constituted by the consent of the parties—by their intention to become husband and wife—being expressed and manifested. The mode in which it is necessary that this manifestation should take place is that the woman should pass into her husband's possession. A man and a woman are not married in the eye of law merely because they live together, unless they do so with the intention of marriage. A Khasiya may take a woman as mistress only; there is no marriage in such a case, as the intention to join in wedlock is wanting, but, if she is not of the untouchable class, a valid marriage will result if the intention be to take her as wife. Under Khasa law the line between concubinage and marriage is very thin and the nature of the union depends on intent alone. The policy of law is to presume in favour of good morals.

When a man and woman have lived together as man and wife, then the onus of proving that there was no marriage would, it seems, rest on the party who asserts it, especially if children be born.

We have seen that for a valid marriage it is enough that the bride is brought to the house of the husband and the presence of the husband is not necessary. Even absentee soldiers are married, and, as we have seen, the real bridegroom is sometimes represented by his brother from a fear dictated by astrological considerations.[1] The price is paid for the girl and she is brought to the house of the man. The marriage is complete; there is no pretence of a ceremony or formal entry. The woman in Khasa law is a chattel and marital rights are rights of property. For the creation of those rights it is enough that the object of the transaction, the "Res", to borrow a word from Roman law, has been acquired for him with his consent by means of an agent. We can also appreciate why in case of Kanyadan marriages such agency is not allowed. Kanyadan is a gift of the bride, with some religious ceremonies; the real contract is with the donee, and he cannot transfer those rights owing to the religious significance attached to the transaction. To return to the more common kind of marriage, other conditions being satisfied, a valid marriage results when the woman has been put under the actual or constructive power of the man, and this invariably takes place by the woman being brought to the house of the husband. The various ceremonies of marriage with "a pitcher" or "image", etc., have more an ornamental than a legal significance. The essential element in a marital tie is by these means

[1] Paturi, para. 73, p. 136; *ante*, p. 109.

supplemented for purposes of greater publicity or superstition. Speaking of a "Sarol", "Dola" or "Taka ka Biyah", i.e. marriage by purchase, Mr. Lall says:— "The bride is then taken publicly to the husband's house, may be with music and blare of trumpets. The bridegroom may be away in distant lands when his marriage is performed and his wife brought home. The proofs of the marriage are the payment of the price, the putting on the bridal ornaments and clothes and the *coming of the bride publicly to the husband's house.* An anchal ceremony may take place after a long interval—many years in fact. Its object is to purify the wife for social and ceremonial purposes. It does not confer any extra legal right. Once she is brought in *sarol* to the husband's home she becomes a wife with full legal rights. She cannot, e.g. be returned to the parents as 'disapproved' or turned out in any other way."[1] Mr. Lall has very nearly appreciated the real nature of a Khasa marriage in the above observations, with this difference—that the public coming of the bride is not merely a proof of marriage, but a vital condition in a valid marriage.

The necessity for tradition or delivery, i.e. actual or constructive possession of the husband, is made out affirmatively by the remarks of Mr. Lall and a careful analysis of the various ceremonies mentioned above. Let us now test it on its negative side. If tradition or delivery of the wife is essential, then a union between a man and a woman would not constitute a valid marriage where this element is wanting. The two well known instances of a woman's taking Tekwa and of cohabitation by a man with his brother's widow who has not left her

[1]K.L.C., para. 46 (2), p. 9.

husband's house clearly point out the necessary ingredient in a valid marriage. The Tekwa lives with the widow in her own house, hence he has no *locus standi*. The woman is not his wife, because no tradition or delivery took place and there is no intention of marriage. He has not appropriated the woman, but the order has been reversed—the woman has in a way taken possession of the man. So also when the widow of the elder brother "continues to live in her deceased husband's house she is looked upon as a mere concubine and the issue is illegitimate (*kamasl*), but if the man takes her into his own house, the woman is equal to a lawfully married wife and her offspring as legitimate."[1] Here, too, the same rule is applied by custom with a vengeance. The widowed *bhauj* (elder brother's wife) is not and cannot be a wife unless she goes to the house of her brother-in-law. She is not under his power and therefore he is not the father of the children legally. We have already shown[2] in this case and that of a Tekwa the children are affiliated to the deceased husband of the woman. Custom hardly seems to have troubled itself about the morality of the rule. It holds by one rule and carries it to its bitter logical conclusion in a rough and ready manner. Custom does not make any difference when a person other than the brother-in-law acts as Tekwa. The observations of Mr. Lall that "there is now no distinction for purposes of inheritance in any of the three districts whether the *bhauj* goes to live in the house of her husband's brother or cohabits with him in her own" are hardly in harmony with the decision in *Kirpal Singh* v. *Partab Singh*, and the answers of those who are in a position to know the custom.

[1] Kirpal Singh *v.* Partab Singh (K.R., 12).
[2] *Ante*, pp. 95—100.

In regarding Tekwa union as a marriage Mr. Lall is wrong. The fact that it is considered immoral and getting obsolete ought to show at once that it is not a marriage, even amongst a people where divorce is recognized and there is no bar to widow marriage. The fact is that the custom does not bear the scrutiny of a people whose moral notions are growing. To consider the association of a widow with a Tekwa as a *Dhanti* marriage is an absolute misconception of the custom, and also of the nature of a valid marriage among the Khasas.[1]

A khasa marriage must satisfy the following conditions :—

(1) The parties must possess the *Jus connubii*, i.e. :—

(*a*) Both of them must be Hindus, the depressed classes being excluded. No Khasa can marry a Dom woman.

(*b*) There should be no bar of prohibited relationship—agnatic, cognatic or by affinity.

(2) The consent of the parties, or of their guardians in case of minors, is essential.

(3) Release of dominion over the woman by sale or gift. In case no formal release has taken place and children are born, a valid marriage apparently results by a sort of customary prescription.

(4) The transfer of the woman to the actual or constructive possession of the husband.

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[1]*See* Raturi, Kathala union is not a remarriage with the widow, para. 97, p. 173; also para. 99, p. 174.

According to Mr. Raturi the payment of the price in whole or in part or stipulation about it, followed by the entry of the bride into the house of the man as wife, constitute a valid marriage under the custom.[1] Other conditions being satisfied, a woman kept and treated as wife is a lawful wife under the custom.[2] This plain and simple theory of marriage is supplemented in accordance with the tastes and means of the parties by forms and ceremonies, which are ornamental but do not possess any legal effect.

KHASA MARRIAGE AND FREE MARRIAGE OF THE ROMANS.

Khasa marriage is very much like the archaic "free" Roman marriage, with this striking difference, that among the Khasas the wife is always acquired for consideration from either her father or her husband or their heirs. Gaius describes *coemptio* as fictitious sale and purchase per *aes et libram*, in presence of a *libripens* and five citizen witnesses.[3] The woman by this fictitious sale passed into the Manus of the husband.[4] The transfer of the girl for genuine consideration among the Khasas brings the wife under the marital power of the husband, but there are no such disabilities on her power to demand or prevent a divorce as were imposed by Roman law in case of a marriage in Manum viri.[5] There is no fiction

[1] Raturi, para. 74, p. 137; *see* para. 53, p. 105 too.

[2] *See* Lyall's *Kangra Settlement Report*, para. 115, Son by woman kept and treated as wife is legitimate; no ceremony is needed.

[3] Gaius, I, 110—114. It is thought by some civilians that the wife was purchased by the husband by this fictitious process. Some think that the nominal purchase was mutual [Dr. Muirhead, *Roman law* (1916 edition), p. 60]. The fictitious sale was probably a reality at one time as we find among the ancient Hindus or the Khasas at the present day. *See* Muirhead, App. Note B, pp. 399-400; Ihering, pp. 27-28.

[4] Sanders, p. 32.

[5] Sohm's "Institutes." Translated by Mr. Ledlie (1901), p. 494.

of regarding her as the daughter of her husband[1] for purposes of inheritance, as daughters are rigorously excluded from inheritance by Khasa law.[2] The different modes, *confarreatio*, *coemptio* or *usus*, did not form part of the real tie of marriage; "they only decided when the tie of marriage was formed, what should be the position of the wife. Neither were the religious ceremonies nor the nuptial rites anything more than accessories of that which created the binding relation between the parties."[3] "The mutual consent of the parties, consummated by the tradition or delivery of the woman, was all that was necessary, that is to say, to place her at the disposition of her husband."[4]

In order that the marriage might have the effect of *Justae nuptiae* it was necessary that three conditions should be fulfilled[5]:—

1. There must be consent of the parties duly manifested.
2. The parties must be *puberes*. A marriage between minors was invalid, though it "became valid by their living together with the intention of being married after puberty was attained."[6] Among the Khasas marriages of minors are not invalid. The consent of the guardians is sufficient.

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[1]Gaius I. 115. *See* Hunter's *Roman law* (1897, 3rd edition), p. 223, "In its general characteristics the Manus resembles the *potestas*; a wife was in law in no better position than a daughter."

[2]Some historical jurists maintain that it must have been so in patrician Rome, Muirhead, p. 40, and foot-note (4).

[3]Sanders, "Institutes of Justinian" (1922), p. 31.

[4]Ortolan's *Roman law*, para. 121, p. 103; *see* also para. 60, p. 467, "the only necessary conditions being consent of the woman and her transfer to her husband."

[5]Sanders, p. 32.

[6]Sanders, p. 33 (D. XXIII 2, 4 quoted).

3. They must have the connubium, i.e. legal power of contracting marriage. It is necessary to note that in Roman law, owing to the strong patriarchal character of the family and the dependence of the sons on the father, a person under power, even if adult, must secure the permission of the paterfamilias. We cannot say that with the Khasas this consent of the father is essential in the case of adults. Time has weakened his power. It is rare, however, among the Khasas for a man to bring a wife home without the express or tacit consent of his father. In fact the usual thing is for the parents to arrange a marriage.

Making due allowance for the variations due to time and environments, we find in these two communities that the central idea of a marital union—consent and its manifestation—is practically identical. Among the Romans "the mere expression of consent was not sufficient to constitute a marriage. There must be an actual or constructive passing of the woman into the possession of the man. The ordinary sign of this was that she was received into the husband's house, *'in domum deductio'*; but this was only the usual and most patent sign, and any other clear indication was accepted . . . . a marriage could not be effected by a mere written consent between persons not present together, as by a letter, without the woman passing into the man's possession by some separate distinct act, such as being received into his house."[1] The various marriage ceremonies among the Khasas show

[1]Sanders, "Institutes," pp. 31-32.

that the presence of the woman is always necessary, but the man may be absent, and we see in this a remarkable similarity with Roman law where "marriage could not take place in the absence of the woman, as in addition to consent it required tradition or delivery; whereas on the other hand it might be made in the absence of the man, if the woman was, by his consent, however expressed, taken to his house."[1]

We may note that the essence of a vedic marriage was "the mutual taking of each other in wedlock by the bride and bridegroom, and the conveyance of the bride from the house of her father to that of her husband."[2] But the vedic marriage though simple in ritual, is not secular as there are prayers to Agni for the long life and success of the married couple, and also a sacrificial fire.[3]

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[1]Ortolan's *Roman law*, p. 103, foot-note.

[2]*Cambridge History of India*, Vol. I, p. 89. *See* Wilson's *Rig-veda* (1888), Vol. VI, p. 228, verse 26-27 above, the bride's entry in her husband's house. *See* Ihering, *The Evolution of the Aryan*, pp. 27-28, "The purchase of the wife is found among all nations; the connection of the Roman *coemptio* with this form of the mother nation is no doubt historically correct. In like manner the home-bringing of the wife to the man's house is such a natural consequence of the marriage relation that it seems needless to refer to a similar custom among the Aryans for the purpose of explaining the *deductio in domum mariti* of the Romans."

[3]Mandlik, 400.

CHAPTER IV

DIVORCE

DIVORCE IN KHASA LAW

WE have seen that Khasa marriage law is remarkable in its simplicity. Consent of the parties or of their guardians followed by the delivery of the woman to the husband form the essence of the transaction. No priest or public authority is needed to solemnize the marriage. The dissolution of marriage is equally simple. Failure to recognize the existence of divorce among the Khasas prejudiced in the past a fair appreciation of the legal position of a *Dhanti* wife. She has been called a concubine and her children illegitimate. They were called illegitimate because the true nature of a valid marriage under the Khasa law was not recognized. The brand of illegitimacy was the unfortunate result of drawing analogies from Hindu law. Mr. Stowell specifically affirmed the rights of inheritance which children by *Dhanti* wives undoubtedly possess under Khasa law.

"It may safely be asserted," said Mr. Stowell, "however, from a considerable experience of incidental and undisputed instances that among the ordinary villagers of somewhat dubious caste, as distinct from the

undoubted Brahman and Rajput castes, an illegitimate son inherits equally with legitimate sons as a matter of course."[1] He also found that "the *Dhanti* connection is commonly a permanent one; it is very common in Kumaon among the ordinary villagers and is not considered in any way disgraceful.[2] The reason why there is no disgrace or immorality in a *Dhanti* marriage lies in the fact that divorce and widow marriage are well recognized among the Khasas. The following extract from the Census Report, 1921, Vol. XVI, Part I, p. 102, throws some light on the matter :—

Civil conditions at effective age (15—40) *per* 1,000 *each year.*

ıtural division.	Males.			Females.		
	Unmarried.	Married.	Widowed.	Unmarried.	Married.	Widowed.
ıalaya West ..	264	695	41	27	887	68

The proportion of married females at the effective age in the Himalaya West is the largest in the provinces, and that of widows the least. The statistics go to show the existence of polygamy and widow marriage.

Mr. Stowell reconciled the right of the *Dhanti's* children as so-called illegitimate sons to equal inheritance with the legitimate sons by considering the Khasas as Sudras in Hindu law.[3] The writer differs from that position. They inherit to their father on the organic principles of Khasa Family law itself, as they are perfectly legitimate children, and born of a union which is valid

[1] K.L.T., p. 52. *See* K.L.C., letter to the Commissioner, para. 3, p. 1, where Mr. Lall regrets the use of the word "illegitimate" when applied to sons by a *Dhanti* wife.
[2] K.L.T., p. 51.
[3] K.L.T., p. 52.

and in no way dishonourable. The Hindu law of the present day has no application to the Khasas in any of their family institutions.

It is a pity that divorce and widow marriage, which play such an important part in the family relationship of the Khasas, have not been expressly noticed by Mr. Lall. His observations on the status of *Dhanti* wives must, however, give a wholesome lead to the courts in protecting their rights under the customary law.

HOW IS A KHASA MARRIAGE DISSOLVED

The contract of marriage can undoubtedly be dissolved by mutual consent. On this point there can be no dispute.[1] A question of greater delicacy and importance is about the right of the wife to terminate the marriage at her will and contract a fresh marriage, provided the second husband pays the expenses of the marriage to the first husband. Some of the correspondents do not concede such a right to the wife at the present day, and limit her power to one enabling her to determine the marriage with the consent of the husband.[2] It is unanimously said that a *Dhanti* wife can terminate her existing marriage and take another husband, if he will pay the marriage expenses to his predecessor.[3]

The wife's right to dissolve a marriage in spite of the husband's wishes in the matter was undoubtedly

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[1]Unanimous answers to Question 3 (Divorce and Maintenance, Appendix A); Raturi, para. 88, cl. (*a*), p. 164—mutual agreement effects a divorce.

[2]Messrs. Sah, B. D. Joshi, G. N. Joshi, Trivedi and Juyal on Question 1 (Divorce and Maintenance, Appendix A).

[3]Unanimous answers to Question 2 (Divorce and Maintenance, Appendix A).

recognized by Khasa law.[1] "Mountaineer," whose other observations show care and faithful detail, must be quoted at full length on this topic:—"If, when she goes to her husband for good, she does not like her new home and cannot be induced to remain, she is taken back to her parents and remains with them some time longer, when, if still unwilling, they either force her to go, or agree to her entreaties for a divorce. If a man wishes himself to divorce his wife, he receives back but two-thirds of the amount he or his parents may have paid, and that not till she gets another husband. If the woman or her friends insist on a divorce, he receives double, or half as much more, as the Phoundar may decide; one half the amount at the time of the divorce, and the remainder when she gets another husband. If young, and there has been nothing unusual in the circumstances of a divorce, a girl seldom remains many months before she is again married."[2] At another place we are told "The lovers generally gain the day, the law, or rather custom, being that if a woman can from any quarter offer the double amount of her purchase money, with the expenses of a divorce, she is entitled to it."[3] This liability to pay twice the amount of the marriage expenses is confined to pargana Rawai only in Tehri State, and the money is payable when the wife demands a divorce against the wishes of the husband.[4] If the husband forces the wife to seek release from the marital bond, he is entitled to

[1]Among the Newars in Nepal the wife puts a betelnut under the pillow of the husband and goes out of the house. The marriage is dissolved. Dr. Wright's *History of Nepal*, p. 33, The Laws of Menoo in Burma. Translated by D. Richardson (1874), p. 141, para. 17, Wife has the right to separate from her husband and marry again.

[2]"Mountaineer," p. 201.

[3]"Mountaineer," p. 173.

[4]Raturi, para. 89, p. 166.

half the amount of the marriage expenses[1] (i.e. bride-price minus the dowry received). The parties keep a regular account in some places of all the items paid to the father-in-law and of the money or things received back.[2]

By paying for the wife the husband does not acquire an absolute dominion over her. He gets the usufruct, and the right so acquired was transferable in pre-British days.[3] But the wife, too, could redeem herself if she could either herself pay, or find some one to pay, the husband the marriage expenses, which formed the basis of his power over her. So that under Khasa law a marital bond could be determined if the bride-price which in fact created that tie was paid back. The woman was treated as a chattel, no doubt, but the community could not ignore the fact that she was a human being, with human likes and dislikes. It provided a way of escape from the gamble made for her by her parents. On the moral aspect of the right to get a divorce one can only say in the words of Yudhishthira, "the ways of morality are subtle.". . . Whether the hopeless tying of a helpless girl even to a scoundrel[4] which Hindu law enforces is to be preferred on broader grounds of public policy and social welfare to a system which enables a girl to put an end to a union in which she had no voice is a question which people will answer according to their own notion

[1] Raturi, para. 89, p. 166.

[2] *See* "Mountaineer," pp. 199—201, where the accounts by Man Singh and Durmoo for Durmoo's daughter Minah are noted.

[3] Atkinson, XII, 255.

[4] Manu, V, 154, directs the wife of an unfaithful husband to worship him like a God! and allows the wife to be repudiated not only for adultery, but various light offences, e.g. unkind speeches, extravagance or on account of barrenness, sickliness and bringing forth female children only; Manu, IX, 77-78. *See* Narada, XII, 94, which directs a husband not to show love to a barren woman or who contradicts him, etc.

in the matter. The task of the student is to represent faithfully the custom as he understands it. It is for the courts to see if public policy and good morals are infringed by the right, or for the legislature to curtail the right, if such a course be deemed prudent and conducive to public welfare.

This right of the woman to determine the marriage, and contract a fresh one, on payment of the marriage expenses may appear novel, but is a logical incident to the secular Khasa marriage. "Mountaineer" refers to it. The polyandrous Khasas of Jaunsar Bawar have the same custom—"women are free to leave their husbands, if dissatisfied with them, on condition of the second husbands defraying the expenses of the previous wedding."[1] Question 1 (Divorce and Maintenance, Appendix A) which deals with this right in Almora and Garhwal among the Khasas has been answered in the affirmative by Messrs. Thulgharia and Pant. Mr. Gairola states "under the old custom she could do so, but not under the present custom and law. The *Dhant* (i.e. the second husband) is now liable to be prosecuted under section 497 or 498, I.P.C. (which make adultery and enticing away a married woman criminal offences). The Khasas have found these sections very useful in adjusting their family relationships and for the swift and sure enforcement of the only rights which a husband possesses under the customary law,[2] for the aggrieved husband may legally compound the offence and so terminate the criminal

[1] Williams, para. 125, p. 60.

[2] *See* Atkinson, XII, 118-119, about the Bhotiyas—"If a woman desert her husband and goes to live with another man, her husband takes from that man the costs of a second marriage; the woman is thereby divorced from her first husband and becomes the wife of her seducer. If she, in turn, deserts the second man for another paramour, he can take from the third man the costs of a marriage, and the woman for the third time changes husbands".

proceedings. The man who wants to acquire the woman is prosecuted and he pays the marriage expenses to the first husband, the wife returns the jewellery and the husband executes a *ladawa* (deed of relinquishment) and withdraws the prosecution on compounding the offence. The woman and the *Dhant* go home and live as husband and wife. The first marriage is dissolved on receipt of the marriage expenses and ornaments. The second marriage is formed by consent of the parties and the residence of the woman in the house of the *Dhant*. We can see thus why these complaints are compromised and generally end in *ladawas*[1] (deeds of relinquishment). Civil suits for restitution are not unknown, though very rare, and they too are compromised in the same manner.[2] It is said that honour is easily satisfied among these people. This is because custom does not give husbands very pre-eminent rights over the wives; marital rights are in effect and sentiment rights of property, and a Khasa sees poor fun in keeping a kicking horse. Instead of insisting on the company of a recalcitrant wife, he finds it more prudent to get another wife by the money obtained from the *Dhant*. In judging the probative value of the answers on Question 1 (Divorce and Maintenance, Appendix A) about the existence of the actual custom, it is to be remembered that the informants are men, and admissions against their own right by a few are of greater weight than statements in their own favour by a majority. The right of a *Dhanti* wife to terminate her marriage by payment of the marriage expenses is unanimously declared. It has been made clear that in law there is no difference between a *Dhanti* wife and a wife who was married

[1]Answers to Question 8 (Divorce and Maintenance, Appendix A).
[2]Answers to Question 10 (Divorce and Maintenance, Appendix A).

as a virgin. There is just a sentiment in some places against acknowledging the right of a wife to repudiate the marriage. In case the woman leaves the husband, the custom cares more for the return of the marriage expenses to the first husband, than for the return of the woman,[1] and it shows us the true character and incidents of a Khasa marriage.

Let it not be understood that when marriages are so easily dissolvable the Khasas must be having an awful family life, in which the husband does not know what is to turn up next day. The duration of a marriage does not depend on custom or law alone, but is regulated by a variety of circumstances in the social and economic life of the people. Marriage is by its very nature a relation which lasts beyond the mere act of propagation. The presence of the children is a great guarantee for the continuance of the marriage tie, which is strengthened by economic considerations. A dissolution of marriage deprives the woman of a supporter and the man of a household drudge. The economic factors, including the existence of children, operate to keep a man and woman together. Khasa law is a human institution which has grown out of human necessities and the social exigencies of the people. It attempts no religious hypnotism of the people, which would reconcile them to present misfortunes in the hope of future bliss. The customary law of the Khasas is free from the higher conceptions of Brahmanic theology. Custom does not insist on a marital union being kept up when the parties decide to the contrary. The privileged position of the wife results from the nature of the marital rights in Khasa law, and also

[1]K.L.T., p. 51.

from the existence of the freer conditions of marital relationship in a remote past, when the wife probably did not come to live with her husband as she does at the present day.[1]

DIVORCE AND REMARRIAGE OF WOMAN IN HINDU LAW

Hindu law at a very early stage of its development came to regard marriage as a sacrament and an indissoluble union—once a wife always a wife is the rule of Hindu law. Though Manu declares "Neither by sale nor desertion can a wife be released from her husband."[2] Parasara Narada[3] and Devala[4] lay down rules when it is permissible for a wife to take a second husband. Parasara[5] says :—"If the husband be missing, dead or retired from the world, or impotent, or degraded, in these five calamities a woman may take a husband." Narada and Devala are to the same effect; one text of Manu clearly recognizes[6] the son of a remarried woman (*Paunarbhava*). Mr. Mayne[7] thinks that a verse after Chapter IX, 76, which was in the earlier text, has been deliberately omitted in the existing text of the Manu Smriti. This verse, as he rightly points out, is meaningless without the corresponding verse found[8] in Narada Smriti, which allows a woman to take another husband in the cases contemplated in Manu, IX, para. 76. The texts which allow divorce

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[1] *Ante*, p. 77.
[2] Manu, IX, 46. *See* IX, 101, about mutual fidelity between husband and wife till death being the supreme law; V, 162, second husband not allowed to virtuous women.
[3] Narada, XII, 97—101. *See* also paras. 18, 19, 24, 46—49.
[4] 2 Colebrooke's *Digest*, 470-471, about Devala. *See* Vasishtha XVII, para. 20.
[5] *Parasara*, IV, 28, quoted by Sen, *Hindu Jurisprudence*, Appendix B, p. 402.
[6] Manu, IX, 175.
[7] Mayne, para. 93, p. 114.
[8] Narada, XII, 98. *See* also XII, 98—101.

and remarriage of woman "relate to a primitive stage of Hindu society," according to Sir Gooroodas Banerji.[1] Alberuni in the 11th century noted that divorce is not allowed among the Hindus.[2] Kautilya in his celebrated Artha Sastra allows divorce from mutual enmity, but not when the marriage was celebrated in any of the four approved forms.[3] He also refers to widow marriage and the case of a woman with many male children by many husbands and the devolution of her Stridhan in such a case.[4] There can be no doubt about dissolution of marriage being allowable under certain circumstances among the ancient Hindus or about the existence of remarriage of women.[5] The right of the wife to abandon the husband arises, however, only in well-defined cases among the early Hindus, and she does not possess the latitude which the Khasa law gives her.

DISSOLUTION OF A "FREE" ROMAN MARRIAGE

We have seen the similarities of a Khasa marriage to the free marriage of Roman law. It is also remarkable that in a "free" Roman marriage divorce was always permitted if either party ceased to wish to preserve the tie of marriage which was only looked on as a contract resting on mutual consent. A wife "in Manu" could not divorce herself.[6] "The dissolution of a free marriage

[1] Banerji, "Marirage and Stridhana" (4th edition, 1915), p. 187.

[2] Alberuni, Vol. II, 154, "Husband and wife can only be separated by death, as they have no divorce".

[3] *Artha Sastra*, p. 191.

[4] *Artha Sastra*, pp. 188-189, about the contingencies when a wife can abandon the husband and remarry.

[5] Mayne, para. 93, pp. 113—115; *Hindu Jurisprudence*, p. 280; R. L. Mitra, "Indo-Aryans", Vol. II, p. 155; Dutt, Vol. I, pp. 73, 171, 255; Hastings, Vol. 8, para. 6, p. 453.

[6] Sanders, p. 39; Sohm, 494, "It is interesting to note that among the Cretan and Ancient Greeks marriage was a free contract and its dissolution freely allowed, but if capricious it involved heavy penalties—under the Greek law, the father or his legitimate heir could

(*divortium*) could be brought about either by mutual agreement or by the will of one party only. . . . . As far as the right to bring about a divorce was concerned the legal position of the wife was precisely the same as that of the husband."[1] Causeless "*repudium*" terminated the marriage, but heavy penalties were attached to its being insisted upon by one party in the absence of any statutory ground of divorce, e.g. the wife forfeited the *Dos*, and the husband lost the *Donatio propter nuptias*.[2]

Thus, with the elements of a "free" marriage, in Khasa Family law we have the custom of paying a bride-price for the wife, and therefore, though the marriage is dissolvable at the will of the wife, liability to pay back the marriage expenses remains.

PAT AND NATRA MARRIAGES

The custom of divorce and of the remarriage of a divorced wife or widow, though not allowed by Brahmanic law, are found in many parts of India among Hindus.[3] The remarriage of widows apart from custom has now been legalized amongst them.[4] Second marriage of a wife or widow is known among the Maharattas as Pat, and as Natra in Gujrat. Caste rules in the Bombay Presidency allow a woman to contract a Natra during the life of her first husband.[5] The prevailing practice of the Bombay courts has been not to recognize the validity of

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end the marriage". *See* Royal Commission on Divorce and Matrimonial Causes (1912), Appendix I, by G. E. J. DeMontmorency, p. 3.

[1]Sohm's "Institutes", 495.

[2]Sanders, p. 39; Sohm, 496.

[3]Mayne, para. 94, pp. 115—118.

[4]Act XV of 1856.

[5]S. Roy's "Customs and Customary Law in British India" (1911 edition), p. 291.

any divorce obtained without the consent of the husband. In *Reg.* v. *Karsan Goja*[1] which is the leading case on the point, Karsan Goja had married and cohabited with one Rupa, a married woman who had repudiated her former husband without his consent. Thereupon Karsan was tried for adultery and Rupa for bigamy. The defence was that by custom the woman was at liberty to leave her husband without his consent and marry another person. They were both convicted and the High Court of Bombay observed "we are of opinion that such a caste custom as that set up, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of Hindu law, and we hold that a marriage entered into in accordance with such custom is void."[2] Those who are acquainted with the conditions in the Himalayan districts would see that if the courts in the Kumaon division had applied these rigorous provisions to the Khasas a large proportion of *Dhants* would have been in jail and their children bastardised. Divorce is undoubtedly opposed to the spirit of present day Hindu law, but in judging the family institutions of the Khasas care should be taken to avoid any allusions to Hindu law, which can only mislead one and make a correct appreciation of the customary law difficult. The writer remembers that in 1915 he himself argued a case[3] before Mr. Dible, Assistant Commissioner at Ranikhet, and challenged the validity of a *Dhanti* marriage, where the woman had left her husband without

[1]2 Bom. High Court Reports, p. 117. *See* 1 Bom. (I. L. R.), 347, in which the court does not recognize the authority of the caste to declare a marriage void or to give permission to a woman to remarry in case of leprosy. *See* Mandlik, pp. 428—431; Steele, pp. 168-169.

[2]2 Bom. High Court Reports, p. 125.

[3]Civil suit no. 56 of 1915 (Sub-Divisional Officer, Pali, Almora), instituted 2nd August, 1915, Jaint Singh and others *v.* Bachh Singh.

his consent, doing so on the strength of rulings in other parts of India, but with no effect. The courts in Kumaon upheld the custom on the ground that such a divorce is recognized, and this present study of Khasa law shows that the decision was quite correct.

WIFE'S RIGHT OF DIVORCE IN CERTAIN CONTINGENCIES

The right of a woman to abandon her husband and take another in case of (1) leprosy, (2) impotency, (3) excommunication from caste, and (4) apostacy is merged in the more extensive right discussed above. The answers to Question 4 (Divorce and Maintenance, Appendix A) show that social sentiment is decidedly in favour of her right to divorce under such circumstances. A causeless repudiation in any society which is settled in social order must be viewed with disfavour and the legislature or the king at one time or another intervenes to penalise such action. No outside authority has so far promulgated rules as to Khasa family relations, except in Tehri State during recent years. There has been very little desire for change among the Khasas and they have kept up the primitive conditions. There can be no doubt that a wife can leave her husband without his consent and marry again in case of his (1) leprosy, (2) impotency, (3) excomuunication from caste, (4) apostacy.[1] On the custom as we find it she can also do so in the absence of such reasons. The second husband is in all cases liable to refund the marriage expenses. All those who affirm the right of the wife to leave her husband in the abovementioned contingencies also say that the second husband

[1]Messrs. Thulgharia, Pant, Juyal, G. N. Joshi (Mr. Trivedi says she can in cases 3 and 4 only) on Question 4 (Divorce and Maintenance, Appendix A); Raturi, para. 88, pp. 164-165.

is liable for the marriage expenses to the first, and this appears to be in harmony with the entire spirit of Khasa marital relationship.[1]

HUSBAND'S RIGHT TO DIVORCE THE WIFE

This right is of very little importance in Khasa law. It has importance in a monogamous community, but a Khasa can keep as many wives as he chooses, and some use the privileges of law to their full extent.[2] It is only rarely that a Khasa is anxious to get rid of his wife. A wife is at least valuable as a household slave. He manages to make things hard for a disagreeable wife and so force her to seek a protector elsewhere. He thus gets rid of the woman and recovers the marriage expenses from her second husband. A complaint under section 498, I.P.C., is enough for the purpose. It is not always that a helpless woman can find another man who will take her, and then suicide seems to have been the only alternative. Speaking of suicide by females, Mr. Traill wrote:—"The hardships and neglect to which the females in this province are subjected will sufficiently account for this distaste of life, as, with a trifling exception, the whole labour of the agricultural and domestic economy is left to them, while food and clothing are dealt out to them with a sparing hand. Suicide is never committed by males except in cases of leprosy[3]. An oasis in this matrimonial desert is the rule of the Tehri

[1] Messrs. Thulgharia, Pant, Juyal and G. N. Joshi on Question 5 (Divorce and Maintenance, Appendix A). The true rule of Khasa law appears to be so from the practice of Tehri courts. Raturi, para. 88, p. 165. Mr. Trivedi says the second husband is not liable. The answer shows the resentment of the people against an excommunicated person and an apostate.

[2] Atkinson, XII, 255; Ratauri, para. 84, p. 159.

[3] Atkinson, XII, 510, where Mr. Traill's remarks are quoted.

courts that no husband can divorce his wife without her consent[1]. This, however, seems to be due to the intervention of the State. "Mountaineer" informs us that the husband forfeited one-third of the marriage expenses if he wanted a divorce, and the amount was payable only when the woman got another husband. Mr. Raturi notes that in like circumstances in pargana Rawai only half the amount is payable[2]. We cannot say if there was the same practice among the Khasas on this point throughout the Himalayan districts or whether there were local variations about the penalty inflicted on a husband for a causeless repudiation of his wife. There is no record of past practices in this respect. On the strict theory of Khasa law the husband would be entitled to divorce his wife and at the most lose his marriage expenses. He can give up his rights over the wife, just as he can in case of any other property. The question is, however, of little practical interest, as custom and public opinion have been shaped by section 488 of the Criminal Procedure Code. The husband may turn out his wife, but is bound to maintain her unless she is unchaste[3]. It is not difficult to see that he would rather keep her as a slave than pay separate maintenance, unless the misconduct of the woman has amounted to a disregard of caste rules. The husband would be liable also under section 488 of the Criminal Procedure Code. It is not necessary to repeat that the position of a *Dhanti* wife, and her rights, are the same as those of any other wife.

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[1]Ratauri, para. 91, 169.

[2]"Mountaineer," p. 201; Raturi, para. 89, p. 167.

[3]Unanimous answers to Question 11 (Divorce and Maintenance, Appendix A).

MARRIAGES BY EXCHANGE OF WIVES

The secular nature of Khasa marriage and its dissoluble character is forcibly brought out by the custom of marriages by exchange of wives. Mr. Raturi only notes it in the case of brothers. Two Khasa brothers according to him sometimes exchange their wives, and when the wives have consented to the new arrangement the marriages by exchange are valid[1]. Question 9 (Divorce and Maintenance, Appendix A) refers to the custom in its general aspect. The custom is not known to many of the correspondents, which shows that it is not common and is practised only by the Khasas in backward parts of the country. The existence of the custom to some extent is made out from the answers of Messrs. Thulgharia and Trivedi to Question 9. Mr. Thulgharia says "exchange of wives with their consent is not very common. The sons are considered as sons of *Dhanti*". Mr. Trivedi, who questioned 112 persons, notes:— "No, not by consent, but sometimes by force; yes, they are considered legitimate". It seems his informants were too eager to proclaim their unlimited powers over their wives, who could be disposed of as they liked[2]. The children of these rare unions are unquestionably legitimate. This fact follows from the very nature of a Khasa marriage. There is no religious idea behind this marriage, and there is little of finer affection and chivalry. It is a union freely dissoluble by mutual consent, without the intervention of any outside body, and a valid marriage takes place when a woman takes up her

[1]Raturi, para. 73, p. 136.

[2]Messrs. Thulgharia and Trivedi on Question 9 (Divorce and Maintenance, Appendix A). Mr. J. L. Sah says that the practice has become obsolete.

residence as wife in the house of a man. In exchange by mutual consent both the marriages are dissolved and two fresh ones formed in a single transaction, so that the children born after the exchange has come into effect are perfectly legitimate under Khasa law. Ethical sense should not get the better of legal principles. This custom which offends against delicacy and our notions of marital relationship shows how hopeless it is to judge Khasa law by the canons of Hindu law, which does not allow divorce and requires some ceremonies for the validity of a marriage. Children who are unquestionably legitimate under Khasa law would be mere bastards under Hindu law.

DIVORCE AND REMARRIAGE OF KHASA WOMEN IN TEHRI COURTS

In the Tehri State divorce and remarriage of women are subject to a civil proceeding in the courts. No release is valid till confirmed by a civil court of proper jurisdiction[1]. The decision[2] in such cases is based on Regulation 43 of 1896 which lays down rules as to when a wife or a widow is entitled to remarry and the conditions which should be fulfilled. The engrained doctrine of Khasa law that marital rights are rights of property is fully recognized by the courts in the Tehri State. No widow can remarry unless she has procured her release from the family of the deceased husband by payment of the marriage expenses, and she is reckoned as assets[3]. It is necessary for the remarriage of a woman that the

[1]Raturi, para. 96, p. 172.
[2]Raturi, para. 88, p. 164.
[3]Raturi, para. 88, p. 166, In British territory, too, in the past, when price for widows was taken, such releases appear to have taken place before the patwari. Mr. Atkinson says "widows are sometimes remarried but it is a civil contract, made before the patwari and is not held to be very binding. Atkinson, XII, 255.

previous marital tie should be formally determined. In some cases a *ladawa* (deed of relinquishment) may be executed by the husband or his heirs, and the marriage expenses may be remitted. There may be no heirs of the deceased who are entitled to marriage expenses and the widow is then granted release. The main principles of the Tehri Regulation are as follows :—

1. Divorce can be effected by mutual consent, by application to the court.
2. The wife, however, is entitled to divorce in the following cases without the consent of her husband :—
   (*a*) Leprosy of the husband.
   (*b*) Impotency.
   (*c*) Absence for 6 years, when he has not been heard of.
   (*d*) Cruelty.
   (*e*) Excommunication from caste, apostacy and adoption of a religious order.
   (*f*) Lunacy of the husband or imprisonment for a long term or for life.

The marriage expenses are payable to the husband in all these cases.

When the marriage was a *Kanyadan*, i.e. by gift of the girl, Rs. 100 are payable as compensation to the husband, though no nuptial fee had been paid. The rule is based on the practice of the Tehri courts and not on any principles of Khasa law[1].

[1]Raturi, para. 90, p. 169.

CHAPTER V

PATERNITY AND SONSHIP

DIFFERENT SORTS OF SONS AMONG THE KHASAS

THE various sorts of sons recognized by Khasa law are the following :—

1. *Asal*, i.e. the son begotten by a man on his lawful wife, who had not been married before to another person.

2. *Kamasal*, the son begotten by a man on his lawful wife, who is either a widow or the divorced wife of another, i.e. the son of a *Dhanti* wife. He corresponds to what the Smriti writers call a *Paunarbhava* son.

3. Son by a Kathala or Tekwa, i.e. the son begotten on his wife with the consent of the husband, or on his widow with the consent of the deceased husband's kinsmen by a Tekwa.

4. *Jhantela*, the son of the wife, i.e. the son brought to the house of the *Dhant* by his *Dhanti* wife.

5. Dharmaputra or so-called adopted son. He will receive a detailed consideration separately.

ASAL AND KAMASAL SONS

The *Kamasal* son in Khasa law took some time to get full recognition of his rightful place before the courts in Kumaon owing to the odium attached to widow marriage and the absence of divorce among the Hindus for the last several centuries and to the idea that Khasa law was merely modified Hindu law. His status and that of his mother (the status that is of *Dhanti* wife and her issue) was for the first time assured when Mr. Stowell said that the *Dhanti's* son "inherits equally with legitimate sons as a matter of course"[1]. Mr. Stowell's words: "the real question at issue in such cases is not so much (as it is usually put) whether illegitimate sons in Kumaon can claim to inherit a proportionate share in the ancestral estate, as whether the parties belong to a genuine Brahman or Rajput caste or to a Khasiya caste"[2], show a clear appreciation of the customary law, which unfortunately has been missed by Mr. Lall.

There is no doubt that *Asal* and *Kamasal* sons inherit equally to their father[3] among Khasas. Their rights to collateral succession are the same[4]. This is so

[1]K.L.T., p. 52.

[2]K.L.T., pp. 52-53.

[3]K.L.T., pp. 51—53; K.R.C., (Com.), para. 12, pp. 13-16; Nar Singh *v.* Ram Singh and others (K. R., p. 9); K.L.C., para. 11.

[4]K.L.C., para. 19. Mr. Lall calls *Dhanti's* sons illegitimate, though he objects to this word at one place. No illegitimate son succeeds among the Khasas. They succeed because their mother is a lawful wife of their father; unanimous answers to Question 16 (Inheritance to Hissanari, Appendix A). *See* Ratauri, para. 113,

because a *Dhanti* marriage is as lawful under Khasa Family law as any other marriage.

The remarkable similarity between the customary law of the Khasas of our study and the agriculturists of the Kangra hills is brought out in many respects. The observations of Mr. Lyall show the identity between their marriage customs. It would be well to repeat here that there are some ethnic affinities between these people[1], and the cultural seclusion of both classes has been practically the same. In Kangra those people whose women work in the fields contract *Jhinjara* or widow marriages. Among these the son of any kept woman (provided she was not of impure race, connection with whom would involve loss of caste) would, by custom or past practice, share equally with the son of a wife married in the most formal manner . . . the Gaddis say that among them if a widow has been, as they understand it, lawfully obtained from her guardians in consideration of value given, then she is reckoned a wife, whether any ceremony be performed or not. The feeling among the Kanets is the same[2].

SON BY A TEKWA, FOUNDATION OF PATERNITY

The fact that a child procreated by another can be reckoned in law as the son of the deceased husband of the woman does not surprise those who have studied the custom of Niyog and the position of the Kshetraja son in the Dharma-Sastras. The son "begotten on the

p. 203, and case no. 35, dated 23rd June, 1909, Madnu *v.* Tula Ram; case no. 16, dated 14th April, 1908, Durga *v.* Mangal; case no. 129, dated 17th March, 1910, Kedar Singh *v.* Dabb Singh quoted there.

[1] *Ante*, pp. 17-18.

[2] Lyall's *Settlement Report*, para. 74; Tupper, Vol. II, 184.

wife'' who has been duly authorized occupies a unique position in early Hindu law. The son begotten by a man on his lawful wife, i.e. an Aurasa son, is the best, but after him the highest position among the subsidiary sons is assigned to a Kshetraja son by a large number of Smriti and Sutra writers[1]. We have said that Tekwa union is a kind of Niyog. The Hindu sages limit such directions to a wife or widow to ''times of misfortune''[2] only. The custom among the Khasas has secular objects in view. The so-called ''appointment'' of a sonless widow is not so frequent. The interests of the reversioners in this case are against the ''appointment''. Its primary purpose is to protect the interests of the minor children of the widow and give a male helper to her[3]. We have shown that the children by a Tekwa are affiliated to the deceased husband and inherit his property with their uterine brothers, and not the property of the Tekwa, as Mr. Lall believes they do[4]. The remarks of Mr. Lall ''Both she and such children have full rights in the Tekwa's property, if any''[5] suggest that instances of such inheritance are practically non-existent. The ruling which has been more than once quoted on this topic denies such a right of inheritance and no actual instances are mentioned by Mr. Lall[6].

[1] *See* Mayne, p. 81, for the admirable list which shows the respective positions assigned to secondary sons by various writers. Gautama, Vishnu, Vasishtha, Manu, Narada, Sancha and Lischita, Harita and Yama all put the Kshetraja son second in the list, while Vrihaspati assigns him the eighth position: Baudhayana, Dewala and Yajnavalkya give him the third position, and the second position to the son of an appointed daughter.

[2] Manu, IX, 58.

[3] *Ante*, p. 93.

[4] *Ante*, pp. 95—100.

[5] K.L.C., para. 44.

[6] Kirpal Singh *v.* Partab Singh (K.R., p. 12).

As we have seen under Khasa Family law a woman is a mere chattel. The marital power is proprietary in character. When a husband who is living commissions a person to raise issue on his wife, the child is his property by the mere fact that the mother belongs to him. The case of a widow is not so easy to comprehend. The ownership of the husband *primâ facie* ceases by the physical fact of his death, and his control is removed. His sonless widow and his estate were available to his brother. But if the brother does not take possession, the widow by a fiction is apparently deemed to continue to be the property of her deceased husband till she is appropriated by his heirs. Primitive law does not go by scientific niceties, but contents itself with rough certainties. The existence of some fiction of posthumous control in the case of a widow who continues to live in her husband's house appears from the fact that if the brother-in-law appropriates the widow and takes her to his own house, the children born to her afterwards are his children and not those of the deceased husband[1]. The case of a widow with minor children is also intelligible on the doctrine of fictitious posthumous control.

JHANTELA OR SON OF THE DHANTI

Where divorce and widow-marriage are freely practised, questions about the care and control of very young children who follow their mother to the house

[1] *Ante*, p. 97. *See* Mayne, para. 69, about the theory of paternity among the Hindus, and paras. 70-71; in the case of a widow the husband was probably considered by a fiction as surviving in her. Manu, IX, 45, the husband is declared to be one with the wife; Raturi, para. 99, p. 175, where the fact that "the widow is in possession of the husband's estate" is adduced to support the claim of the Tekwa's sons to the estate of the deceased husband as Kshetraja sons.

of the second husband must frequently arise. The position of such sons under Khasa Family law requires careful consideration, as the matter is of practical interest in the daily life of the Khasas. This problem has been solved by the Khasas in a simple and natural manner. The child is reckoned as a child of the second husband and inherits equally with his other sons.

Mr. Atkinson notes that the "children by a first marriage who follow the mother to her second husband's house lose their paternal inheritance, but are entitled to succeed to their step-father's property equally with their step-brothers, his children of the second marriage"[1].

Question 4 (Inheritance, Appendix A) was expressly directed to find out the true rule on this subject. Many correspondents are against the affiliation of a *Dhanti's* son by her former marriage to the second husband, and say that the boy will get a share in his natural father's property[2]. It seems to the writer that opinion in this case has outweighed the real usage. It is undoubted that the child in such cases does not inherit to his natural father, and to say that he will so inherit is the expression more of a pious wish than of actual practice[3].

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[1] Atkinson, XII, p. 118. The remark is primarily made in connection with the Bhotiyas, but in order to avoid repetition about the Khasas, he shows that the rule is applicable to the Khasas by saying "It should be mentioned here that what has been written about the remarriage of widows among Juhari Sokpas applied equally to remarriage of all the ordinary Khasiya Rajputanis," p. 119, and Mr. Atkinson does not deal with this topic in connection with the Khasiyas of Kumaon or Garhwal.

[2] Mr. Gairola says that the boy is usually adopted, but no affiliation takes place. Mr. B. D. Joshi says that the second husband in many cases makes a concession in favour of the child and grants him a share of his property, but there is no question of affiliation. Messrs. Juyal, Pant and Sah say that he will inherit to his natural father.

[3] Mr. Lall, who conducted the enquiry throughout the division, does not seem to have found any instance of such inheritance to the natural father. He says "Such children naturally do not succeed

The observations of Mr. Atkinson receive support from the answers of Messrs. Thulgharia and G. N. Joshi to Question 4 (Inheritance, Appendix A)[1], which go to show that affiliation to the second husband of young children is undoubted.

The remarks of Mr. Lall on this subject are interesting :—"There are numerous instances of *Jhantelas*, as there must be in a country where it is common for a woman to leave one husband for another. Such children naturally do not succeed in obtaining anything from their own fathers whom their mother had deserted. On the other hand, the new husband of their mother nearly always feels some interest, if not actual responsibility, for them. In cases where he gets no children of his own he often adopts the *Jhantela* as a son and gives him his whole estate. And even when he has sons he does not leave the *Jhantela* quite unprovided, but gives him a part. Indeed, instances are not uncommon where he has been given a share equal to that of the sons. It is difficult to say how far these instances constitute or indicate a right to inherit. I do not go so far as that, but merely conclude that a *Jhantela* has a sufficient share in the foster father's property for his or her maintenance"[2]. Mr. Lall concludes that a *Jhantela* is only entitled to adequate maintenance till majority[3], in spite of the "not uncommon instances" of equal inheritance with other

in obtaining anything from their own father whom their mother had deserted". K.L.C., para. 283.

[1]Mr. Thulgharia says :—'The unweaned child will be considered as legitimate son of the second husband, but the weaned son will not be so considered". Mr. G. N. Joshi :—"Unweaned and weaned child is considered legitimate if marriage expenses are paid to the former husband. There is no age limit."

[2]K.L.C., para. 283.

[3]K.L.C., para. 31.

sons. The words "It is difficult to say how far these instances constitute or indicate a right to inherit" are suggestive of the public opinion on the matter during his enquiry. Backward Khasas would regard a *Jhantela's* succession as a matter of course, while cultured Khasas would wish to get rid of antiquated practices and explain equal inheritance as a concession rather than a right. Those influenced by Brahmanism would also wish to stop divorce and widow marriage. We are concerned in this study with the actual usages of the Khasas and we find that a *Jhantela* inherits equally with any other legitimate son.

Mr. Raturi tells us that in Rawai and other places the custom is to assess a price for the child in the womb or for an unweaned child in addition to that of the mother. If the husband or his heirs do not want to keep the child they release the woman with the child, and when she remarries, the unweaned son or the son born in the second husband's house inherits equally with his other legitimate sons; such a marriage is called "*Syun chela Biyah*", i.e. marriage together with the child[1]. There is a remarkable agreement between this statement of the customary law and that given by Mr. G. N. Joshi's informants.

Mr. Lall's rule that a *Jhantela* is entitled to adequate maintenance from the foster father or his estate is purely arbitrary. He is either reckoned as a legitimate son under the Khasa law or has no *locus standi*. Mr. Raturi clearly states that such a son as a matter of fact inherits equally with other sons of the second husband.

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[1] Raturi para. 113, p. 201.

The statement is entitled to great weight when we remember that his book is published under official authority for the guidance of courts in the Tehri State. He is supported by Mr. Atkinson's authority and two answers on Question 4 (Inheritance). The actual practices of the Khasas observed by Mr. Lall point to the same conclusion. The child gets no share in his father's estate, and many instances of his equal inheritance with the other sons of the second husband were noticed by Mr. Lall. We are not told that there were cases in which such a child was excluded from equal inheritance. Mr. Lall seems to think that these cases probably constitute or indicate a right to inherit, but for some unexplained reason he was not prepared "to go so far as that," and so evolved a rule that they are entitled to adequate maintenance only. Khasa Family law recognized a *Jhantela* as a son, though opinion is growing in some places against the recognition of such a right. Opinion, however, is not custom; it is only custom in the making, and the material on which custom is fashioned by practical assent[1]. So long as actual instances of a *Jhantela's* exclusion from the second husband's estate and admittance to a share in his own natural family are not forthcoming, it cannot be said that the rule about his affiliation, for purposes of inheritance, to the second husband of his mother has been abrogated. This study is not confined to the customary law of the Khasiyas in the Kumaon division only, but attempts to find out the legal conceptions and practices of the Khasas in all the Himalayan

[1]L. Gray, The nature and sources of law (1921), p. 285. Custom is not opinion, it is practice. Custom is what men do, not what they think. The opinion of a community as to what a man ought to do is not based on custom, unless there is general practice.

districts. It may well be that the Khasas in one district or village have done away with primitive practices. It is the essence of customary law that the people themselves shape it and the pressure of advanced public opinion is reflected in actual practices. No custom can be changed by mere intent and the change must be manifested by actual usages.

During the transitional stage of a people slowly emerging from primitive thought to modern conceptions the task of a Judge must be very delicate. He should be on his guard not to confuse the mere shadows of past practices with living customs. An ancient usage may have become a thing of the past in a society emerging into new forms of life—a tradition rather than an existing rule.[1] The grave risk of sanctioning by judicial decree an obsolete practice ought to be avoided as much as the abrogation of a living custom by importing legal and ethical considerations which are foreign to the people. So far the writer can see, a *Jhantela* is generally recognized as a son among the Khasas of the Himalayan districts, and on this view the party which alleges in court that the practice is obsolete must make out that contention by giving at least some instances of his exclusion from inheritance.

PADUA *v.* BHAWAN SINGH

Padua v. *Bhawan Singh and others*[2] throws some light on the position of a *Jhantela* son. Jasa was the

[1] E.g., in Punjab *Pichlags* (step-sons) are not recognized as heirs, Rattigan's *Digest*, para. 10, p. 20. In Kangra district, too, the rule is the same, *see* Lyall's *Settlement Report*, para. 74, and it is said, however, that the child of an enciente bride is not a *Pichlag*, so that if the child is born in the second husband's house he is regarded as his son.

[2] (First appeal no. 10, dated 19th August, 1886) K. R., p. 7.

son of Bhawan Singh's *Dhanti* wife by a former husband. His father was unknown, the woman came to Bhawan Singh's house as his *Dhanti* with her son Jasa, who was treated as his own son by Bhawan Singh. No formalities of adoption took place. Padua was Jasa's son and claimed a right to collateral succession. The claim was contested on the ground that "his father was supposed to be illegitimate." The suit was dismissed by the lower court, but was decreed in appeal on the ground that "Jasa was practically adopted by Bhawan Singh. Such adoption is all that takes place in these hills; except amongst the inhabitants of large towns and rich people the formalities required by Hindu law are never gone through"[1]. The courts in this case looked to Hindu law for guidance and regarded Jasa as an adopted son.

Adoption by its very nature affects the rights of inheritance of the natural heirs. The adoption of a stranger introduces an alien into the village community. Some formalities, whatever their nature may be, are therefore found necessary for the purpose by the people who allow adoption[2]. There is something decidedly peculiar in this adoption without any formalities. The learned Judge who decided the case must have been struck by the fact that Jasa was deemed Bhawan Singh's son and was treated as such. He tried to determine his position under Hindu law and said it was adoption without any formali-

[1]K.R., p. 9.

[2]Sanders, 41-42, A public character was always attached in ancient Roman law to so important an alteration in families as adoption. *Mancipatio* and *in jure cessio* were needed for adopting a person *alieni juris*, while *arrogatio* was jealously watched by the pontifices, Sanction of Curia was probably necessary for validity of adoption. Roe and Rattigan's *Tribal law* (1895), 22-23, 94-95; Mayne for ceremonies of adoption, paras. 150—152; Hastings, Vol. I, paras. 5-6, p. 106. Among the Chinese the ceremonies are religious, p. 107; for Greeks, *see* paras. 5, 108.

ties. It is undoubtedly adoption in a wider sense than this term carries in Hindu law, and we should say that it is not invalidated by the existence of the other sons of the adoptive father.

EQUITY IN FAVOUR OF JHANTELA

A rule which under present conditions seems peculiar and incomprehensible, ceases to be so if we look to past conditions among the Khasas. Marital rights were rights of property. The normal thing was for a woman to change husbands only when the marriage expenses had been paid over to her first husband or his heirs. The question of young children, who need maternal care, requires solution. The child cannot be separated from its mother when very young, and has to follow the mother. It would be a worry to its natural father or his relations to keep control of such a child, and it would also prejudice its chances of safety. There is nothing unreasonable or unnatural in the arrangement that the natural father or his heirs should release their dominion over the child in such a case. In the case of a grown up child or a child whose bringing up would not cause much trouble, the father or his heirs would like to retain it, for both male and female children are a source of wealth. A child of 6 or 7 years among the agriculturists proves his utility by looking after the cattle and doing odd jobs. A girl fetches a bride-price even at the present day. A son and a daughter were both liable to be sold by the father and the right was not exercised sparingly[1]. Conjugal or parental affection has not been a strong point with the Khasas in the past.

[1]Atkinson, XI, 685. In June, 1815 the transit duty on the sale of children was given up and the practice abolished, "but it

A *Jhantela* is removed from his natural kin, with his mother, to another kin. He grows up there and becomes a part of the village brotherhood. If we go back to times of inter-tribal wars, he would probably fight for the village of his adoption, possibly even against the people to whom he belonged by birth. The equitable sense of the village community would be in favour of recognizing his claim to share the property of the family with which his fortunes had been joined and he naturally got a place in the family law of the Khasas. Customary law grows from the communal sense of right and wrong. There is no dishonour in divorce and widow marriage among the Khasas, and the moral sense of the community is not violated when a *Dhanti* comes with a very young child to her second husband. We have seen that fictitious affiliation is recognized by the Khasas in the case of a Tekwa. There is nothing to offend delicate sensibility in this custom of *Jhantela* son or "*Syun chela Biyah*". It is merely a sort of adoption which may take place, although there are other sons too. Let us also remember that being in the position of a son, he could have been sold like other sons. If the child is a girl, her adoptive father takes the bride-price. As we have seen she is regarded as a daughter of

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continued in a mitigated degree. According to Mr. Glyn, in 1882 (Atkinson, XII, 512), the Government thought that no enactments were needed to protect the children and the natural affections of the parents might safely be relied upon, but it continued and flourished, and in 1837 the Commissioner reported 'Slavery in Kumaon appears to be hereditary'. . . . . The recognition of slavery by the courts is confined to the sale of individuals by their parents", XIX, 513. Mr. Moorcroft refers to the immemorial practice of sale of children and was told that people practised polygamy to raise money by the sale of children. Moorcroft and Trebeck, *Travels in the Himalayan Provinces*, p. 15. *See* Fraser's *Journal*, p. 219, and Hamilton's *Nepal*, 235, for sale of sons into slavery in Nepal.

the family to such an extent that she cannot be married to a son of the adoptive father by another woman[1].

JHANTELA SON, A RELIC OF PRIMITIVE IDEAS OF PATERNITY

A custom can hardly be well appreciated if we look to present conditions alone. It takes its origin in dim antiquity under, one may say, semi-barbaric conditions of life and thought. Paternity by procreation may seem natural to us, but it was not so with the Hindus at the time of the Dharma-Sastras. Adoption is still recognized in Hindu law, where legal paternity is established without physical paternity. The recognition of *Jhantelas* among the Khasas is due to an easily dissoluble marital tie and to the proprietary nature of marital and paternal rights, and it supplies a solution of the difficulties about an infant's protection and nourishment in case of remarriage by a divorced woman or widow.

We are told that in early Arabia "young children whom a woman carried with her to the house of a husband and whom he brought up were often incorporated with his stock". This was usual where the children were not the offspring of a *ba'al* marriage[2]. In *ba'al* marriage the wife used to be purchased or acquired by capture, the marital rights of the husband created a dominion over his wife, and the disposal of her hand did not belong to the woman but to her guardian[3]. "When she got leave from her first husband's people to marry into another kin, it would be a matter of contract whether she should take her children with her, but an infant could not conveniently be separated from its mother, and would

[1] *Ante*, p. 134.
[2] *Kinship and marriage in Early Arabia* (1903), p. 136.
[3] *Kinship and marriage in Early Arabia* (1903), p. 121.

therefore be usually brought up 'in the lap' of the second husband''[1]. There is in fact a proverb in Maidani "*If thou dost not beget sons, sons are begotten for thee*", which is said to be applied to a man who marries a widow with children[2].

Of the twelve kinds of sons which were recognized among the early Hindus eleven need not be or physically cannot be the children of their legal father. The nearest approach to a *Jhantela* in Hindu law would be the *Sahodha* and *Kanina* sons of the Dharma-Sastras. *Sahodha,* or son received with the wife, was the child of the pregnant bride[3]. A *Jhantela* is not a child in the womb at the time of the marriage, but is mostly an unweaned child. The recognition of these sons in early Hindu law is not to secure by some means a son for spiritual benefit, but follows from primitive ideas of paternity which rested on *patria-potestas.* The spiritual efficacy of a subsidiary son is poor according to Manu[4]. The theory of paternity must be sought elsewhere. Both Narada and Manu[5] are involved in an elaborate disquisition whether paternity arises by procreation or by marital ownership, and Manu comes to the conclusion that "the receptacle is more important than the seed''[6] and both of them draw analogies from calves begotten on one owner's cow by another

[1] *Kinship and marriage in Early Arabia* (1903), p. 137.
[2] *Kinship and marriage in Early Arabia* (1903), p. 138.
[3] Manu, IX, 160—173; Gautama, XXVIII, 33; Vasishtha, XVII, 27. Vasishtha gives preference to a *Sahodha* over an adopted son (XVII, 28). The adopted son that has not been received with the bride has an inferior position in the list of secondary sons "who are not heirs but kinsmen."
[4] Manu, IX, 161, The case of a man who tries to pass the gloom of next world with the help of substitutes for a son is compared to a man who tries to cross a sheet of water in an unsafe boat.
[5] Manu, IX, 32—11, 48—55; Narada, XII, 56—60.
[6] Manu, IX, 52.

owner's bull and say that the calves belong to the owner of the cow[1].

The legal paternity over the children of a woman, in the absence of a contract to the contrary, rests with the husband of the woman[2]. It is immaterial who begot them. In the strong patriarchal family of the early Hindus, where the son did not acquire any property for himself, it was necessary to determine the proper *patria-potestas* over him[3]. *Patria-potestas* determined the paternity in Hindu law. It may arise through dominion over the mother of the child or through transfer of *potestas*. A person who is not under power may put himself under *potestas* and he is reckoned a son (Svayam-Datta)[4]. The case of a *Kanina* son holds the key to the mysterious paternal relationship in Hindu law. The child of the unmarried damsel in her father's house was called a *Kanina*. He was the son of his mother's father as long as she remained unmarried, and the moment she married he belonged to her husband,[5] because the dominion over the mother was transferred. A similar legal conception of paternity to that which recognizes *Kanina* and *Sahodha*

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[1]Manu, IX, 50; Narada, XII, 57, The story of Budha's birth given in *Vishnu Purana* is illuminative on queer conceptions of paternity. Soma eloped with Vrihaspati's wife Tara. When she was restored to her husband, but was pregnant, she gave birth to Budha; both Soma the adulterer and Vrihaspati the husband claimed paternity. On Tara's admission the paternity was fixed in Soma, but Vrihaspati's claim is suggestive and the decision reflects the improved notions of paternity when the Purana was written. *See* Wilson's *Vishnu Purana*, Book IV, Chap. VI.

[2]Mayne, paras. 69-70.

[3]Manu, VIII, 416, A wife, a son and a slave, these three are declared to have no property. The wealth which they earn is acquired for him to whom they belong.

[4]Manu, IX, 177. Compare Arrogatio in Roman law.

[5]Manu, IX, 172; Vasishtha, XVII, 22-23; Vishnu, XV, 10—12; Yajna Valkya, II, 129; Baudhayana, II, 2, 3, 24-25; Vishnu, XV, 12; and Manu, IX, 172, expressly mention that *Kanina* son belongs to the man who afterwards marries the mother.

sons is met with in the case of a *Jhantela*. The infant son of the *Dhanti* gets a place in the social polity as a son because his natural father or his heirs have released their dominion and accepted the price for the wife or widow and have also been compensated for the loss of the child[1]. He is the son of the second husband of his mother, as both of them are under his power. The man who has dominion over the mother is father of the child, if there is no other person who claims a higher *patria-potestas* over him. In the case of a *Jhantela* the *potestas* of the natural father should be formally released, according to the rules of customary law, i.e. the marriage expenses should be paid to the former husband. When this is done the son is the property of the second husband, and paternal relationship arises by transfer of *potestas*. Among the Khasas, as in many other ancient societies, "paternal power and protective power are inextricably blended together"[2]. We are in a position to appreciate the observations of the eminent Jurist when he says "In truth, in the primitive view relationship is exactly limited by *patria-potestas*. Where the *potestas* begins kinship begins and therefore adoptive relatives are among the kindred. Where the *potestas* ends kinship ends, so that a son emancipated by his father loses all rights of agnation"[3]. It is on this idea that a *Jhantela* gets recognition among the strongly patriarchal Khasas[4]. The son has been emancipated by his natural father and adopted

[1]Raturi, paras. 113, 201.

[2]Maine, *Early law and custom*, p. 98.

[3]Maine, *Ancient law*, p. 155.

[4]Narada, XIII, 45, "The son received with the wife is mentioned by Narada as fifth in the list of subsidiary sons and is a 'kinsman and heir'. We may note that Narada recognizes divorce and widow marriage."

by his mother's second husband. There is no prohibition of such adoption, even if the father has already other sons. Probably in early Hindu law the rule about the acquisition of subsidiary sons by adoption was the same. Sunahsepa's story is to that effect[1].

In Patriarchal Rome the family was originally based not on marriage or relationship, but on power[2]. The position was the same among the early Hindus. "According to the ancient conceptions of family relationship among the Aryans, a child must be under the *patria-potestas* of some individual, and paternity arose (1) through dominion over the mother of the child and (2) through transfer of *patria-potestas* from the natural parents by gift or sale or by the consent of the child when freed from the *patria-potestas* of the parents either by reason of their being dead or by reason of their having cast him off"[3]. The fatherhood principle in a patriarchal system among primitive tribes "centres on property, for the law of marital union depends less on the law of relationship, not to speak of affection, than on the law of property and authority"[4]. It is this idea of marital property over the woman and *patria-potestas* over the child that determines the paternity of *Jhanicla*. The social necessity of protecting the child made his fictitious affiliation in a stranger kin inevitable. The primitive Khasa who decides his legal problems by human

[1]Sunahsepa was sold by his father as a victim for human sacrifice. He was saved and adopted by Viswamitra, who had already 100 sons of his own. For his recognition as a son, *see* Vasishtha, XVII, paras. 32, 35, and Max Muller's *History of Ancient Sanskrit Literature*, pp. 408—416 and 573—588; *see* Mandlik, 454-455, for another instance from Yajurveda where Rishi Atri gave away all his sons.

[2]Ortolan, paras. 45-46, pp. 461-462.

[3]Sen, *Hindu Jurisprudence*, 234.

[4]Vinogradoff, *Historical Jurisprudence*, Vol. I, 197.

passions and weaknesses finds nothing unnatural in the rule. It seems simpler and more natural to him that a person should inherit to the foster father, with whom he has lived[1], rather than claim inheritance from or through his natural father to whom he and his mother had been lost.

[1] *See* Gautama, XVIII, 14, "a Kshetraja son being reared by the husband belongs to him". The same analogy can be applied to a *Jhantela*.

CHAPTER VI

ALIENATIONS OF FAMILY PROPERTY

PATRIARCHAL FAMILY AMONG THE KHASAS

MR. Mayne begins his discussion on the Hindu law of property with the pertinent observations "the student who wishes to understand the Hindu system of property must begin by freeing his mind from all previous notions drawn from English law. They would not only be useless, but misleading"[1]. In our study of Khasa property law a similar warning is needed against the Brahmanised property law of the Hindus. We have seen the effect of reliance on Hindu law in *Fateh Singh* v. *Gabar Singh*[2], when a perfectly valid marriage under the Khasa law was not recognized by the courts. The peculiarities of Khasa property law were not fully appreciated by Mr. Lall, who mistakenly looked for analogies in the Mitakshara or Dayabhaga. He came to the conclusion that family land is held in Kumaon in the same way as under the Dayabhaga, that the son has no share in the family property until his father's death[3], and that the father can transfer the ancestral property *inter vivos* in any way he likes[4].

[1]Mayne, para. 222.
[2]K.R., p. 47; *ante*, 39—41.
[3]K.L.C., para. 290, p. 77.
[4]K.L.C., para. 36.

The Khasa family organization is characteristically patriarchal, though the despotic authority of the *pater-familias* has substantially changed now. The patriarchal family may be defined as "a group of men and women, children and slaves, of animate and inanimate property all connected together by common subjection to the paternal power of the chief of the household"[1]. This "group of natural or adoptive descendants held together by subjection to the eldest living ascendant"[2], of course includes the wives of the male members among the Khasas as it did among the Romans. The essence of patriarchal social organization is the supreme authority of the eldest male ascendant[3]. This family organization was seen in its primitive purity among the Khasas before the advent of British rule. The father was the despotic head of the household and had his sons "under his power". Besides being owner of the personal effects, he was lord of his wife, children and slaves. He could sell all of them in the same way as any other movable property of the family[4]. Slavery was abolished soon after the British occupation of Kumaon and sale of wives and children was stopped. The atrocious custom of burying alive or throwing away a child born under evil stars (*Mool Nakshatra*) was also found in these hills and it shows the unlimited extent of parental authority[5].

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[1]Maine, *Village communities*, p. 15.

[2]Maine, *Early History of institutions*, 116; *Ancient law*, 141.

[3]Maine, *Early Law and Custom*, 196; *Ancient law*, 132 141, The patriarchal authority of the chieftain is as necessary an ingredient in the notion of the family group as the fact (or assumed fact) of its having sprung from his loins.

[4]*Ante*, p. 111 (foot-note) about wife, and p. 179 (foot-note) about children.

[5]Raturi, p. 54.

MITAKSHARA JOINT-FAMILY IS NOT FOUND AMONG THE KHASAS

In primitive times every possible care is taken to secure the continuity of family organization. "There was no compelling reason for dissolving it in connection with the death of a particular member, even if the member in question happened to be the ruler or manager of the concern"[1]. The death of the father or any member does not affect the corporation. At an early stage in a patriarchal society when the father is dead the eldest son becomes the head and manager of the family. We have survivals of these conditions in the custom of *Jethon* (excessive portion of the eldest son)[2]. The ownership of the family property vests in the joint family as a whole. It does not belong to the individual members collectively. "It does not belong to the members of the family as partnership property belongs to partners, but as collegiate property belongs to fellows of a college"[3]. The members at this stage have only a right to maintenance and not a defined share[4]. Economic and social forces operate, however, towards individualism and the consequent disintegration of the corporation.

The polyandrous Khasas form a joint-family. All the brothers hold their land, goods and wives jointly. If one brother dies the others take his interest by survivor-

[1]Vinogradoff, *Historical Jurisprudence*, Vol. I, 261; Maine, *Ancient law*, p. 135, "Corporations never die and accordingly primitive law considers the entities with which it deals, i.e. patriarchal or family groups, as perpetual or inextinguishable."

[2]Post, pp. 281-282.

[3]Sir William Markby on "Indian law" in *Encyclopaedia Britannica* (11th edition), Vol. XIV, p. 436.

Vinogradoff, *Historical Jurisprudence*, p. 265. The aim and essence of the arrangement (joint-family institution) is to provide the means of subsistence for its members.

ship[1]. Their customary law is noted in Dustoor-ul-aml (Record of customary law). We are chiefly interested in the family law of the non-polyandrous Khasas who form the large majority of the population in the Himalayan districts. Among them the family organization on the death of the father is observed to be weak and the main incidents of the Mitakshara joint-family are not found.

No one who observes the Khasa agriculturists of our study can fail to notice that brothers separate in food and cultivation pretty soon after the death of their father and sometimes in his lifetime[2]. The land continues to be entered jointly in the revenue records for a length of time[3], but the members live separate from each other. Man is the creature of his environments, society adapts itself to its economic necessities. About 90 per cent. of the people are agriculturists with small estates. The topographical conditions of the country require constant individual care of the fields and much expenditure of labour. Joint property is proverbially ill-cared for[4]. It is an advantage to separate as soon as possible and to look after the plots independently. The customary right of extending cultivation on unmeasured land also helps towards a separation[5]. Human nature being as it is,

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[1] *Dehra Dun District Gazetteer*, p. 90.

[2] K.R.C., p. 12, "The tendency of the joint-family in the hills is to separate". *See* Raturi, p. 522, Partition of land sometimes takes place in the lifetime of the father and it is quite common after his death. *See* also Raturi, p. 437.

[3] K.L.T., 42-43.

[4] Upreti, p. 175. (1) *Sajhi bakaro laga ni khawa*, i.e., even a leopard does not care to kill a goat (being lean) which is owned jointly; (2) *Sero bago sero bago maneka mero lag bago*, i.e. the irrigated plot was washed away and so a little of mine was also washed away.

[5] K.L.T., 140-141. Goudge's Report, p. 12, "holdings may be increased in the hills by reclamation of the adjoining waste."

a man wants to appropriate the fruits of his individual labour to himself and his children. Where proprietorship mainly consists in dividing the rents separation may not be economical, but where individual labour is constantly needed the motive for separation would be strong. We may also notice that joint families are strong in Southern India where Dravidian influence is the highest[1]. It may be that an infusion of Dravidian culture has something to do with the stability of the joint-family system among the Indo-Aryans who settled in the Gangetic plains.

Whatever the causes may be[2] we find that family organization after the death of the father is weak and individualistic among the Khasas. In such a society two novel legal ideas were introduced. A hissadari right came to be transferable by sale[3] and women ceased to be disposable property. Customary law had to adjust itself to these changed conceptions as to ownership of land and position of women. The weakness of the joint-family made it easy for a brother or nephew to be reckoned an independent owner who could sell his nominal share in the family property. "In the hills," said Mr. Pauw, "the Shikmi hissadar[4] has always been permitted to

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[1]Mayne, para. 8, p. 6.

[2]*See* Maine, *Early Law and Custom*, 241, "It has been observed, where joint-families are abundant, the village organization is weak and village communities rare." Bhattacharyya, p. 80, joint-families are posterior to village communities; Tupper, Vol. II, p. 60, "As the village dissolves, the joint-family is one of the new forms which may be assumed by its component materials". If we accept these dicta, the existence of village communities among the Khasas may also in a way explain the weakness of joint-family.

[3]Pauw, para. 36.

[4]Shikmi or Shikmi hissadar--a joint hissadar with the man in whose name the family share stands recorded; the Shikmi is usually the younger brother or nephew. K.L.T., p. viii.

exercise full proprietary rights over his nominal share of the inheritance and to claim that his portion shall not be held responsible for debts due from the manager unless he is specifically mentioned as liable in the decree"[1]. Mr. Stowell, too, notes that the unity of the joint Hindu family is less strictly observed in respect of alienations in the hills than elsewhere[2]. The community contents itself with the more honest expedient of getting back land sold to an outsider by means of pre-emption[3]. The position of the widow was determined by simply allowing her to represent her deceased husband at the time of succession when he left no male issue[4].

The result of these innovations and different principles of succession has been that the main incidents of a Mitakshara joint-family are not found among the Khasas. Under the Mitakshara the death of the common ancestor or head of the house gives rise to the joint-family[5], which is a corporation in which all the members possess agnatic affinities. So long as the family is joint, "no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share"[6]. An undivided co-parcener under the Mitakshara has no right to dispose of his share in the family estate. Mr. Mayne points out that the theory of the Mitakshara law is clearly against such a right as under that law

[1]Pauw, p. 43. Mr. Pauw, rightly thinks that sale was not permitted under the Garhwal Rajas, and the reference to Shikmi hissadar's right of alienation relates to the custom since the British rule *See* Pauw, para. 36.

[2]K.R.C., para. 10, p. 11.

[3]K.L.T., 45—47.

[4]K.L.C., para. 15 (c); Post, pp. 283-284.

[5]Mayne, para. 231.

[6]Approvier *v* Rama Subba Aiyan, 11 M.I.A., 89.

"all the co-parceners are joint owners of the property, but only as members of a corporation in which there are shareholders but no shares.[1] So far as the courts in Bengal and the United Provinces are concerned a co-sharer under the Mitakshara has no authority without the consent of his co-sharers to dispose of his undivided share to raise money on his own account and not for the benefit of the family[2]. But a brother can sell his interest in the family estate among the Khasas[3].

The essence of a joint Hindu family (under the Mitakshara) is the right of survivorship. If one member dies there is no succession, but others continue to hold the joint estate by survivorship[4]. The widow of a deceased co-parcener gets no share, but has only a right to maintenance[5]. A Khasa widow, however, succeeds not only to the share which was vested in her husband[6], but also the share which he would have received if alive when the succession opens[7]. If one out of several brothers dies issueless his widow succeeds, whether the brothers be still associated or not is immaterial[8]. We shall also see

[1]Mayne, para. 353, p. 490.
[2]Mayne, para. 363. *See* Madho Parshad *v.* Mehrban Singh, XVII, I.A., 191; right by survivorship prevails and the purchaser has no equity or charge on the undivided share against the survivors in respect of this purchase money; Balgobind Das *v.* Narain Lal, XX, I.A., 116.
[3]There can be no doubt about the customary rule on this point. *See* Panw, p. 43; K.L.T., 42; K.R.C., paras. 10, 11, 12; K.L.C., para. 32, in Sukhdeo Parshad *v.* Gouri Dat (K.R., 38) Mr. (now Sir) Campbell, Commissioner, applied the rule of Hindu law to a high caste Hindu family, and the local custom was not discussed. The clause drafted by the Committee for the Kumaon Laws Bill in 1915 (*see* K.R.C., p. 12) mentions this right.
[4]Mayne, para. 270.
[5]Mayne, para. 451, pp. 645—647.
[6]K.L.C., para. 37.
[7]K.L.C., para. 15 (*c*).
[8]K.L.C., para. 15 (*a*), para. 260.

that the rules of succession among the Khasas are not the same as those in the Mitakshara.

We are thus in a position to say that a Khasa family is a Patriarchal family, and that a joint-family of the kind recognized by the Mitakshara law does not result on the death of the *paterfamilias;* so long as the father is living his authority over family possessions is great, but not absolute. The son has no right to ask for partition[1] of the family land, nor can he sell any portion of the same[2], and the family property is not liable for his separate debts[3]. On the death of the father the rights of his descendants *inter se* are different from those in the Mitakshara as the evolution of family rights among the Khasas has not been along the lines of the Mitakshara system.

VILLAGE COMMUNITIES AMONG THE KHASAS

A detailed consideration of this topic would unduly enlarge the scope of this study, but in order to appreciate the rules of inheritance, and the right possessed by an individual over family land, some brief account must be given. Mr. Pauw says about Garhwal:—"The people consisting mostly of peasant proprietors or tenants with a vested interest in the land are settled in village communities among the members of which there is a strong spirit of clanship, as is evidenced by the number of castes simply named from the village in which the respective members reside"[4]. The description applies to agricul-

[1]K.L.C., para. 35.
[2]K.L.C., para. 290 (*c*).
[3]K.L.C., para. 35, para. 290(*b*).
[4]Pauw, para. 33, p. 31. *See* K.L.T., p. 31, "In the most common type of village, however, we still find a proprietary body representing the original community of village cultivators and thus often all of one caste and more or less inter-related.

turists in other parts of Kumaon too. It is in the interior of the province where no encroachment was made by the Rajas that we find the ancient Khasa tenures[1]. The best example of those that have been preserved to us is a *pucca* Khaikari village. The agriculturists in such a village derive their title to land by actual occupation[2]. They are the descendants of the original settlers and their title is based on prescription and as first breakers of the soil[3]. It is also beyond doubt that this proprietary body, owing to mistakes in early settlements after British occupation and the fraud of farmers of revenue, has been reduced in law to a position of under-proprietors[4]. For a study of the ancient Khasa tenures a *pucca* Khaikari village is very valuable. A *pucca* Khaikar cannot sell his land or make a gift of the same[5]. Only a limited class of heirs are entitled to the holding of a deceased Khaikar[6].

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[1]Traill in Batten's Report, p. 31, "the land in the interior seldom changed proprietors; the greater part of the present occupants there derive their claim to the soil solely from the prescription of long established and undisputed possession".

[2]Atkinson, XII, 488. A second class (of proprietors) derive their title solely from long established occupancy; this class is composed of the aborigines of the mountains, while the grantees are the descendants of emigrants; *see* Atkinson, XII, 490. Sir Henry Ramsay wrote :—"In some villages Khayakars are alone in possession, and the proprietor residing elsewhere has no power to interfere with them or their land, waste or cultivated. A ghar-Padhan realizes the demand and the proprietor's cess and pays over to him. In such villages the Khayakars were formerly the real proprietors, but in some way the right became recorded in the Thokdar's name, and though every effort was made to right these wrongs at the recent settlement, it was not possible to do so in all cases."

[3]K.L.T., 82; Goudge, p. 10, "when Khaikars hold the entire area of the village, they are to be regarded as originally the hissadars in virtue of their having first reclaimed it from waste."

[4]K.L.T., p. 61 (*a*), p. 82 (*g*); Pauw, p. 33. *See* Goudge, p. 11, "The *pucca* Khaikars recognized the Sayana as overlord and not as proprietor of their land."

[5]Suraj Singh *v.* Amar Deo quoted by Pauw, para. 51, p. 47, "The Khaikari right is only heritable, not transferable."

[6]A collateral succeeds to the holding if he shared in the cultivation, K.L.T., 85 and 77.

The Board of Revenue observed in one case : "under the custom it is understood that collaterals have no prior right to lapsed Khaikari lands; such lands lapse to the Khaikari community"[1]. The result is that if a family becomes extinct, its share returns to the common stock. The "Panch Khaikars", i.e. the village community, possess the right of reversion over the holding of a Khaikar who has no issue or widow[2]. There is no escheat to the superior proprietor[3] or to the Crown[4].

Reference may also be made to the unusual custom of Mawari-Bant[5]. It means that Gaon Sanjait or village common land should be divided according to families (i.e. Mao) and not by "Rakm Sharah" (i.e. revenue payable by each person). We find in this custom the relics of a primitive social organization where the units are not individuals, but families[6].

The custom of "Mungsyar" also points towards communal ownership. After the harvest is gathered, any villager's cattle can go to graze and eat stubble in the fields of another without objection. This is evidently the relic of a time when separate ownership of land was in its infancy. The families who were in possession of separate plots had no right to sell the land but only to

[1]Upan Deo *v.* Bachi Singh (order dated 18th July, 1892) quoted in K.L.T., 85—It was held that land does not revert to the hissadar.

[2]K.L.C., para. 20.

[3]Pauw, p. 45; K.L.T., 86-87.

[4]K.L.C., para. 270; K.L.T., 85.

[5]K.L.T., 40-41; Dulap Singh and others *v.* Ram Singh and others, K.R., 90, where the custom was enforced in a *pucca* Khaikari village.

[6]Maine, *Village communities*, p. 41, "the indigenous system of the country (i.e. India) is one of common enjoyment by the village communities and inside those communities by families . . . The individual here has almost no power to disposing of his property."

enjoy the fruits thereof. When the crop is gathered there is apparently a reversion to its real character of being owned by the entire body of village proprietors till a fresh crop is grown. Though individual ownership is recognized now, the ancient usage is continued.

The village community once controlled the alienation of land by a co-sharer. Freedom of alienation becomes greater as the communal bonds are loosened, and in some places a right to sell land in case of extreme necessity had grown up in pre-British days[1]. When such a necessity arose the village community itself tried to provide the money and preserve the land to itself. This gave rise to the right of pre-emption. The right to pre-empt in the first instance belongs to the inner circle of agnates within three degrees and then to the outer circle which forms the village proprietary body[2]. Pre-emption in Kumaon is of indigenous growth and not a foreign importation. There has been no Moslem influence in Kumaon. Pre-emption in Kumaon and in Jaunsar Bawar[3], like that in the Punjab[4], is the logical sequence of the disentanglement of individual rights of ownership out of the blended rights of the village community[5]. This, however, is only one side of the picture. Village communities were obviously crushed in many parts within the Himalayan districts, by the rapacity

[1]Traill in Batten's Reports, p. 32; Mayne, para. 251, "The right of alienation, of course, proceeds *pari passu* with the development of property from the communal to its individual form."

[2]K.L.T., 45-46.

[3]Williams' *Memoir*, Appendix VIII, para. 11.

[4]Roe and Rattigan, *Tribal law in the Punjab*, p. 83.

[5]Maine, *Ancient law*, 280, Private property in the shape in which we know it was chiefly formed by the gradual disentanglement of the separate rights of the individual from the blended rights of the community.

of the Rajas. Baden-Powell points out that "the right to land grows out of two ideas : one being that a special claim arises, to any object or to a plot of land, by virtue of the labour and skill expended on making it useful or profitable; the other that a claim arises from conquest or superior might"[1]. The claim to land thus arises through the spade or the sword, and in Kumaon, so far as *pucca* Khaikari villages are concerned, fraud of farmers of revenue has also created proprietary right. The right through the sword was frequently exercised near the capital, but in the interior the village community claims title by "occupation"[2]. The Garhwal Rajas do appear to have claimed full proprietary rights over the entire land in their territory and to have reduced the landowner to the position of a mere Khaikar, i.e. a tenant who could go on enjoying land so long as he paid the Crown rent[3]. Like his neighbour on the west (i.e. the Raja of the Kangra hills) in Garhwal, "the Raja was not like a feudal king lord paramount over inferior lords of manors, but he was the manorial lord of the whole country"[4]. The Rajas ruthlessly tried to narrow down the rights of the subject, wherever it was possible

[1]Baden-Powell, *The Indian Village Community*, p. 400.

[2]Goudge p. 10, "when Khaikars hold the entire area of the village, they are to be regarded as originally the hissadars in virtue of their having first reclaimed it from waste."

[3]Batten says the word is made from *khana* (to eat) and *kar* (i.e. rent), *see* Batten's Report glossary, p. 165.

[4]Lyall's *Kangra Settlement Report*, para. 25, p. 24. *See* Raturi, para. 278, p. 537, No right to sell land was allowed to the subject and the Raja was owner of all land; p. 620, "The *sapindas* are allowed to inherit now," but (pp. 624-625) in the past inheritance was confined to male descendants, and in their absence the land with other effects of the deceased, including his wife and unmarried daughters, reverted to the Raja and not to the village community. Mr. Gairola says that the landholder in Garhwal in pre-British days was a Khaikar and not a landowner—Answer to Question 1 (Power of disposal, Appendix A); Pauw, para. 36.

or proper and expedient to do so[1]. The result was that by reason of superior might the paramount property in the soil came to rest with the sovereign throughout Garhwal, and in many places near the capital towns in Kumaon the Raja made grants at the cost of existing rights and exercised authority over land[2]. From such oppressive onslaughts on the proprietary rights of the subjects the tenures in the interior were saved[3]. If we exclude the super-imposed hissadar, a *pucca* Khaikari village has all the incidents of a perfect village community. The present village communities in Garhwal and Almora and Naini Tal have in a way been resurrected by British rule. The rights of the village community and of the subject, which particularly the Garhwal Rajas usurped, have been given back to them. It is worth notice that if we take away the hissadar, who has entered into his rights by fraud or mistake, we find in the Panch Khaikars the ancient proprietors who derive their title to the soil as original settlers, and hold land on a communal basis rather than as individuals''.

[1]*Cf.* Tupper, Vol. II, p. 67. About Kangra Mr. Tupper says :—"In Kangra proper if the true communal village ever existed, its traces were obliterated by centuries of the personal rule of the Hindu Rajas".

[2]Traill in Batten's Reports, 31, The full property in the soil has invariably formed part of the royal prerogative; para. 12, p. 137, Paramount property in the soil here rests with sovereign.

[3]Atkinson, XII, 487, Arbitrary transfers, at the cost of existing rights, were not uncommon near the capital and on the border, but infrequent in the interior; Batten's Report, 31.

[4]Holding of a Khaikar reverts to the village community after a family becomes extinct; collaterals succeed only if cultivation was joint (K.L.T., 85); a collateral may succeed with the consent of Panch Khaikars; Amba Dat *v.* Lalmani (K. L. T., 86), the hissadar can sue the Panch Khaikars as a community for arrears of rent (revenue and malikana); in all relations with him they form a joint village community, K.L.T., 91. Gaon Sanjait or common village land is managed jointly, the income sometimes going to meet common village expenses or common religious worship (K.L.T.,

LAND ORDINARILY INALIENABLE

We propose to discuss the nature of a landholder's interest under the customary law and see what power of sale was possessed by him prior to British rule. Mr. Traill[1], whose observations must receive full consideration of a student of early conditions in Kumaon, mentions private transfer by absolute sale (*Dhali Boli*), and *Mat*, which was a mortgage that was redeemable at any time by the mortgagor or his heirs. He tells us, however, that "the landed proprietors ever evince the most tenacious attachment to their estates, whatever be their extent, and never voluntarily alienate them except under circumstances of extreme necessity"[2]. These observations of Mr. Traill hold the key to the inner portals of land tenures in Kumaon.

The direct observations of this experienced administrator may be strengthened by comparative study. Some factors which go against alienability of land were present in these hills.

1. The man who has cleared the forest and after years of toil has broken up the hill slopes and terraced his fields with the help of his family would have a sentiment against alienating it.
2. The land is the chief means of support for an agriculturist and his family. Its aliena-

39). In Dulap Singh and others *v.* Ram Singh and others (K.R., 90) Mawari-Bant, i.e. division of common land according to families irrespective of land in actual possession, was enforced in a *pucca* Khaikari village. The share of a *pucca* Khaikari or hissadar is ordinarily in area held by him (K.L.T., 34). Perfect partition of land is unknown in the hills (K.L.T., 32).

[1]Batten's Report, p. 32.

[2]Batten's Report, p. 32.

tion means certain ruin and starvation. Land is the life blood of the village community and should not be parted with. This economic factor underlies the text of Vyasa cited in the Mitakshara "They who are born and they who are yet unbegotten and they who are still in the womb require the means of support. No gift or sale should therefore be made"[1]. Customary law is the child of environments and of social and economic necessities. Alienation of land is harmful to the family and community, and so it is prohibited. We also find that "the agriculturists in Kumaon in the past considered it a crime to sell land. Until lately they used to say that land is one's mother and to sell it is to sell a mother"[2].

3. The circumstances, which ordinarily make for alienability, e.g. industrial and commercial enterprizes, did not exist in Kumaon. The agriculturist was content to live his simple life in these hills cut off from the outside world.

It is needless to give examples from other countries where land is still legally inalienable[3]. We may, however, look to the neighbouring districts, on the east and the west.

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[1]Mitakshara, I, i., para. 27.

[2]Per Mr. B. D. Joshi's note.

[3]*Origin of Civilization*, pp. 484-485.

In Kangra "the people never considered their tenure of the absolute and perfect character that they could transfer it finally to another. The idea of sale is evidently quite strange and even distasteful to them"[1]. "In the hills absolute proprietorship was a thing created by our settlement"[2], says Sir James Lyall about Kangra, and the same remarks apply to the Kumaon hills. Turning towards the east to Nepal we find that "the sovereign is deemed to be originally the absolute proprietor of all lands, nor is there any tenure under which they can be enjoyed permanently, or considered as hereditary possessions, except the few hereafter particularized. Even the first subject of the State, whether as to birth or office, has, generally speaking, but a temporary and precarious interest in the lands which he holds"[3]. The only exceptional cases, where sale was allowed, were the Birtha or Brhemoter lands.

1. Kosso-birtha was a grant made to Brahmans. "They were rent free, saleable and hereditary, but were also forfeitable for certain crimes."[4]
2. Soona-birtha were grants made on receipt of a fine proportioned to the value of the land to Newars who continued ancient possession under the Government of the conquerors. They were renewable under each successive prince[4].

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[1] *Report on the settlement of Kangra*, by Mr. Barnes, para. 128, p. 65.
[2] Lyall's *Settlement Report of Kangra District*, para. 36, p. 41. *See* Rattigan's *Digest*, para. 143, Warisi or hereditary ownership of land in the Himalayan districts of the Punjab is not considered to be saleable.
[3] Col. Kirkpatrick's *Account of Nepal* (1811), pp. 86-87.
[4] Col. Kirkpatrick's *Account of Nepal* (1811), pp. 92-93.

Mr. Raturi says that prior to 1803, while Tehri and the British Garhwal were under the same king, all the land in the State was recognized as the property of the Raja, and at present in the Tehri State a man is punished for selling land whether it be ancestral or self-acquired[1]. Mr. Pauw thinks that the landholders in pre-British days had no transferable property in their estate[2]. He says "Mr. Traill had better means of judging of the tenures which prevailed under the Rajas than anyone since his time; but there are two reasons for supposing that the right of cultivators in land was not transferable. In the first place local tradition ascribes the origin of the private right of transfer of land to the introduction of the British rule, while again no private right of transfer exists in Tehri Garhwal at the present day which is ruled by the descendants of the old Garhwal Rajas, and where there is every reason to suppose that the old customs are preserved more or less intact"[3]. Mr. Traill clearly mentions transfer by absolute sale[4] (*Dhali Boli*) in cases of extreme necessity. It is doubtful if he would have mentioned absolute sale, unless he was sure of it. His observations on other subjects show care, precision and exactness. We may disagree with his conclusions drawn from other materials, but there cannot be much hesitation in accepting what he must have himself observed[5]. We can

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[1]Raturi, paras. 278, 537.

[2]Mr. Traill notes: "the occupant zamindars hold their estates in hereditary and transferable property". *See* Batten's *Official Reports*, para. 12, p. 137.

[3]Pauw, para. 36. Mr. Gairola on Question 1 (Power of disposal, Appendix A) says that a landholder could not sell land in Garhwal in pre-British days.

[4]Batten's Reports, p. 32.

[5]Questions 2 and 3 (Power of disposal, Appendix A) were intended to clear this obscure point. All the correspondents except Mr. J. L. Sah say that they have not seen any sale-deed executed

only say that sale of land was unknown in Garhwal, but in the rest of the Kumaon province sale was not unknown; it was confined to cases of extreme necessity. We have seen that sale of land was not recognized in Kangra hills and Nepal and it was unknown in Garhwal prior to British rule. Comparative jurisprudence shows us that individual ownership of land in the fullest sense of the term is found only in an advanced condition of society[1]. Sale of land is practically unknown to archaic jurisprudence. "We are apt to forget", says Sir George Campbell, "that property in land as a transferable, marketable commodity, absolutely owned and passing from hand to hand like any chattel, is not an ancient institution but a modern development, reached only in a few very advanced countries"[2]. The recognition in Kumaon of a hissadari right, where the holder of the land possesses full rights of transfer, subject to the right of pre-emption of his co-proprietors, is a creation of British rule[3]. "Property" or "dominion" in its strict sense, according to Austin, "denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing"[4]

before 1815. Mr. Sah, however, says that he has seen sale-deeds executed before 1815, and all of them are not in the form of a mortgage.

[1]Sir Frederick Pollock, *Oxford Lectures* (1890), p. 118, The conception of private and absolute property, the dominium of Roman lawyers belongs not to the earliest stages of society, but is of comparatively later origin.

[2]Sir G. Campbell on "Indian land tenures" in *Cobden Club Essays* (1881), 215.

[3]Pauw, para. 40.

[4]Austin's *Jurisprudence*, Vol. II, p. 790. Sir F. Poolock, *First Book of Jurisprudence*, p. 179, "ownership may be described as the entirety of the powers of use and disposal allowed by law. This implies that there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power at all".

Mr. Williams in his standard work on English law of real property says "another incident of absolute ownership is free power of disposition, that is, the right of the owner to transfer as he will the whole or any part of his rights over the thing owned. And in modern times free power of disposition is generally incident to, and indeed inseparable from, any ownership. But the student will find that in earlier times those were regarded as owners whose right to maintain or recover possession was secured by law, though their power of disposition was limited"[1]. This main incident of modern conception of absolute ownership, i.e. free power of disposition, was not recognized by the Khasa customary law, and a landholder was not an owner as defined by Austin. Taking the analysis of "dominium" by Roman Jurists[2], we may say that a landholder's interest among the Khasas consisted of *Jus utendi* and *Jus fruendi*[3]. *Jus abutendi* was practically unknown, though sale of land in case of extreme necessity had come to be recognized in some parts at the time of the British occupation. The Khasa land tenures conferred on an individual landholder or family only a limited ownership. Daughters and their sons are excluded from inheritance among the Khasas[4]. Succession is

[1]Williams on *Real Property*, pp. 2-3.

[2]Sanders, p. 88.

[3]*See* Atkinson, XI, 481, In the Pandukeswar copper plate we have the record of a grant made by Lalita Sura Deva [who reigned in Kumaon about 853 A. D., *see ante*, p. 29, foot-note (10)], to Narayana Bhattaraka. The idea of sale by the grantee is not even contemplated, on the contrary "a perpetuity contemporaneous with the continuance of the sun, moon and earth" is deemed to be established in the grantee. We are told "whoever becomes the owner of land at any time, he then reaps the fruits thereof". In order to guard against a resumption of Brahmanottra lands by a subsequent Raja, some precatory verses were added to the grant to show the sinfulness of such a course.

[4]K.L.C., para. 16.

strictly confined to male agnates, though some females acquire an estate for life. The agnates were in a sense deemed to have fragments of those rights which constitute the complete "dominium" of the Roman Jurists. Sir Henry Maine points out "Property once belonged not to individuals, nor even to isolated families, but to larger societies composed on the patriarchal model"[1]. It is this legal conception of rights over land which underlies the successive claims in Tehri courts by the nearest agnates of a sonless person, in which they tried to set aside gifts of land to a daughter or to a son-in-law[2]. It was held in all cases that brothers and nephews have no right to object to such gifts by a sonless person. The interest of the question does not lie in modern decisions, but in the fact that different persons at different times felt that their rights have been violated by such an alienation. They show the general sense of the community to the effect that land should not be diverted from the agnates. "It is but a necessary result of a strict rule of agnatic succession that the power of the holder for the time being over the estate should be subject to some control by the agnatic heirs; were it not so, were the holder allowed to sell or mortgage the estate for his own benefit or to divert the succession for the benefit of others, the agnatic rule would soon cease to operate and the social and family systems based on it would be destroyed"[3]

[1]Maine, *Ancient law*, p. 279.

[2]Raturi, para. 276, p. 533, and cases noted therein: No. 56, dated 24th March, 1906—Nag Chand *v.* Shibu and Gulabu; No. 54, dated 13th August, 1909, Dayalu Madu *v* Mukh-MuRapu; No. 55, dated 25th September, 1901—Rupsa *v.* Hansu and others. *See* Gujar *v.* Sham Das [P.R. no. 107 (1887)] when a Jat proprietor was held to have no right to sell ancestral land in the presence of near agnates.

[3]Roe and Rattigan, *Tribal law in the Punjab* (1895), p. 21.

LAND INALIENABLE IN EARLY HINDU LAW

Students of Hindu Jurisprudence know that full dominion over land was not recognized in early Hindu law. Alienation of land has been condemned in no uncertain terms. "In regard to the immovable estate sale is not allowed, it may be mortgaged by consent of parties."[1] Vijnaneswara gives an explanation which harmonizes the law with the practical needs of his time, as social and economic necessities had become too strong to let the land remain tied up to a family. The explanation shows how "fictions" were used by Hindu commentators to adapt the written law to changed social conditions. Vijnaneswara says, "Sale of land is not allowed, but gift is commended, so land may be transferred in the garb of a gift."[2] The formalism of law was retained even if its spirit was violated.

"In the religious stage of society, of which traces are so abundant in the Brahmanic system of Jurisprudence, sale was unknown and indeed impossible. The belief in the necessity for subsistence in after life or in the future state rendered the preservation of family property indispensable."[3] The growth and secularization of society, and the economic pressure of commercial enterprize, made sale of land necessary, and Vijnaneswara resorted to the fiction of gift with gold and water mentioned above to give to the sale of land a show of legality. "The historical reason for the limited powers of disposition allowed to owners by the Hindu law is probably to be found in the ancient idea of the inalienability

[1]Mitakshara, I, i., 32.
[2]Mitakshara, I, i., 32.
[3]Chatterji's "Transfer of immovable property *inter vivos*" (*Tagore Law Lectures*), p. 289.

of the patrimony."[1] "The family estate, once regarded as *inalienable, a quality extending even to acquisitions by acceptance of religious gifts, next became disposable by the joint will of all interested.*"[2] The progress from this stage, through the allowance of religious gifts, to freedom of sale is traced by reference to the Hindu authorities in *Lalu Bhai* v. *Bai Amrit*.[3] "If, setting aside the preconceptions which beset those brought up in the midst of modern life, we look back to the earlier sources of the Hindu law we find that the sale of land is not contemplated as possible, or is regarded as sacrilegious. This was by no means peculiar to the Hindus, as may be seen by reference to many passages in the classical authors. The inseparableness of the family lands from the family to which they belonged was a favourite notion, indeed almost through antiquity both with the populace and with philosophers."[4] "The inseparableness of the family lands from the family" is a prominent feature of the Khasa customary law.

LIMITATIONS ON THE CO-OWNERSHIP OF THE SONS OVER FAMILY PROPERTY

We are told by Mr. Lall[5] that in Kumaon sons do not acquire a right by birth over ancestral land, and that their position is analogous to that of sons under the Dayabhaga, where the ownership of the sons accrues on the death of the father. The conclusion is based on the

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[1] West and Majid, 195.

[2] West and Majid, 672, foot-note (K).

[3] 2 I.L.R. (Bombay), 299, at pp. 328—330.

[4] 2 I.L.R. (Bombay), p. 328.

[5] K.L.C., para. 290.

following undoubted characteristics of Khasa customary law :—

(*a*) A son cannot demand partition against the wishes of his father.

(*b*) Family property in the lifetime of the father is not liable for the debts of the son, while it can be sold for the debts of the father. But it cannot be made liable for the immoral and unjust debts of the father.[1]

(*c*) The son cannot alienate any part of the property in the lifetime of the father.

On the strength of these facts it is argued that the father in Kumaon holds the ancestral land as an absolute owner and can do with it as he likes. Mr. Lall says "the three principal characteristics of a Mitakshara co-parcener are not to be found in the case of the son in Kumaon. Their position rather resembles that of the sons in the Dayabhaga. It follows that during his father's lifetime he is not a co-parcener in the sense the term is used in Hindu law. He has no share in the family property until his father's death."[2] Then he proceeds to say "From these conclusions it follows that the sons have no power to restrain the father from disposing of the property in any way he likes *inter vivos*."[3] Customary law is not dialectics. It is undoubted that the family law of the Khasas is historically older than either the Mitakshara or the Dayabhaga, so it is useless to go to those books for an elucidation of the rules of Khasa customary law. Neglect of historical order has confused Mr. Lall,

[1] Post, 228—230.

[2] K.L.C., para. 290.

[3] K.L.C., para. 291.

and one is forcibly reminded of Sir Henry Maine's terse saying, "Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy."[1] It is true that the rights of a son among the Khasas are obviously not the same as under the Mitakshara, but the reason is that their family law discloses even more ancient juridical thought and practices.

A SON CANNOT CLAIM PARTITION AS PATERNAL POWER IS NOT EXTINCT

Among the Khasas the father was the ruler of the household. His dominion extended not only to his land and goods, but also to his wife, children and slaves. He could sell his sons prior to British rule.[2] The son as such had no voice in the management of the house. The legal rights of the individuals, in a patriarchal family, as Sir Henry Maine points out, arose through the slow unwinding of the despotic paternal power.[3] "The movement of the progressive societies has been uniform in one respect: through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the family, as the unit of which civil laws take account."[4] In the static Khasa society the growth of individual rights within the family has been retarded. The individuality of the son is not

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[1] Maine, *Ancient law*, p. 17.

[2] *Ante*, p. 179 (footnote).

[3] Maine, *Village communities*, 15, "a great part of the legal ideas of civilized races may be traced to this conception (i.e. patriarchal family and paternal power) and the history of their development is the history of its slow unwinding".

[4] Maine, *Ancient law*, 172. *See* p. 174, in progressive societies the movement has been from status to contract.

fully evolved. So he has no right to seek partition against the wishes of the *paterfamilias*, the land is not liable for his separate debts, and he has no right to sell it in the lifetime of his father. In the somewhat progressive Brahmanic society patriarchal power steadily declined, and the individuality of the son was gradually evolved. Sale of sons was recognized by Indo-Aryans. Sunahsepa was sold by his father for human sacrifice.[1] Vashistha, after premising that the son owes his existence to his parents, observes:—"Both parents have power to sell or desert him."[2] But according to Yajna-Valkya[3] and Narada,[4], a son cannot be given away, and the latter denies this right to a father even in extreme distress. The practices of the past were condemned subsequently and "under the later Hindu law a father could not ordinarily sell his son or give him away except in adoption."[5] At the time of Manu, though the position of the son is of great dependence,[6] yet a man was to be fined if the son was cast off unless he was guilty of a crime causing loss of caste.[7] "Everybody conversant with the philosophy of opinion is aware," says Maine, "that a sentiment by no means dies out of necessity with the passing away of the circumstances which produced it."[8] The fact that the despotic power of the father was preserved among the Khasas up to British rule has

[1]Max Muller, *History of Ancient Sanskrit Literature*, pp. 408—416.

[2]Vasishtha, XV, para. 2.

[3]Yaj, II, 175.

[4]Narada, IV, 4, 5.

[5]*Hindu Jurisprudence*, p. 256. *See* 252—256 regarding the power of the father to sell or give away his son.

[6]Manu, VIII, 416, a wife, a son or a slave have no property; they earn for him to whom they belong.

[7]Manu, VIII, 389.

[8]Maine, *Ancient law*, 288.

affected the status of the sons, and they are not deemed to have the same rights over family property as the father.

DEVELOPMENT OF THE RIGHT OF PARTITION IN HINDU LAW

Mr. Mayne says "It was, however, by very slow steps that the right to a partition reached its present form. At first it is possible that a member who insisted on leaving the family for his own purposes went out with only a nominal share, or such an amount as the other members were willing to part with. This is the more probable, since so long as the family retained its patriarchal form the son could certainly not have compelled his father to give him a share at all or any larger portion than he chose. The doctrine that the property was by birth—in the sense that each son was the equal of his father—had then no existence. The son was a mere appendage to his father and had no rights of property as opposed to him. The property is vested in the head of the family not merely as an agent or principal partner, but almost as an absolute ruler. The right of the other members is only a right to be a maintained in the family house."[1] The legal position of the sons and father over family property in early Hindu law is correctly represented here, and we can say that this was the position under the customary law of the Khasas. We would, however, lose the true perspective if we forget that even with the Vedic Hindus land was held inalienable at first, and that transfer was allowed in later times only for pressing family necessity.[2] A *paterfamilias* was an autocrat against a *filius familias*, but so far as land was concerned was an owner only in a restricted sense of the term. He

[1]Mayne, para. 244.
[2]Bhattacharya, p. 105; Mitakshara, I, i, 28; and Mitak, I, i, 32.

could, in no case, sell it unless it was for pressing family need. Even this right was a later stage in the evolution of ownership. *Patria potestas* and restricted ownership of land are inextricably blended together in early Indo-Aryan law. They were the foundations of the family organization in those days and were deemed essential to prevent the family corporation being broken up. Divorce one from the other and we get a blurred, nay a wrong picture of the time. In Khasa Family law the father is an autocrat, but let it be clearly remembered that he had no free power to sell land, and the sons had an interest in the family property, although they could not get a separate allotment of it in the father's lifetime against his wishes.

THE RIGHT OF SONS IN FAMILY PROPERTY PRIOR TO MITAKSHARA

We should not assume hastily that when the sons were dependent on the father in early Hindu law and could not demand partition they had no rights in the family property. We should avoid applying modern conceptions of ownership to early law. The sons had a right to be maintained out of the family land, as much as the father had. The father could not cast off the sons.[1] The division of the inheritance was to be made equally among the sons.[2] The father could not make an unfair division. Even Jimutvahana, the apostle of a father's exclusive right over family land, denies to him the power of unfair division. If the partition is made at the request of the sons, he is bound to give each

[1]Manu, VIII, 389.
[2]Manu, IX, 101.

an equal share, the law merely allowing a large share to the eldest.[1]

The text of Vyasa that sons born and unborn require the means of support, and so no sale or gift of land be made,[2] puts before us the true position of the sons with regard to family property. The sons had undoubtedly inchoate rights in the family property under the control of the father. These rights were perfected into that qualified ownership which the early Hindu law recognized, when they separated from the father with his consent and became independent heads of their households.

The sons could not demand partition of the family land against the wishes of the father, who, however, could not transfer the land away from the family and thus deprive the sons of the property to which they primarily must look for maintenance. Inability to demand partition against the wishes of the father by no means negatives a right in the family property. The Dharma-Sastras deny the right of the son to separate his share in the family property, yet the son is deemed to be a co-owner with his father.[3] Baudhayana, Gautama and Devala[4] regard the consent of the father as indispensable to a partition of the ancestral property. Sancha and Lichita require the sons to get the father's consent even for partition of their self-acquired proper-

[1]Dayabhaga, ii, para. 86.

[2]Mitakshara, I, i, para. 27.

[3]Mitakshara, I, i, para. 23, the right of the sons and the rest by birth is most familiar to the world as cannot be denied.

[4]Baudhayana, II, 2, para. 4; Gautama, XXVIII, 2; Devala, Colebrooke's *Digest* (1801 edition, 3 vols.), Vol. 2, 522, After the death of the father, sons may divide his estate; but they have not ownership or full dominion while a faultless father lives.

[5]2 *Digest*, 526, "Since they are not their own masters in respect of wealth or religious duties"; 2 *Digest*, 533, "truly the support of the family depends on the patrimony; sons who have living parents are not independent, nor even after the death of their father while their mother lives.

ty.[5] Yajna-Valkya declares "The ownership of both father and son is the same in land, a corody, or wealth received from the grandfather."[1] Still he defers the right of partition not only till the death of the father, but of the mother too.[2] Manu speaks of a division of the paternal and maternal estate after the death of the parents, and expressly says that the sons have no power over it while the parents live.[3] Under the Punjab customary law a son cannot demand partition[4] against the wishes of his father, yet no one will dream of calling the father absolute owner there. Ancestral immovable property is ordinarily inalienable there, except for necessity or with the consent of male descendants, or, in the case of a sonless proprietor, of his male collaterals.[5] The power of the sons, though they cannot demand partition of ancestral land, at times extends under the customary law to restrain alienation of even self-acquired land by the father.[6]

POSITION OF SONS IN ROMAN LAW

"The power which we have over our children is peculiar to the citizens of Rome, for no other people have

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[1]Yajna-Valkya, II, para. 121.
[2]Yajna-Valkya, II, para. 117.
[3]Manu, IX, 104.
[4]Rattigan's *Digest of Customary law* (1909), para. 6, p. 15, Remark (1).
[5]Rattigan's *Digest*, para. 59, p. 93.
[6]Rattigan's *Digest*, p. 58, Exception (1). *See* Badr-ud-din and others *v.* Jita and others—Punjab Record no. 17 of 1886—By the custom of the Cis-Ravi Arains of the Lahore district acquired and ancestral land are on the same footing in regard to alienations. A proprietor having adult sons cannot alienate, except for necessity, without consulting them. *Cf.* Mitakshara, I, i, iii, 27, about the control of sons over the self-acquired land of the father. *See* Mayne, para. 251, "it was till lately an unsettled point whether, under Mitakshara law, a father has absolute control over self-acquired land"; Mayne, para. 344 : Rao Balwant Singh *v.* Rani Kishori, 25 I. A., 54, where the question was decided against the son.

a power over their children, such as we have over ours'' says Justinian.[1] It is not an idle boast when we look to the rights of the father over his children under the XII tables. The father could immediately destroy monstrous or deformed offspring. He had the right to imprison, scourge, keep to agricultural labour in chains, to sell or slay his children, even though they may have been in the enjoyment of high State offices.[2] Nowhere has the father possessed higher power over his sons. Let us see the position of the sons as regards the family property and the despotic father. Dr. Muirhead tells us ''During the Republic and afterwards it was held to be within the power of a *paterfamilias* testamentarily to disinherit any or all of his children *in potestate*, and so with his last breath to deprive them of their interest in the family estate. We have no evidence of this having ever been done by the early patricians,''[3] and that the practice crept in on the strength of the rule in the XII tables ''as a man shall settle with respect to his estate so shall it be law.''[4] ''But so repugnant was it (disherison) to the ideas entertained of the relation of a *filius familias* to the family estate as one of its joint owners that it was in every way discountenanced. Nothing short of express disherison could deprive him of his birthright.''[5] ''It can hardly be supposed,'' says Dr. Muirhead, ''that disherison was contemplated by the compilers of the tables; it was

[1] ''Justinian's Institute'', Lib., I., Tit., IX, 2.
[2] Ortolan's *History of Roman law* (1896 edition), trans., p. 85. Table IV, 1 and 3.
[3] Dr. Muirhead's *Historical Introduction to the Private law of Rome*, pp. 42-43.
[4] Dr. Muirhead's *Historical Introduction to the Private law of Rome*, p. 43; Ortolan's *Roman law*, p. 86, Table V, 3, ''the testament of the father shall be law as to all provisions concerning his property and the tulelage thereof''.
[5] Muirhead, p. 43.

altogether foreign to the traditional conception of the family estate. So notoriously were the *sui heredes*[1] entitled to the first place, and that not so much in the character of heirs as of persons entering upon the active exercise of rights hitherto existing, though in a manner dormant, that the compilers of the XII tables thought it superfluous expressly to declare it."[2] Reference has been made to Roman law merely to show that in a patriarchal society where the father possessed despotic powers over his children, they were considered to acquire an interest in the family property from the moment of their birth. The property was deemed to belong to *sui heredes* in a sense from before the death of the father. Even unborn sons had a sort of interest in the family property, for if a man omitted to institute or expressly disinherit children unborn at the date of the will, the effect of the birth of another child was to invalidate the will.[3]

The peculiarity of early Indo-Aryan law is that sale of land is prohibited, as land is deemed essential for the maintenance of the family. The sons had an interest in the family property from the moment of their birth, but could not have it separated against the wishes of the father who continued with gradually diminishing powers

[1] *See* Gaius, II, 157, "They are called *sui heredes* because they are family heirs, and even in the lifetime of the parent are deemed to a certain extent co-proprietors"; Vinogradoff, *Historical Jurisprudence*, Vol. I, 289, "The conception of the unity of the household reflected by the cult of ancestors, and supported by common property, is clearly expressed, among other things, in the standing of *sui heredes*, who are said in as many words to be masters of their property, successors in the administration of the household property as coming into their own"; Sohm, para. 108, p. 253, "In the oldest times the family is the sole owner; p. 579, If a man had a *filius* he could not, at the outset, make a will at all."

[2] Muirhead, *ibid*, 156.

[3] Institutes, Lib., II, Tit., XIII, 1. *Cf.* the text of Vyasa in Mitakshara I, i, 27, about unborn sons requiring the means of support.

to be the head of a patriarchal household till the Mitakshara declared the right of the sons to secure partition of the ancestral estate in spite of the father's wishes."[1] The patriarchal family gives place to the joint-family, and the father instead of an autocract becomes merely the manager of a partnership, with a few survivals of his former power.[2]

POSITION OF KHASA SONS ANALOGOUS TO THAT IN PRE-MITAKSHARA DAYS AMONG THE HINDUS

The rights of the father and sons prior to the evolution of the rules or customs stated as law in the Mitakshara were as follows :—

1. The sons had ordinarily no right to demand a partition of the family land against the wishes of the father.[3]
2. The sons had inchoate rights in the family property, which were perfected when the father effected a partition. The sons thereby became independent holders of the land subject to the rights of their own sons.
3. Land was ordinarily regarded as inalienable.[4] The father had independent power in the disposal of effects other than immovables

[1] Mitakshara, Chapter I, V, para. 5.
[2] Mayne, para. 335.
[3] Mayne, para. 244, originally subject to father's consent (page 325); "subsequently a partition was allowed even without the father's wish, if he was old, disturbed in intellect or diseased, that is, if he was no longer fit to exercise his prental authority" (p. 326). *See* Sankha or Harita cited, Mitakshara, 1, 2, para. 7; Viramitrodaya, Chapter II, Part I, para. 4, "when the father is alive and worthy of independence, his desire alone is the cause of partition."
[4] Mitakshara, I, i, 32, "In regard to the immovable estate sale is not allowed."

for certain purposes, and was said to be subject to the control of his sons even as regards self-acquired immovable property.[1] An exception to the general rule about inalienability of land appears in the Mitakshara, i.e. "even a single individual may conclude a donation, mortgage or sale of immovable property, during a season of distress, for the sake of family, and especially for pious purposes."[2]

Under the Mitakshara we find two remarkable departures from the original sacred law :—

1. Sale of land was recognized and it was to be made in the garb of a gift with gold and water.[3]
2. The right of the sons to get a partition of ancestral land against the wishes of the father was declared.[4]

It appears that there is some intimate connection between these two innovations on the earlier law. Economic pressure required that the legality of sale should be declared. It necessitated a clear definition of the rightful owner or owners who would convey a good title to the vendee. The sons, grandsons and great-grandsons

[1]Mitakshara, I, i, para. 27; Mayne, para. 251. *See* Rao Balwant Singh *v.* Rani Kishori, 25 I. A., 54, pp. 67—73, where the point has been dealt with and finally decided against the son. *Hindu Jurisprudence*, 131—137. Dr. Sen thinks that the father could not sell his self-acquired land without the consent of the sons. *See* Virmitrodaya, Chapter I, para. 30, about limitations on the father's right over ancestral or self-acquired land.

[2]Mitakshara, I, i, para. 28.

[3]Mitakshara, I, i, para. 32.

[4]Mitakshara I, v, para. 5, "For or because the right (of a son) is equal or alike, therefore partition is not restricted to be made by the father's choice."

were all through regarded as participators in the family wealth. In his elaborate discussion[1] of whether sons acquired property by birth or on partition, the author of the Mitakshara tells us :—"The right of sons and the rest by birth is most familiar to the world as cannot be denied."[2] and it is a settled point that property in the paternal and ancestral estate is by birth.[3] As sale was recognized, ownership must be defined. When co-ownership of the son with the father was declared, he must have a right to interdict the waste of family property by the father.[4] The recognition of the co-ownership of the sons in the family estate would not be enough to protect their rights when sale was allowed. A remedy must be provided against the spendthrift father who would not obey the prohibitions against alienation and the right of interdiction of waste and the right of partition were conceded to the son.[5] Where no sale of family land is allowed it is not necessary to emphasize the rights of the son. The position among the Khasas in pre-British days was the same as it was in early Hindu law before the adoption of the alterations set out in Mitakshara. Sale of land was unknown in some places or was confined in other parts to cases of extreme necessity, while a son had no right to demand partition.

DAYABHAGA AND KHASA LAW

Turning to the other great system of Hindu law, we find that the exigencies of commerce, the strong

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[1]Mitakshara, I, i, paras. 17—27.

[2]Mitakshara, I, i, para. 23.

[3]Mitakshara, I, i, para. 27.

[4]Mitakshara, I, V, 10.

[5]Mitakshara, I, V, 8, Partition of the grandfather's estate may be exacted by the sons from their father.

influence of the Brahmans, and other factors, brought about a silent but sure revolution among the Hindus in Bengal.[1] It was reserved for the forceful personality of Jimutavahana to reconcile current usage with the sacred written law. He managed it by what Mayne calls "a little dexterous juggling of the Sanskrit texts, because it suited the social and economic necessities of the people." "He was the apologist of a revolution which must have been completed long before he wrote. But from his writing that revolution derived the stability due to a supposed accordance with tradition."[2]. Even a superficial acquaintance with the history and social conditions of the Khasas is enough to convince us that no revolution of thought or usage has taken place in Kumaon which would tend to make the father absolute owner of the family land. Mr. Lall has unconsciously adopted the argument of Jimutavahana, who in an attempt to prove that father was the exclusive owner of family property, referred to the texts of Manu and Devala which prohibited partition without his consent, and said that as property arose by partition, so sons had no rights against their father.[3] The author of the Dayabhaga explains away the texts prohibiting alienation of land, by saying that it is sinful to do so, but "the gift or transfer is not null, for a fact cannot be altered by a hundred texts."[4] Mr. Mayne truly says that the argument "is opposed to the first principles of historical and legal reasoning."[5] He ironically observes about the absolute ownership of the

[1]Mayne, para. 261.
[2]Mayne, para. 260, p. 337.
[3]Dayabhaga, I, paras. 12—34, particularly para. 14 and para. 18, where Manu and Devala are quoted. *See* Mayne, para. 259.
[4]Dhayabhaga, Chapter II, paras. 22, 30.
[5]Mayne, para. 260.

father deduced by Jimutavahana, "It might with equal logic be argued that the Karnavan of a Malabar Tarwad at the present day is absolute owner of its property, because none of the junior members can demand a share."[1] These remarks may well be applied to Mr. Lall's conclusion in this matter.

PUBLIC SALES OF LAND UNKNOWN TO THE HINDUS AND THE KHASAS

Mr. Lall says[2] "There are in the Mitakshara two tests of a co-parcener's rights :—

(*a*) the right to have his own share partitioned and separated;

(*b*) the liability of the family property to be seized in satisfaction of his separate debts, whatever their nature, to the extent of his share.

In Kumaon a third test is also available, viz. :—

(*c*) the power to alienate his share."

Mr. Lall argues that as these rights are not possessed by the son, so the father is absolute owner. We have shown at some length both why the son is not entitled to claim partition and the weakness of Mr. Lall's conclusion in that respect; this perhaps is also the widest difference between Khasa law and Mitakshara law.

As to the second alleged test of co-parcenary rights under the Mitakshara, Mr. Lall has missed the fact that that Commentary nowhere contemplates the seizure of land to enforce payment of a debt, whether due from the father or the son. It could not do so, as attachment and sale were not the means by which a debt was recovered

[1] Mayne, p. 336.
[2] K.L.C., para. 290.

in Hindu law. This remedial measure for realization of debt through the intervention of the courts was unknown to Hindu Jurists. They relied to a great extent upon religious sanctions for the payment of a debt.[1] "He who having obtained a debt or the like does not repay it to the creditor shall be born again (to be) a slave servant, wife or a beast (of burden) in the house of the latter;" again "If an ascetic or an agnihotri (the keeper of a perpetual sacrificial fire) should be in debt (the merit of) these austerities or that worship of the fire will belong to the creditor."[2] Messrs. West and Majid note :—"Nowhere amongst the provisions of the Hindu law for enforcing payment of debts is such a process as the attachment and sale of the lands of a family mentioned. Jagannatha's discussion on the subject makes it plain that the connection between an owner and his land was conceived by the Hindu lawyers as separable only by his own volition, however that might be influenced. Attachment and sale in execution are entirely the creatures of British legislation."[3] The remedies of the creditor against the debtor were only personal. The defaulter could be confined or restrained by the creditor till he paid the money. Self-help was the process for the

[1]Sir Frederick Pollock, *Oxford Lectures*, p. 59, The sanction which temporal jurisdiction did not afford was afforded by religious fears.

[2]Katyayana and Vyasa quoted in Vyahara Mayuka (Mandlik), pp. 111 and 112. *See* Virhaspati, I, Colebrooke's *Digest*, 334, to the same effect; Narada, I, para. 9, the merit of an ascetic or agnihotri who dies indebted goes to his creditors.

[3]West and Majid, p. 602. *See* the remarks of Sir George Campbell on Indian land tenures (*Cobden Club Essays*), p. 166. He says that before the British rule "the seizure and sale of land for private debt was wholly and utterly unknown". By the ancient common law of England execution could not be had for debt or damages against the land or person of the debtor (except in special cases), but only against his chattels and corn. Coke, 2, Institutes, 394.

recovery of debt in ancient times.[1] If the creditor was powerful he could use extra judicial force and secure immediate payment,[2] or the debtor could also be reduced into slavery. If the debtor was powerful, then the creditor had to resort to Dharna.[3] There is no provision in the Mitakshara for seizing a son's share in the family land for his separate debts of whatever nature and the proposed test of Mr. Lall is obviously wrong. In the Himalayan districts this process of attachment and sale of land for recovery of debt was quite unknown in pre-British days. Mr. Traill wrote on 27th May, 1821 :— "The landed proprietors in these mountains have never been disturbed by foreign conquest, nor have the rights of individuals ever been compromised by public sales of lands. . . . No sales have ever taken place in this province."[4]

We may, however, assume that Mr. Lall refers to the practice of the courts which administer the Mitakshara law, and not to the Mitakshara itself.

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[1]Megasthenes says :—"Among the Indians one who is unable to recover a loan or deposit has no remedy at law. All the creditor can do is blame himself for trusting a rogue." McCrindle's *Ancient India* as described by Megasthenes, p. 73; Frag., XXVII, c.

[2]I. Colebrooke's *Digest*, Chapter VI. Vrihaspati says :—"From a debtor who promises payment the debt may be recovered by employing him in work, by legal deceit, by violent compulsion and by confinement at home (p. 349). The debtor may be forced by confining his son, his wife or his cattle, or by watching constantly at his door. This was lawful confinement" (p. 342). *See* Vrihaspati, XI, 54—59.

[3]Notice the poor machinery for recovery of debt in Hamilton's *Nepal*, p. 103, "A poor creditor had in general no resource aaginst a powerful debtor except sitting *dharna* on him, and unless the creditor be a Brahman he may sit long enough before he attract any notice." When Hamilton wrote Kumaon was under the Gurkhas. *See* also Hodgson's *Essays*, Vol. II, p. 235. Question and Answer 94, about the existence of *dharna* in Nepal and answer to Question 93. The creditor may stop the debtor wherever he finds him, take him home, beat and abuse him, but should do no serious harm to health and limbs.

[4]Atkinson, XII, 468-469.

But we must see why such practice cannot be applied to the Khasas. As far as the courts in British India are concerned, for persons governed by the Mitakshara, "It may be taken as settled that under a decree against any individual co-parcener, for his separate debt, a creditor may, during the life of the debtor, seize and sell his undivided interest in the family property."[1] This right took some time to get established. There are some early decisions in which it was held that under the Mitakshara a creditor could not be allowed to seize the interest of any one in the joint property for satisfaction of his separate debt.[2] The earlier decisions were reviewed and the right of the creditor established in *Suraj Bansi Koer* v. *Sheo Proshad* which is the leading authority on the subject.[3] Under the Mitakshara the son has a right to demand partition at any moment that he likes.[4] Actual apportionment of the joint property is not necessary for partition.[5] Partition under the Mitakshara is a matter of individual volition. An unequivocal expression of the intention to become divided in status when intimated to other co-parceners is enough to effect partition.[6] Hindu law ascribed great sanctity to the obligation of a debt.[7] The equitable sense of the courts

[1]Mayne, para. 355, p. 494.

[2]Bhyro Pershad *v.* Basisto Narain Pandey, 16 Suth, 31. *See* Mayne, paras. 353—355, where the entire question has been dealt with at length.

[3]6 I. A., 88.

[4]Mayne, para. 246; Mitakshara, I, V, para. 8.

[5]Mayne, para. 495, p. 718; Madho Pershad *v.* Mehrban Singh, 17 I.A., 194. "Actual partition is not in all cases essential. An agreement to hold the joint property individually in definite shares is sufficient to support alienation, p. 197.

[6]Mayne, para. 495 A; Suraj Narain *v.* Ikbal Narain, 40 I. A., 40; Girja Bai *v.* Sada Shiv, 43 I. A., 151. Clear and unequivocal intimation to co-sharers of the desire to sever himself from the joint-family by one effects an immediate severence of the joint status.

[7]Mayne, para. 355.

would not allow the law to be made a cloak for fraud which would have been easy had they abided by the literal interpretation of texts written at a time when the new process for the recovery of debts was unknown. So a creditor can seize and sell "the right, title and interest" of the judgment-debtor, who has an unqualified right, as a co-parcener, to get possession of his share in the family land by partition.[1] The execution purchaser has then to work out the rights which he acquires by means of a partition.[2]

No arguments are needed to show that if partition of family land at the instance of the son had not been allowed by Hindu law, the courts would have been powerless to give relief to the creditor. The right of a son in that case is a mere *Spes successionis* and cannot be seized in execution.[3] Such is the case among the Khasas. The son has merely dormant rights in the family land, which can be separated only with the consent of the father. The creditor or the court cannot coerce the father to give such consent, and the son's interest cannot be attached or sold for his separate debts on any legal principle.

SON CANNOT SELL HIS SHARE IN FAMILY LAND

The fact that the son cannot sell his share in the family land is a corollary to the rule that he cannot demand partition against his father. There is no definite

[1]Deendyal *v.* Jugdeep, 4 I. A., 247; in this case it has been settled by the Privy Council that a creditor who has obtained judgment against a co-parcener for his separate debt may enforce it during his life by seizure and sale of his undivided interest in the joint property; attachment in the lifetime of the judgment-debtor is enough now; sale may take place after his death; the seizable character of an undivided share in joint property is established by Suraj Bansi Koer *v.* Sheo Proshad, 6 I. A., 83.

[2]Suraj Bansi Koer *v.* Sheo Proshad, 6 I. A., 88, at p. 103.

[3]Code of Civil Procedure, Act V of 1908, section 60, cl. (*m*).

property which he can convey to the vendee. He has only an imperfect right over the family land. There is much confusion of thought when Mr. Lall looks to the right of a brother (Shikmi hissadar) to sell his share in the family land without the consent of his brothers, for the purpose of negativing the co-ownership of descendants with ascendants in the family land.[1] The limitations on the son's right are due to the fact that paternal power is not quite extinct among the Khasas. The freedom of alienation among Shikmi hissadars is due to the absence of a truly joint-family.[2]

FATHER'S POWER OVER MOVABLES

It is evident that the father as head and ruler of the family must necessarily possess a very large control over its wealth.[3] He must have the power to sell or barter, in the ordinary course of management, all the articles produced for sale or barter. He buys, exchanges or sells the household utensils and implements of husbandry or trade. The chattel property of an agriculturist Khasa is confined to cattle, household utensils, implements of husbandry and some ornaments worn by the women. No case is known where a son ever objected to a father's paramount authority over the scanty family movables. The father has sole power of disposition over the same, in fact the sons themselves were a sort of movable wealth to the father and could hardly be deemed to have any rights of their own in the movable wealth.

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[1] K.L.C., para. 230.

[2] *Ante*, pp. 189—194.

[3] *See* Mayne, para. 255, p. 332.

ALIENATIONS FOR FATHER'S DEBTS

The supreme authority of the father in the Khasa family system is undoubted. His debts hold a privileged position. The sons are under an obligation to discharge his just debts and the entire family property is also liable to be sold for the same.[1] The reason for the rule we shall find in pre-British social conditions. Sale of land was practically unknown at first. A father could discharge his personal debts by selling all or any of his sons.[2] When sale came to be somewhat recognized, a father would naturally be entitled to clear off the debts by sale of the family land. It would not do for a son to say that he should be sold and not the family land. Chance growths are rare in customary law. There is a germ of antecedent legal thought, however crude, on which the changed environments and sense of convenience work. After the British annexation, though the son could not be sold, yet the practice shaped itself on the original legal idea. It may be said that on the same analogy the family land can be sold for the unjust and immoral debts of the father. The answer would be that customary law is not based on rules of logic. Its strength and validity lie in actual usage. The instances of a father incurring debts for immoral purposes and then selling their sons or family land are so rare and repugnant to the community, that such a right cannot be said to have accrued to the father as a matter of customary law. Unequivocal instances, sufficient in number in different parts of the country should be proved, before it can be said that the father can transfer the family land *inter vivos* in any

[1] K.L.C., para. 290 (*b*).

[2] "Mountaineer," p. 205.

way he likes. We have to start from the undoubted fact that sale of land was not allowed among the Khasas in a considerable part of the Himalayan districts, and in some places it was recognized only in case of extreme family necessity. Among the Khasas of Tehri State no voluntary or public sale of land is permissible. Land thus is not liable for the debts of the father whether they be just or whether they be immoral. Where sale of land is allowed in British territory, we have to look to actual practices and then determine how far old limitations on alienation of land have been relaxed.[1] Mr. Lall nowhere says that courts have upheld alienations for immoral debts of a father or that such alienations are made by the people to such an extent that the right of the father may be taken as established under actual usage. The right of the sons to control unjustifiable alienations of ancestral land by the father has not been doubted in the Kumaon courts to the best knowledge of the writer.[2]

[1] *See* the judgment of Roe, J., in Gujar *v.* Sham Das and another (P. R., 107, 1887) where a sonless proprietor in the Punjab village communities was held to have no power to alienate to the prejudice of the near agnates. The burden of proof to show that such power exists lay on the vendee, on a consideration of the historical fact that no right of sale was recognized previously and the proprietary title was in the village community.

[2] Karam Singh *v.* Sher Singh (K. R., 40). It was a suit by a *Dhanti's* son. The courts applied the analogy of an illegitimate son under Hindu law and said that his right does not accrue in the father's lifetime. The judgment shows that there was no doubt about a legitimate son's right to object to unjustifiable alienations. Mr. Lall says (K.L.C., para. 291) there were decisions when a son's share was seized in execution and also where he was allowed to challenge his father's disposal of the family property. But such decisions were mentioned with disapproval, and there are plenty of decisions to the contrary. The latter sentence is ambiguous. It is perfectly correct if only the seizure of son's interest in father's lifetime is meant, but no case is known to the writer where the alienation by a father without justifiable necessity was upheld by the courts. Mr. Stowell nowhere mentions it, and such a remarkable departure from Hindu law would have been certainly noticed by him. If any alienation for immoral debts had been upheld by the courts, Mr. Lall would certainly have mentioned it.

Mr. Raturi says that the sons are not liable for the immoral debts of the father,[1] and a father among the Khasas cannot alienate ancestral land for his immoral or gaming debts.[2] We have to note that the present day title of a hissadar has grown out of conditions where he possessed no power of transfer, and then to see that as a matter of actual usage sale for family necessity or antecedent valid debts alone is recognized. Family land can certainly be sold nowadays by a father for discharge of his antecedent just debts. The liability does not arise on Sastric texts, but as a matter of customary law owing to the nature of paternal power among the Khasas in the past.

ALIENATIONS OF SELF-ACQUIRED LAND

Land in Tehri State is not liable to be sold or mortgaged, whether it be ancestral or self-acquired.[3] An exchange of land, a gift to friends and relatives or a pious gift is allowed.[4] The fact that gift of land, but not sale, was recognized led naturally to abuse. Sales which were ostensible gifts came to be made in Tehri, and by Regulation no. 9, dated 6th April, 1895, it was laid down that only a genuine gift of land and not a collusive one was permissible.[5] In Kumaon full power of disposition is now possessed over self-acquired property by a hissadar,[6] and in Tehri, too, self-acquisitions can be dealt

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[1]Raturi, para. 491, p. 746.

[2]Messrs. Sah, B. D. Joshi, Thulgharia, Gairola and Juyal on Question 11 (Power of Disposal, Appendix A. Messrs. Pant and Trivedi say that he can. It seems that they have accepted Mr. Lall's conclusion about absolute ownership of father and approached the question from that standpoint.

[3]Raturi, para. 278, p. 537.

[4]Raturi, p. 538, cls. 4—6 and 9.

[5]Raturi, pp. 538-539.

[6]K.L.C., para. 40.

with by a man as he likes, subject to the restrictions about sale and mortgage, and the sons cannot object,[1]

TESTAMENTARY DISPOSITION

Wills, which are the product of a later stage in juridical history, are unknown to the Khasas.[2] "Primitive organization leaves little room for the disposal of property by testament. Volition is naturally supposed not to reach beyond the physical existence of the individual."[3] We have seen hat even alienation of land *inter vivos* by an individual was unknown to the Khasas in some parts and the absence of wills among them is natural.[4] Mr. Lall says that a person can dispose of by will his self-acquired property in Kumaon.[5] It is enough to say that wills are very rare in these districts[6] and had no place in the family law of the Khasas which made no distinction between ancestral and self-acquired land.[7] The full ownership of a person over his self-acquisitions does carry with it the right of testamentary disposition under modern conceptions and is generally conceded. The nature of the country and the family law of the Khasas must have made self-acquisitions of agricultural land very rare up to comparatively recent times.

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[1] Raturi, para. 275, p. 532. *See* case no. 24, dated the 13th June, 1906 (Tehri State), Leela and Divaspati *v.* Sripati, where it was held that a father is entitled to give his entire self-acquired land to one son only.

[2] Maine, *Ancient law*, p. 207, Intestate inheritance is a more ancient institution than testamentary succession.

[3] Vinogradoff, *Historical Jurisprudence*, Vol. I, p. 288.

[4] Mayne, para. 404, Wills were unknown to Hindu law.

[5] K.L.C., para 40.

[6] Raturi, para. 514, p. 867.

[7] About the Khas in Nepal, *see* Hodgson's *Essays*, Vol. II, pp. 232-233, Question 83 and answer to it, "If a Khas has a son, he cannot alienate a rupee from him by will, save only, and in moderation, to pious uses.

LAND BELONGS TO THE FAMILY AND NOT TO FATHER ALONE

We have seen that individual ownership of land was not contemplated in Kumaon prior to British rule.[1] Ownership vested in the village community, wherever it was saved from the inroads of the Rajas, who, in a considerable part of these districts, succeeded in establishing their claim as lords paramount of all land by reason of superior might.[2] Within the village communities the landholding units were families and not individuals. Mr. Lall, in his report, is the first person[3] to enunciate the rule that a father in Kumaon is the absolute owner of all family land, without power of testamentary dispositions,[4] and that the son "has no share in the family property until his father's death."[5] We have discussed the cogency of his arguments on which the conclusion is based. It is necessary to refer to some facts which show that the right of the son in family land is beyond question recognized by the Khasas.

The proverbial philosophy of the people on this topic throws much light on the question. The common proverb is "*Bhayon ka banta hathaguli ka rekha*,"[6] i.e. the shares of brothers and the lines of Fate on the palms cannot be obliterated. It forcibly expresses the nature of the interest that the sons have in family land. Mr. Raturi says that the right of the sons over ancsetral land accrues

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[1] *Ante* pp. 205-206.
[2] *Ante*, pp. 198-199.
[3] Mr. Stowell does not mention this absolute ownership of the father in K.L.T. or K.R. It has never been alleged in any book or report, and, so far as the writer is aware, not even set up in the Kumaon courts, much less accepted by them.
[4] K.L.C., para. 291.
[5] K.L.C., para. 296, p. 34.
[6] Upreti, "Folklore," 141. *See* "*Bapa dewa ya chhapa dewa*"—a father is to give a man his rightful share or he will get it through court, p. 196.

on their birth,[1] but in the lifetime of the father it is merely confined to one of maintenance.[2] The sons cannot demand partition in the father's lifetime against his wishes.[3] Partitions of family land with the consent of the father frequently take place,[4] and then he either takes out of the family land an equal share which is called Budhawal (i.e. old man's share) or agrees to accept maintenance only.[5] Such division of the family land in the lifetime of the father, though with his consent, indicates in a way that the sons have an interest in the family land, but their rights over it are in abeyance during the father's lifetime unless he waives his particular privilege. The custom of postponing partition during a mother's pregnancy[6] also suggests the same conclusion.

Among the polyandrous Khasas of Jaunsar Bawar we find that the share of a separating brother is reduced if there are children.[7] The custom clearly shows that children have a vested interest in the family property from the moment of their birth, or even of their conception.

The father has no right to make an unfair division of ancestral land among his sons.[8] The custom of

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[1] Raturi, p. 447.
[2] Raturi, p. 448.
[3] Raturi, para. 282, p. 543, and the cases noted there where sons demanded partition in father's lifetime but failed. If the idea of father's absolute ownership had been present, such claims could hardly have been made.
[4] Raturi, p. 522.
[5] Raturi, pp. 547, 560.
[6] Raturi, para. 284, p. 544.
[7] *Dehra Dun District Gazetteer*, p. 89. *See Dustoor-ul-aml*, para. 12, cl. (1). If a younger brother out of four brothers separates, he cannot take away the wife or children, "but the children are entitled to equal shares from the four brothers which are paid to the elder" with whom they live. William's *Memoir*, Appendix VIII.
[8] Messrs. Thulgharia, Gairola, Juyal on Question 9 (Power of disposal, Appendix A). Mr. B. D. Joshi says "unfair division is not much approved of," while others say he can do so.

Jethon, i.e. the extra portion of first born, cannot be looked upon as justifying unfair division. In *Asaru* v. *Bali Ram,* Sir Henry Ramsay quashed a Sautia Bant which had been carried out by a father in his lifetime.[1] The decision negatives any special powers of the father which entitle him to make an unfair division of the family land among his sons. The father cannot make a gift of ancestral land to his mistress to the detriment of the rights which the sons possess over it.[2] He has no right to make a gift of the entire ancestral land for religious or pious purposes.[3] Small gifts of land for pious purposes are not objectionable. Mr. Raturi remarks that the father has no right to transfer family land, except during distress for the sake of the family, or, to a small extent only, for pious purposes.[4] The limitations on the father's powers arise not only from the legal conception of land being held by the family and not the individual, but also from the fact that some of the unjust alienations mentioned above are either rare or not made at all. Unless sufficient instances are found no custom can be said to have arisen.

If a man dies leaving some sons, and the sonless widow of a predeceased son, the widow of the son takes a life interest in the ancestral property which would have

[1]K.L.C., para. 272; K.R.C., 18. Mr. Lall says Sir Henry went too far in this decision as the father can do what he likes *inter vivos*. The powers of the father are not so unlimited as Mr. Lall thinks. About the incapacity of the father to effect Sautia Bant, *see* Raturi, para. 288, p. 552.

[2]All the correspondents except Messrs. Pant and Trivedi answer Question 13 (Power of disposal, Appendix A) against the father's right to make such a disposition.

[3]Messrs. Sah, B. D. Joshi, Gairola on Question 14. Some say he has such right, some confine it to small gifts only.

[4]Raturi, para. 271.

vested in her husband if he were alive.[1] She is not excluded by her brothers-in-law. It is easy to see that if the sons had not been regarded as having an indefeasible interest in the paternal estate, the succession of a son's widow would be hard to explain. The widow succeeds to the estate which in a sense belonged to her husband,[2] and this custom shows the real nature of the sons' vested interest in the family property.

Whether we look to the ancient conception of land-holding[3] or to modern usages,[4] we find that the absolute ownership of the father over family land does not exist among the Khasas. The father is not an independent owner, but is the lord for life of the family possessions. The real nature of a son's right over family land is restrictive on the father's powers of alienation. Full ownership vests in the joint-family, but the rights of the sons are dormant in the father's lifetime, unless he chooses to forego the privilege of paternal power.

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[1]Messrs. Gairola, Pant, Trivedi and Juyal on Question 2, Problem (1) (Widow's estate, Appendix A). Messrs. Sah and B. D. Joshi say that she cannot probably on the analogy of Hindu law. Mr. Lall says a widow represents her deceased husband even in collateral succession; K.L.C., para. 15(c).

[2]K.L.C., para. 37.

[3]Maine, *Ancient law*, p. 181, "At an earlier time the *paterfamilias* was not regarded as owner, but as an administrator of the family property which in some sense already belonged to the heirs as well as himself."

[4]To what has been said before, we may add that gift of ancestral land is made in favour of a daughter, only when there are no sons; K.L.C., para. 9. This custom we discuss in the next chapter.

CHAPTER VII

GHARJAWAIN

GHARJAWAIN OR RESIDENT SON-IN-LAW

SUCCESSION among the Khasas is strictly agnatic. Daughters and their sons are excluded from inheritance[1]. In Nepal, too, daughters do not inherit among the Khasas[2], and the same custom is found in the Kangra hills and Kulu[3]. We propose to discuss the archaic institution of Gharjawain before dealing with the simple rules of inheritance among the Khasas. Mr. Pauw notes :—"It is the custom for a man who has no son to marry his daughter to a son-in-law who agrees to live in his house and who is known thereafter as the Gharjawain. In such a case the daughter takes her father's inheritance, but should she go into her husband's house, the inheritance usually descends to the nearest male heirs of the deceased. Even in the case of a Gharjawain, the relatives frequently make a strong fight for the property,

[1]K.L.C., para. 16; K. R. C., para. 15, p. 19. Unanimous answers to 12, 14 and 15 (Inheritance, Appendix A).

[2]Hodgson's *Essays*, Vol. II, p. 232. Question and Answer, 81—married daughters and their progeny never inherit.

[3]Lyall's *Kangra Settlement Report*, paras. 74, 115; Roe and Rattigan, p. 140, Near male collaterals ordinarily exclude the daughter among the agriculturists in the Punjab so far as ancestral land is concerned, Rattigan's *Digest*, para. 23.

especially if the marriage has been arranged by the widow after the death of her husband. In such cases it is not uncommon for the widow to go through the form of selling the land to the Gharjawain on the pretence that the sale-proceeds are required to repay him the costs incurred in settling her husband's debts''[1] It is important to notice that the daughter and her sons inherit to her father if she resides with him, but the right of inheritance is lost if she goes away with her husband to his village[2]. Mr. Lall has missed the real nature of this interesting custom and its place in the history of the evolution of cognatic succession in a strictly agnatic community. The rules which have been propounded by him in his report make the position of a Gharjawain worse than that of an ordinary donee. He says:—''a son-in-law acquires no rights by the mere fact of his admission into the father-in-law's family''[3], as ''no Gharjawain or daughter can succeed without an express deed of gift''[4]; and the ordinary presumption in such a deed is that the property should revert to the nearest heirs of the donor unless there be an express condition to the contrary in the deed[5]. The necessity for a formal deed of gift in the case of a Gharjawain has been propounded for the first time by Mr. Lall, who also says that the residence of the son-in-law in his father-in-law's house is not necessary[6]. Messrs. Pauw and Stowell do not mention a deed of gift, and regard continued

[1]Pauw, pp. 43-44.

[2]*Almora District Gazetteer*, p. 105; *Garhwal Gazetteer*, p. 68; Stowell K.L.T., p. 55; K.R.C., para. 9, p. 10.

[3]K.L.C., para. 9.

[4]K.L.C., para. 246.

[5]K.L.C., para. 13.

[6]K.L.C., para. 246.

residence of the Gharjawain with the father-in-law as essential to enable the daughter or her sons to succeed. Mr. Lall endeavours to ignore the weight of Mr. Stowell's conclusion by saying:—"If this was the custom, then it has now changed"[1]. No student of customary law would say that customs are immutable, but it is certain that there is enough stability about customary law to resist sudden change in the absence of strong external forces[2]. The possibility of a sudden transformation in the fundamental nature of a custom is remote among a people scattered in small village communities throughout a considerable area[3]. The suggestion that the custom has changed in the few years since Messrs. Pauw and Stowell wrote cannot be easily accepted[4]. For a proper appreciation of the custom we must try to understand how and why it has come into existence. The institution of the "Gharjawain" is not a chance growth among the Khasas. It is inter-related with other rules of customary law, and to be understood rightly it must be viewed as a whole with them.

GHARJAWAIN AND GROWTH OF DAUGHTER'S RIGHT TO SUCCEED

The clannish Khasas living in village communities ordinarily exclude daughters from inheritance. When

[1]K.L.C., para. 246..

[2]Maine, *Ancient law*, p. 126, "The stable part of our mental, moral and physical constitution is the largest part of it" and offers resistence to change. Maine, *Village communities*, p. 58, "Naturally organized groups of men are obstinate conservators of traditional law."

[3]Maine, *Ancient law*, p. 15, "It is a known social law that the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality."

[4]Mr. Pauw's *Settlement Report* was made in 1896. Mr. Stowell brought out his book on Land Tenures in 1907, the second edition in 1919, and his Collection of Kumaon Rulings and Commentary thereon after 1915. Mr. Lall made his report in 1920.

communal bonds become slack and clannish feeling weak, the demands of natural affection predominate. If there are no sons, then a daughter appears to be the most eligible person to receive her father's inheritance. The trouble was that she belonged to another village by marriage. She had been sold to, and in still earlier times probably forcibly captured by her husband and his people. If village land goes to her and her children, undesirable aliens would be found in the village[1]. The claims of natural affection and justice clash with the instinct of self-preservation. The village lands must be preserved to the village community, yet the daughter had a natural right to the inheritance of her father.

The conflict of feelings results in a compromise. If the daughter does not leave the village, she does not become a stranger to the village community. As she cannot marry an agnate, her husband too must come and live in the village with her father. The village community does no regard him as an entire stranger in that case. On these conditions alone the son-in-law, daughter and her children can take the inheritance. Under these circumstances a daughter's sons are incorporated in the village community and allowed to take the estate of their maternal grandfather. Non-agnates by this means enter the village community, and a breach in the rules of strict male agnatic succession takes place[2]. The

[1]K. L. C., para. 249, "The people of Kumaon have a natural objection to landed property passing to persons not resident in the village."

[2]Maine, *Early Law and Custom*, p. 94, "The chief interest of the Hindu 'appointment' and of the counterparts of it in the law of other races lies in their probably marking one of the points at which the right of women to inherit made its way into the strict agnatic systems of kinship and succession which prevailed among the more advanced of the barbarous societies."

village community was, however, quite vigilant to preserve the ultimate reversionary interest in the land. When a Gharjawain's male line became extinct, the property reverted to the agnates of his father-in-law and not to his own[1].

It seems to the writer that this institution originated in an attempt to reconcile the claims of a daughter with the interest of the village community in keeping a stranger away. A little thought over the question will show that execution of formal deeds of gift could not be necessary. In the simple primitive life of the Khasas the fact that the stranger came and lived year in and year out with his father-in-law, the fact that he looked after the cultivation and helped him in all agricultural pursuits, was more important than the execution of a "scrap of paper".

The community was not so interested in a piece of paper as in the physical existence of the Gharjawain in their village. The hostility towards a stranger was bound to wear away if he left his own village and identified himself with the community in an appreciable manner, and his sons who never left the village were in a sense reckoned members of the village brotherhood.

CONTINUED RESIDENCE WITH FATHER-IN-LAW ESSENTIAL

The continued residence of the son-in-law with his father-in-law is the only essential condition to inheritance of village lands by the daughter and her sons. Local custom and tradition attach little value to an express

[1]K.L.C., para. 13; Raturi, para. 181, p. 367, Suit no. 42, dated 31st May, 1907 (Tehri State), Bhatu *v* Chota, where it was decided that Gharjawain inherits equally with an after-born son and the property reverts to the agnates of the father-in-law.

deed of gift, which is but a recent innovation. A son-in-law as donee should not be confused with a Gharjawain. The etymology of the word perfectly indicates the nature of the institution. It is made of two words : *ghar* (i.e. house) and *jawain* (son-in-law), and means a son-in-law who lives in the house of his father-in-law.

Mr. Stowell says :—"A special and fairly common form of adoption in the hills is that in which a man, who has no son, marries his daughter to a son-in-law who agrees to live permanently in his house, and is known thereafter as the Gharjawain. In this case, if the married couple continue to live permanently with the father they inherit the estate, but if they leave him and go to the son-in-law's house, they are disinherited. It must be remembered that the hill people do not recognize the right of the daughter to inherit"[1]. Mr. Lall doubts the correctness of this rule. The statement of Mr. Stowell is quite in consonance with local custom and the origin and growth of the institution which we have attempted to discuss. The daughter cannot succeed if she goes to her husband's house, as she and her sons thereby become strangers to the village community[2].

GHARJAWAIN INSTITUTION ANALOGOUS TO THAT OF AN "APPOINTED DAUGHTER" IN EARLY HINDU LAW

A daughter who lives away from her father's house is not an heir under the customary law of the Khasas.

[1] K.R.C., para. 9, p. 10. *See* K.L.T., p. 55, and Pauw, p. 43, to like effect.

[2] *See* Tupper, Vol. II, p. 75, about Gharjawain, "If he (a landholder) has no son, natural or adopted, he may be allowed to bring his son-in-law into the village. His daughter and her husband will come and live in his house and attend on him. He will treat the son-in-law in all respects as a son (*cf.* Kumaoni proverb, *cheli santi chelo*, i.e. a son is obtained in exchange for a daughter); and the latter will cultivate the fields for him, and when old age

A daughter or her sons were not recognized as heirs in early Hindu law[1]. We find that as late as the institutes of Manu an "appointed daughter" alone was recognized as an heir[2]. Manu does not speak of a daughter as an heir, except in the discussion about "appointed daughters"[3]. The "appointed daughter", so far as we can see, remained with her father and did not go to her husband's house. Vasishtha quotes a verse from the Veda :—"A maiden who has no brothers comes back to the male ancestors (of her own family); returning she becomes their son"[4].

The practice of special appointment of the daughter became obsolete among the Hindus in later times. One obvious defect of "appointment" was to favour the

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supervenes, take charge of his property. Under these circumstances the son-in-law may be accepted as heir; and it would be only when a son-in-law had thus been adopted into the clan and village, that he could inherit any of the village lands. He would be heir because he had ceased to be an outsider."

[1]Mayne, para. 517, Women originally without right. *See* Manu, VIII, 416; Jolly, p. 192, The degraded position of women in ancient India precludes entirely the idea of their having been regarded as heirs of the family property in early times, and several early writers have actually quoted a text from the Veda, in which the general unfitness of women for heritage seems to be pronounced." Sarvadhikari, p. 271, The claims of women were not recognized by many legislators. "They consider them specially unfit to partake of even the least portion of the heritage."

[2]Manu, IX, 127—139; Sarvadhikari, p. 271, "From the earliest times an exception was made in the case of an appointed daughter, and her right was almost universally acknowledged by the ancient legislators of India." *See* Jolly, 147—149, on appointed daughter and the high place in the list of heirs of the son of the appointed daughter.

[3]Manu, IX, paras. 185, 217; Mayne, para. 519.

[4]Vasishtha, XVII, para. 16; Mayne, paras, 76, 519. Mayne suggests that a daughter appointed remained in her father's family, so that her son was his son owing to dominion retained over the daughter; Sarkar, p. 131, "The distinctive feature of the arrangement appears to be that the appointed daughter instead of leaving her father's house after marriage, continued to live with him, and the son-in-law used to live as a member of his father-in-law's family."

children of one daughter only. We are not concerned with the causes which brought about the recognition of daughters and their sons as heirs in Hindu law. It is enough to see that the victory of natural affection over the artificial rules of archaic society was complete when Vijnaneswara said :—"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"[1]?

The rights of inheritance which a daughter and her sons came to acquire among the Khasas did not proceed beyond the stage of a sort of special "appointment" of the daughter, and the important condition is that the daughter should remain with her father.[2]

DEED OF GIFT NOT ESSENTIAL FOR INHERITANCE

From what has been said about the nature of the "Gharjawain" custom, it will appear that the daughter and her sons and the Gharjawain are entitled to inherit a man's property in the absence of a formal deed of gift, provided the daughter has not left her father's house.[3] The Gharjawain and his children undoubtedly inherit by the mere fact of Gharjawain's admission into his father-in-law's family, and a deed of gift has never been a

[1]Mitakshara, ii, 2, para. 2, quoting Vrihaspati.

[2]Mayne, paras. 519, 562, says that the rights of inheritance possessed by a daughter and her sons in later Hindu law grew out of "appointment" of daughter. When "appointment" became obsolete, they retained the rights which usage had made familiar.

[3]In Kangra hills a deed of gift is not necessary. *See* Tupper, Vol. II, p. 186. "It seems generally allowed that a 'Gharjawain' or son-in-law taken into the house, becomes after a time entitled to succeed as a kind of adopted son without proof of gift." Lyall's *Kangra Settlement Report*, para. 115. Among the Khasas of our study in the Kumaon division, if possession has been given to a resident son-in-law, then no deed of gift is needed. Question 3 (Gharjawain, Appendix A) unanimous answers, except Mr. G. N. Joshi.

necessary prelude to or substitute for a right to inherit[1]. A son-in-law to whom an actual gift is made should not be confused with a Gharjawain. If there is no evidence of continued residence in the house of the father-in-law, the word Gharjawain is a misnomer.

There is no doubt that a deed of gift is now sometimes executed in favour of a resident son-in-law[2]. It becomes of great evidentiary value in checking dishonest litigation by the reversioners of the deceased, whose interest it would be to deny the claims of daughters and their sons. But the right under customary law is not founded on the deed of gift. If it were, then the deed itself would determine the title of the donee. There are important limitations on the right *primâ facie* acquired by a Gharjawain under a deed of gift. He does not hold the property for himself alone, but also for the daughter of the donor and his male issue by her[3]. If the male line of the daughter becomes extinct, the property reverts to the agnates of her father, and it does not go to the collaterals of the Gharjawain[4]. These facts by themselves demonstrate the futility of a rule which makes a formal deed of gift a condition precedent to a Gharjawain's succession. The custom is of older origin than the deed and overrides it. To appreciate the significance of the limitations which fetter the full operation of the deed, we must look to what has been said about the origin of the institution itself :—

1. The institution grew from a desire to give the daughter and her sons a right of succession in a man's

[1]Unanimous answers to Question 1 (Gharjawain, Appendix A).
[2]K.R.C., p. 10.
[3]K. L. C., para. 13.
[4]K.L.C., para. 13; Raturi, p. 367. Unanimous answers to Question 4 (Gharjawain, Appendix A).

property. The Gharjawain therefore takes the land for them.

2. The village community made an exception for non-agnatic succession in this case, but the right to keep out aliens was preserved. The village land thus does not go to anyone who is a stranger to the village, but reverts to the agnates of the donor[1]. This ultimate reversion to the agnates of the father-in-law is not peculiar to the Khasas. In the Punjab the rule is the same[2]. Among the Nambudri Brahmans of the Malabar coast in Madras a custom similar to that of the son of an appointed daughter still exists. "They are believed to have migrated from Eastern India about 1,200 or 1,500 years ago, bearing with them a system of Hindu law of an archaic character, more nearly representing that of the Sutra writers than the later form to be found in the Mitakshara. Where a Nambudri has no male issue, he may give his daughter in Sarvasvadhanam marriage. The result of such a marriage is that if a son is born, he inherits to, and is for all purposes the son of, his mother's father. If there is no male issue, or on failure of such issue, the property of the wife's family does not belong to the husband, but reverts to the family of her father"[3].

[1]The Gharjawain, on failure of male issue, may himself keep a Gharjawain. K.L.C., para. 249, and unanimous answers to Question 6 (Gharjawain, Appendix A). He can also adopt. Unanimous answers to Question 5, *ibid.*

[2]Sita Ram and others *v.* Raja Ram (F. B.) (F. R. no. 12 of 1892). The collaterals of a donor or adopter have an undoubted right to succeed in preference to the collaterals of the donee or adopted son, who have no rights of succession at all. Roe and Rattigan, Chapter I, para. 33—reversion of land to the original family; Chapter II, para. 42.

[3]Mayne, para. 76, p. 90.

GHARJAWAIN AND SON-IN-LAW AS DONEE

In the Tehri State, if there are no agnates within three degrees, then a Gharjawain can be kept without any formality[1]. If there are such agnates, their consent is essential[2]. This rule shows us that agnates are deemed to have an interest in a man's property, even in his lifetime, strong enough to prevent his alienating it away from them. On the other hand, there is the rule that if a gift is made in favour of the daughter, then the near agnates cannot object[3]. The two rules do not harmonize as their origins are different. One is based on customary law and the other on analogies from Hindu law. Near agnates have tried to set aside gifts to daughters by sonless persons, but they failed on the ground that Hindu law permits gifts[4]. Hence we find this inconsistency in the Tehri State.

In the Kumaon division the land tenures are not the same as they were in the past. A sonless hissadar is not now controlled in his alienations by his agnates. A Gharjawain may be kept at pleasure by any sonless person and a gift of ancestral land can be made to a daughter only when there are no male descendants. Mr. Lall speaks of "a sonless person only", and this incidently shows that the powers of the father over ancestral land are not unlimited among the Khasas.

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[1]Raturi, p. 360, Suit no. 127 of 4th July, 1902, Dhannu *v.* Ganga. Held that a person can keep Gharjawain if there are no agnates within three degrees.

[2]Raturi, p. 360, Suit no. 1 of 13th April, 1897. Nagu and others *v.* Mayati and others.

[3]Raturi, p. 361, Nagchand *v.* Shibu and others, Dayalu and others *v.* Mukhmu and others, referred to there.

[4]Raturi, p. 361, Dayalu and others *v.* Mukhmu and others, case no. 51, dated 12th August, 1909. The objection was that donor had no right to make a gift of his property to his daughter when his near agnates were living. Held gifts are allowed by Hindu law, and it was not a case of keeping a Gharjawain.

The custom is intended to secure the inheritance to the daughter and her sons. The son-in-law acquires merely a life interest in the property should his wife die without having any male issue[1]. This right appears to have grown out of sufferance and the equitable sense of the community in favour of a person who has left his own people and brotherhood. The man who has left his own village and come to reside among strangers is not told to pack off the moment he has the misfortune to lose his wife. Manu, too, lays down a similar rule :— "If an appointed daughter by accident dies without leaving a son, the husband of the appointed daughter may, without hesitation, take that estate "[2].

In the case of a Gharjawain proper, i.e. a resident son-in-law, the real heirs of a person are the daughter and her sons. The Gharjawain takes for them primarily as protector or manager with a remote reversionary interest of his own. If there be a deed of gift merely and no residence in the father-in-law's house, then the donee's interest is defined by the document subject to the implied presumption of reversion to the agnates of the donor.[3]

The position of a resident son-in-law is much stronger than that of a donee son-in-law who takes merely the estate actually transferred to him, while a real Gharjawain is entitled to all the estate vested in the father-in-law at the time of his death. An example will show the distinction clearly. *A* owns a two-anna share in a village. He transfers that share by a deed of gift to his daughter and her husband *B*. After the gift *A*

[1]Raturi, p. 367.
[2]Manu, Chapter IX, 135.
[3]K.L.C., para. 18.

acquires a one-anna share by purchase and a one-anna share by inheritance from a collateral. If *B* is a resident son-in-law, i.e. a Gharjawain, he will be entitled to the entire property which *A* owned at his death, i.e. a four-anna share, if he is not resident with his father-in-law, then he can claim no more than a two-anna share under the deed. But a non-resident son-in-law may be able to claim the entire estate of his father-in-law as an appointed heir.

The Gharjawain has no right to succeed to the collaterals of his father-in-law[1], nor do his sons possess such a right. The custom is an exception to the rule of strict agnatic succession, and there is no adoption of the son-in-law in the strict sense of the word.

GHARJAWAIN DOES NOT LOSE RIGHTS IN HIS PATERNAL ESTATE

A Gharjawain is not adopted by the father-in-law, and Mr. Lall rightly points out that "it has never been suggested that a Gharjawain would acquire any rights to inherit to the collaterals of his father-in-law." His position is entirely different from that of an adopted son. He is indirectly interested in the estate of his father-in-law. The persons who really benefit by the custom are the daughter and her sons. A man who becomes his father-in-law's "Gharjawain" is not deprived of his share in his own family, but in practice seldom makes a claim to such inheritance.[2]

GHARJAWAIN AND AFTER-BORN SON

The respective rights of a Gharjawain and an after-born son of the father-in-law have not been discussed by

[1] K.L.C., para. 11.
[2] K.L.C., paras. 12, 246, 247; Raturi, para. 179, p. 365.

Mr. Lall. This omission is a corollary to the mistaken view that Gharjawain acquires rights merely as a donee. Among the Khasas if a son be born after a Gharjawain is brought into the family, then the after-born son and the Gharjawain share the property equally. It is immaterial whether there was a deed of gift or not.[1]

No rulings of the Kumaon High Court about Gharjawains are known.[2] There have been some cases in the Tehri courts. In *Bhatu* v. *Chota* it was decided in the Tehri courts that the after-born son shares equally with a Gharjawain, and if one of them dies the other inherits his share.[3] Here again the custom is the same as found in Manu. "If, after a daughter has been appointed, a son be born (to her father), the division (of the inheritance) must in that (case) be equal."[4]

GHARJAWAIN KEPT BY A WIDOW HAS NO RIGHT

A Gharjawain brought into the family by a widow acquires no right to the property held by her except when he is brought in with the consent of the reversioners.[5] Among the Khasas in the Kumaon division a sonless man can bring in a Gharjawain without the consent of his agnates, but a widow cannot. The discretion as to whether the agnatic succession shall be diverted always rests with a male owner. We have seen that prior to

[1]Messrs. Thulgharia, Gairola, Pant, Juyal and G. N. Joshi on Question 8 (Gharjawain, Appendix A); Raturi, p. 367.

[2]K.R.C., p. 11.

[3]Suit no. 42, dated 31st May, 1907, quoted by Raturi, p. 367. The incidents of a Gharjawain custom show that it has no similarity to the Illatom adoption in Madras (Mayne, para. 207).

[4]Manu, IX, 134.

[5]Mr. Lall says, K.L.C., para. 11 :—"A widow can keep a Gharjawain, but can transfer the family property only with the consent of the reversioners." He regards formal transfer of land essential.

British rule a widow was herself a sort of heritable property.[1] She now acquires a life interest in her husband's property,[2] and can alienate it for necessity. Gift to a daughter is not a necessity, and if the widow attempts an alienation in her daughter's favour, the reversioners naturally put up a strong fight.

[1] *Ante*, p. 111.
[2] K.L.C., para. 15.

CHAPTER VIII

ADOPTION OR APPOINTMENT OF AN HEIR

ADOPTION OR APPOINTMENT OF AN HEIR AMONG THE KHASAS

CUSTOMARY adoption among the Khasas is in no way connected with religious ideas and is distinct from adoption as found in Hindu law. Adoption is against the Khasa instinct,[1] though it is now obtaining a footing in his society.[2] We shall do well to remember that succession among the Khasas is strictly confined to male agnates, that the Khasas held village land on a communal basis and not as individuals, and that an individual landholder had no power of alienating land in his possession, as he held merely the usufruct over it.

We have seen that among the Khasas non-agnates acquire an interest in village lands in two cases. The sons of a resident son-in-law succeed to a man's estate, and a *Jhantela* son becomes affiliated to his step-father. There is not, however, a complete assimilation in the village community in the first case. A Gharjawain does not succeed to the collaterals of his father-in-law,[3] and

[1]Mr. Gairola on Question 1 (Adoption, Appendix A).

[2]K.L.C., para. 234, "Adoption is not very common in these hills, but this practice is growing"; K.R.C., para. 9, p. 10.

[3]K.L.C., paras. 11, 216.

it is doubtful if a *Jhantela* son can do so, unless he has observed the necessary funeral rites for the collaterals too.[1] We exclude a Gharjawain and a *Jhantela* son from our discussion about the "appointed" heir, as their exceptional positions have been dealt with at length.

The so-called adoption among the Khasas is really a simple appointment of an heir, who will help a man in his old age, look to his cultivation, and after the appointer's death perform his funeral ceremonies and pay up his debts, if any. As a return for services rendered, the adopted son gets the inheritance. Full representation is allowed in collateral succession among the Khasas.[2] The heirs of a person thus form a group. By appointment an individual nearly or distantly related through males only is selected out of the group. The choice need not fall on the nearest agnate.[3]

WHO MAY APPOINT

A sonless male owner can appoint an heir to his estate. A lunatic, or a minor, cannot appoint an heir. A son in the lifetime of his father and without his consent cannot make such an appointment affecting ancestral land.[4] A widow can appoint an heir with the consent of the reversioners.[5]

[1] K.L.C., para. 8.
[2] K.L.C., para. 18.
[3] Raturi, p. 296.
[4] Messrs. Pant, Trivedi, Juyal, B. D. Joshi, G. N. Joshi on Question 15 (Adoption, Appendix A). As regards an impotent person and a leper, the matter is inconclusive, but when land is entered in their name, they can, it seems, appoint an heir. If the son is separate from his father and holds property independently, he too could appoint an heir.
[5] K.L.C., para. 2; unanimous answers to Question 2, *ibid.* *See* Roe and Rattigan, para. 30, p. 24, about the custom in the Punjab :— "The widow can only adopt with the consent of the agnates." Raturi, para. 137, p. 264. *See* Kripalu *v.* Charia, quoted there. Widow has no right to adopt when reversioners do not agree.

A husband's permission given in his lifetime to his wife, to appoint an heir after his death, will be of no avail without the consent of the reversioners.[1] It is beyond doubt that a widow cannot appoint an heir at her own pleasure.[2] Nearly all the answers received are to the effect that a widow can adopt in pursuance of the consent of her husband given before death.[3] But we find that instances of so authorizing the widow are rare.[4] We have to test the correctness of the rule from other facts that we know about the Khasas. Adoption among them is in effect the nomination of a person who succeeds to the *universitas juris* of the adopter. Marital authority over the wife in Khasa Family law was synonymous with proprietary right; so much so that a widow was inherited by the agnates of the deceased like his other property. It is also worth notice that the power to control the devolution of one's property after death was never recognized under the customary law, and wills were unknown. It is doubtful thus whether the husband's consent would be effective even if he expressed a desire for adoption in his lifetime. Nomination of the heir could only be made by the man in his lifetime, just as he alone could keep a Gharjawain.[5] At a time when the widow was herself disposable like a chattel, the chances of her exercising the right of adoption were nil. The rule laid down by Mr. Lall, that a widow cannot adopt without

[1] K.L.C., para. 2, "The giving of the permission to adopt by the husband is neither customary nor effective."

[2] Unanimous answers to Question 1 (Adoption, Appendix A).

[3] Question 3 (Adoption, Appendix A). Mr. Pant says consent must be in writing, and others say that the widow can adopt. But Mr. Trivedi, who examined a number of people, says it is not effective.

[4] Messrs. Pant and Trivedi say no instances are known; Mr. Gairola says it is unusual. Question 4, *ibid.*

[5] *Ante*, p. 249.

the consent of the reversioners, and that the husband's permission is not effective, harmonises with the other juristic conceptions underlying Khasa law.

WHO MAY GIVE IN ADOPTION

An adult adoptee must consent to appointment. He is a "son made." The consent of his natural father is necessary only during minority.[1] In the case of a *Jhantela* no formal handing over is needed. The woman is received as a *Dhanti* with her son and the boy is treated as a son. No formal delivery is ordinarily possible in such a case.

WHO MAY BE APPOINTED AN HEIR

The question before us is whether appointment of an heir under the customary law of the Khasas is confined to agnates only, or whether a stranger can be appointed.

We have already shown that non-agnates could enter the village community in two ways. A *Jhantela* son who might be a non-agnate was reckoned as a son.[2] In that case there was an adoption of a complete stranger. The institution of "Gharjawain" also brought non-agnates to the village. It seems to the writer that no departure from the well-established rule of strict agnatic succession was made among the Khasas, except in those two cases.

We may start by saying that there is absolute unanimity on the question that agnates must be preferred, but it is said that an adoptee need not necessarily be an

[1] Mr. Trivedi on Question 23 (Adoption, Appendix A).
[2] *Ante*, p. 173.

agnate.[1] It is also admitted by all that there are many instances where non-agnates were adopted.[2] The solution to the riddle is offered by the answers of Messrs. Gairola and G. N. Joshi. Mr. Gairola says :—"The large majority of adoptions among the Khasas are of non-agnates. There have been several instances in which a Khasa kept a *Dhanti* wife who brought a son by her former husband with her, and that son was kept as Dharmaputra by her new husband and recognized as heir."[3]

The right of adoption or appointment of an heir is intimately connected with that of ownership. It is only one mode of diverting succession from the customary heirs, who are all agnates among the Khasas. We cannot do full justice to the custom unless we look to the conditions in the past. We have shown that individual ownership of land was not recognized among the Khasas, but land was held by village communities which ordinarily consisted of agnates. A rule of strict agnatic succession must give limited powers of disposal of property to an individual, otherwise the social system based on it would be destroyed.[4] Sir H. M. Plowden pointed out in the leading case[5] on adoption among the agriculturists of the Punjab that "the power of adoption, when

[1]Unanimous answers to Question 5 (Adoption, Appendix A), except Mr. Thulgharia, who says that an adoptee must necessarily be an agnate. It is worth notice that he calls a *Jhantela* a legitimate son.

[2]Unanimous answers to Question 6, *ibid.*

[3]Mr. Gairola on Question 6, *ibid.* Mr. G. N. Joshi gives only one instance of a non-agnate's adoption, and it turns out to be of a boy whose mother was taken as *Dhanti* by the adoptive father. In Punjab, too, a step-son (*Pichlag*) is at times permitted to be made an heir by appointment. Rattigan's *Digest*, para. 10, Remarks 1 and 2.

[4]Roe and Rattigan, Chapter I, para. 24, p. 21.

[5]Ralla and others *v.* Buddha and others (F. B.), no. 50, Punjab Record, 1893.

validly exercised, has precisely the same effect as regards the *warisan ekjaddi*, or presumptive heirs, as a valid transfer of the adopter's land by gift to the adopted son would have: it operates, in fact, as a transfer of his land, but a transfer taking effect after the death of the donor instead of in his lifetime. The power to adopt is valued by the landholding tribes in the Punjab, as it appears, not for the sake of any supposed spiritual benefit, but on more practical grounds; because it enables a sonless man to secure for himself a companion who shall be a fellow-worker and a support in old age, and to make provision for him in return for his services. It is to be expected that this power, as it is capable of being exercised to divert the devolution of ancestral land from its ordinary course, should be as jealously guarded, in the interest of the presumptive heirs as other similar powers, and I think it is unquestionable that, speaking generally, it is so guarded." These observations apply *mutatis mutandis* to the Khasa agriculturists of our study. We have seen that gifts in favour of a daughter by a sonless person were challenged in the Tehri courts by near agnates. They were, however, upheld as the principles of Hindu law were applied.[1] The likeliest non-agnates whom a normal person would prefer to agnates are ordinarily excluded by custom. A man cannot adopt his daughter or sister's son as his heir.[2] It is only natural that a relaxation may in some cases be made in favour of a daughter's son. But in the past the daughter's son

[1] *Ante*. p. 246.

[2] K.L.C., paras. 4, 240. The desire to adopt a sister's son or a daughter's, especially the latter, is felt frequently, and is met by the expedient of keeping him, and transferring the property to him by a deed of gift called locally Vishnu-Priti, i.e. out of love for God (K.L.C., para. 241). Messrs. Thulgharia, Pant, Trivedi and Juyal on Question 9 (Adoption, Appendix A).

could enter the village community only if his mother did not leave her father's village, i.e. when a Ghar-jawain was appointed.[1] When we find that all the rules of Khasa law tend to preserve the village lands to the agnates and the village community,[2] instances of the adoption or appointment of non-agnates must be fairly common before we can say that appointment of a non-agnate is allowed among the Khasas.[3] Adoption of a stranger would be extremely unpopular with the village community, and at a time when that body had the power to enforce its wishes, adoption of a stranger would be resented and resisted by that body. At the present day we talk about the preference of agnates or the moral obligation to adopt them. The line between moral and legal rules is very thin, if not invisible, in archaic jurisprudence. When the sense of justice of the community and village elders is violated by an act, they unhesitatingly disallow it. The collective will of the community is too strong for the individual to be resisted successfully.

Adoption of a stranger could not be allowed, as it was against the social economy of the village and the property rights of the agnates. Apart from that, a villager would have no interest in bringing a stranger to the village and thereby incur the hostility of those with whom he had to live. Some of the agnates at least would

[1]K.L.C., para. 240. Stray instances of the adoption of a daughter's son were found by Mr. Lall, but that is an exception from general practice. Messrs, Gairola and G. N. Joshi on Question 9, *ibid*, say that a daughter's son or sister's son can be adopted.

[2]The right of pre-emption is called "*wirasat*", or inheritance by the Khasas, even though they have to pay for the land acquired thereby. (Mr. B. D. Joshi on Question 14, Power of Disposal, Appendix A.)

[3]Mr. Lall notes :—"Indeed as far as possible a man would try to adopt a son from among his own family, but there is nothing to prevent his going out of the family." K.L.C., para. 242.

have more claims on his affection than a mere stranger. These two feelings act and react on each other, and the result would be to confine adoption to agnates only, the only exception being a *Jhantela*, or son brought with the wife, and a Gharjawain.

It is true that British rule has brought the idea of individual ownership to the people, and except the descendants of a person, no one can object to the disposition of his property. A logical sequence of that position is that a hissadar may appoint anyone as his heir. But the past has not ceased to rule the Khasas. We find that their institutions have grown in accordance with the demands of natural affection. Gifts are made to a daughter's son or sister's son in the form of a Vishnu-Priti (out of love for God) gift.[1] A gift to a non-resident son-in-law has also come to be recognized. It can only be regarded as the appointment of an heir.[2] The adoption or appointment as heir of an entire stranger seems to militate against the property notions and tenurial incidents of Khasa law, and in the writer's opinion is not recognized by it.

ADOPTION CONFINED TO AGNATES IN NEPAL AND THE PUNJAB

The custom under which adoption is strictly confined to agnates exists among the Khas population of Nepal to the east of the Himalayan districts. The same rule prevails in the Kangra hills and other districts of the Punjab. In Nepal the rule among the Khas people is that "they must choose for adoption the child of some

[1] K.L.C., para. 241.

[2] *See* Rattigan's *Digest*, para. 37. Appointment of a daughter's son or sister's son is recognized among non-agriculturists, but not favoured among the agriculturists in the Punjab.

one of their nearest relatives."[1] In the Punjab the appointed heir must be an agnate.[2] In the Kangra hills adoption or appointment can take place only within the Gotra, i.e. no non-agnate can be adopted,[3] accept perhaps a daughter's son.[4] We may call attention to the ethnic and cultural affinities of the Khasas with the inhabitants of the Kangra hills. The writer can see no exceptional social forces operating among the Khasas which would make adoption of non-agnates valid as a matter of customary law. He would urge that a considerable number of instances of the adoption of a non-agnate who was not affiliated as a *Jhantela* to some agnate, or was not a daughter's son of the adopter, must be proved before it can be said that appointment of a stranger is permissible among the Khasas.

RESTRICTIONS OF AGE

There is no restriction as to the age of the appointed heir.[5] He may be older than the appointer.[6] Ordinarily the appointed heir is younger. The maxim *adoptio imitatur naturam* has no place among the Khasas.[7] There is no fiction of sonship as we find in

[1]Hodgson's *Essays*, Vol. II, p. 232, Question and Answer no. 82.

[2]Rattigan's *Digest*, para. 35; Roe and Rattigan, Chapter II, para. 32, The choice is confined to the nearest group of heirs.

[3]*District Gazetteer*, Kangra, p. 57.

[4]Lyall's *Kangra Settelment Report*, para. 74; Tupper, Vol. II, p. 184.

[5]K.L.C., para. 6; *see* K. L. C., para. 243, where a person over fifty years old with wife and five children was appointed; Raturi, p. 308.

[6]Mr. Trivedi on Question 17, *ibid.* A nephew may be older than his uncle and could be validly appointed by the uncle. Others say that the appointer must be older.

[7]Answers to Question 18 (Adoption) are so conflicting, that no rules on this point appear to be followed. As so-called adoption is merely an appointment of the heir, the laxity in practice is natural. Mr. Pant says that a person older than the appointer may be nominated as an heir.

Hindu law. As the very object of appointment or adoption among the Khasas is that the adoptee should be able to help and support the adoptive father, he is ordinarily an adult.[1]

ELDEST SON, ETC., CAN BE APPOINTED

The restrictions imposed by Hindu law on the choice of an adopted son in the Dattaka form are unknown to the Khasas. "The adoption of an orphan, an only son, an eldest son, or of a person whose *upanyana* (i.e. sacred thread ceremony) or marriage ceremony has been performed, is not invalid."[2] The rule in the Punjab about an appointed heir is the same.[3]

RESTRICTIONS IN APPOINTMENT DUE TO RELATIONSHIP

The appointed heir must be one whom it would not be indelicate to regard as a son. An ascendant is not appointed, nor are nominations of brothers or cousins common. The choice is made from an agnate who is one degree lower than the appointer in the family pedigree.[4] Nephews or grand-nephews are usually so appointed; preference is ordinarily given to a brother's son. There are no decisions on the validity of a brother's appointment. Looking to the intrinsic nature of the institution, we cannot say that the appointment of a brother would be invalid. The custom of adoption

[1] Messrs. Gairola and Pant on Question 13, *ibid.* A *Jhantela* son is of course adopted in infancy.

[2] K.L.C., paras. 7, 243.

[3] Rattigan's *Digest*, para. 38.

[4] Unanimous answers to Question 16, *ibid.* Mr. Lall came across stray instances of the appointment of a brother (K.L.C., para. 240), but they are, as he rightly says, occasional lapses from the well recognized general practice. Mr. Juyal also found some instances where cousins were adopted.

among the Khasas is similar to that of Kritrima adoption,[1] and in that form Keshava Misra said that a father even may be adopted by his son.[2]

DOCTRINE OF CONSTRUCTIVE INCEST DOES NOT APPLY AMONG THE KHASAS.

In dealing with adoption in Kumaon, Mr. Lall lays down the startling rule that "A person whose mother could not have been married by the adopted father cannot be adopted as a son."[3] The writer is puzzled as to how this conclusion was arrived at. Mr. Lall did observe stray instances of the breach of this rule, i.e. a brother, or a daughter's son, had been adopted.[4] The so-called Sastric injunction is not obeyed by the Khasas.[5] If we look to the Khasa psychology, they will never say that they do not obey the Sastras. A problem was thus added to Question 21 (Adoption, Appendix A). A man can never marry his mother's sister's daughter. But his maternal first cousin may be married to his paternal uncle's son. Their child would be a near agnate to him. There can be no question that such a child, though his natural mother could never have been married by the adopter, can be adopted or appointed.[6] It shows that the rule proposed by Mr. Lall has no application to

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[1]Post, pp. 275-276.
[2]Mayne, para. 202; 1 MacN., 76.
[3]K.L.C., para. 4.
[4]K.L.C., para. 240.
[5]Messrs. Sah, B. D. Joshi, Gairola, Juyal and G. N. Joshi on Question 21 (Adoption, Appendix A). Mr. Trivedi says it is obeyed in the case of girls within three degrees. Messrs. Thulgharia and Pant agree with Mr. Lall. Mr. B. D. Joshi truly says :—"The Khasas do not trouble about Sastric injunctions, nor do their lawgivers and conscience keepers, i.e. the Purohits".
[6]Unanimous answers (excepting Mr. Thulgharia) to the problem in Question 21, *ibid.* Even Messrs. Pant and Trivedi, who say that the rule is followed by the Khasiyas, have no doubt that such a child can be appointed.

the Khasas. Even under the modern decisions the theory of constructive incest is confined in Hindu law to the three regenerate classes and is limited to the adoption of the son of a daughter, or of a sister, or of an aunt.[1] It does not apply to the Sudras.[2]

In dealing with the customary law of the Khasas we should try to avoid the pitfalls of delusive analogies and *a priori* assumptions. We cannot be too careful in avoiding the fairly recent innovations of the Brahmans in Hindu law. Mr. Lall calls the supposed prohibition "this restriction which Hindu law enjoins."[3] It is sufficient to say that the supposed fiction of Hindu law has long been exploded among eminent scholars.[4] It is true that under Hindu law the courts determine the validity of adoption by the rule that no one can be adopted whose mother the adopter could not have legally married.[5] But the prohibition is not enjoined by any Dharma-Sastras. Hindu law owes these fictional restrictions to the hair-splitting arguments of the authors of the Dattaka Mimansa and Dattaka Chandrika on the text of Saunaka about the adopted son "bearing the reflection of a son."[6] These two books received an eminence which they did

[1] West and Majid, p. 917. Mayne, para. 135, p. 181. It is unlawful on the same ground to adopt a brother, or step-brother, or an uncle (*Dattaka Mimansa*, V, para. 17). The Bombay High Court confines the rule to daughter's son, sister's son and mother's sister's son (Mayne, p. 182). Yamnava *v.* Laxman, 36 Bom., 533.

[2] Mayne, para. 136.

[3] K.L.C., para. 240.

[4] Sarkar, *The Hindu law of Adoption*, pp. 326—329. Mandlik, pp. 474—496. Dr. Jolly, p. 163, "A close examination of the original authorities shows that there is very little, if anything, in the Sanskrit treatises to warrant the formation of such a rule as this." *See* also the judgment of Sir John Edge, C. J., in Bhagwan Singh *v.* Bhagwan Singh, 17 All., 294.

[5] *Dattaka Mimansa*, V, paras. 16-17; *Dattaka Chandrika*, II, paras. 7. 8; Mayne, para. 135, p. 180.

[6] *Dattaka Mimansa*, V, para. 15.

not possess before, owing to their being translated by Mr. Sutherland in 1821. According to Mr. Golap Chandra Sarkar the Dattaka Mimansa was composed in the middle of the 17th century, and the book itself was unknown except to a few Pandits of Benares.[1] The same learned writer calls the Dattaka Chandrika a literary forgery by one Raghumani, for the purpose of supporting the claim of a person in a suit pending before the Supreme Court of Calcutta at the close of the 18th century.[2] The conclusion of Mr. Sarkar is that "there was no restriction governing a boy to be adopted, but Nanda Pandita, while writing specially on the subject, directed his mind to the question and found only two texts on the subject, namely, one of Sakala and the other of Saunaka, the first of which discourages the adoption of only three relations, namely, the daughter's son, the sister's son, and the mother's sister's son. The second passage is capable of different interpretations, but it is liable to be construed as disapproving the adoption of the daughter's and the sister's son amongst the twice-born classes."[3]

The restriction is explained on the ground that in adoption there is a fiction of procreating the adoptive child on his natural mother by the adoptive father, and so the sons of those women whom the adopter could not marry cannot properly be taken in adoption. How far the Khasas are to be regarded as masters of dialectic niceties is a question that may be left for answer to those who know them in the very least.

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[1]Sarkar, pp. 120-121.

[2]Sarkar, p. 124. *See* J. N. Bhattacharya's commentaries on Hindu law, p. 143, about the admission of Raghumani's grandson that the book was prepared by Raghumani.

[3]Sarkar, pp. 327-328.

"It is worthy of remark," says Mr. Sarkar, "that if adoptions in the prohibited cases imply incest, then every adoption must involve adultery;" and "there is is no authority, however, in Hindu law for supporting the notion of fictional or constructive incest and adultery."[1]

In the United Provinces we may refer to the Full Bench decision in *Bhagwan Singh* v. *Bhagwan Singh*.[2] The learned Chief Justice, Sir John Edge, with Justices Knox, Blair and Burkitt, held that the Hindu law of the School of Benares did not prohibit an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of a sister of the mother of the adopter. The authority of the Dattaka Mimansa of Nanda Pandita was considered, and the conclusions in that book were not accepted. Banerji and Aikman, JJ., gave a dissenting judgment. The learned Chief Justice, after a careful enquiry, agreed with the observations of Dr. Jolly that:—"It is simply a misfortune that so much authority should have been attributed in the courts all over India to such a treaties as Nanda Pandita's Mimansa, which abounds more in fanciful distinctions than, perhaps, any other work on adoption."[3] The judgment in this case was, however, set aside by their Lordships of the Privy Council mainly on the ground that "for eighty and ninety years there has been a current of authority one way in all parts of India."[4]

The point which the writer wants to emphasize is that the so-called SaSstric injunction is a Brahmanical

[1]Sarkar, p. 329.
[2]17 All., 294—421.
[3]17 All. at p. 373. *See* Dr. Jolly, p. 166.
[4]Bhagwan Singh *v.* Bhagwan Singh, 26 I. A., at p. 166.

innovation in Hindu law, and has no place in any Dharma-Sastras or old commentaries. The authority which the Dattaka Mimansa and Dattaka Chandrika received owing to their being translated by Mr. Sutherland in 1821 was confirmed in *Bhagwan Singh* v. *Bhagwan Singh* by the Privy Council on the ground of *Stare deisis*, as a matter of public policy. We should note that their Lordships did not enquire in the case mentioned above "whether the view so earnestly maintained by the learned Chief Justice upon the construction of the disputed texts might have been successfully maintained at the beginning of this (19th) century."[1] The judicially recognized fiction of procreation in adoption is one of the most controversial topics in Hindu law. He would be a bold man indeed who could say that the fiction has any place in the secular and unsacramental Khasa law. The prohibition proposed by Mr. Lall, which the writer can only regard as a novel one, has no place in the customary law of the Khasas. The writer holds that a daughter's son or sister's son cannot be appointed or adopted for the simple reason that non-agnates are not ordinarily eligible for that purpose. Their exclusion is certainly not based on the controversial theory of constructive incest.[2]

[1] 26 I. A., at p. 166. *See* Puttu Lal *v.* Parbati Kunwar, 42 I. A., 155, where it was decided that "The *Dattaka Mimansa* is work of high authority and has become embedded in Hindu law, but caution is required in accepting the glosses of its author where they deviate from or add to the Smritis". The second prohibition about a woman's adopting her brother's son (*Dattaka Mimansa*, II, paras. 33, 34) was rejected. As Mayne points out, p. 185 :—"There is no fiction that the natural father had also begotten the child upon the adopting mother."

[2] Rattigan's *Digest*, para. 36. Under the Punjab customary law there are no restrictions as regards the age or the degree of relationship of the person to be appointed, para. 37. Amongst agriculturists a daughter's or sister's son can be appointed with the consent of the agnates only (P.R. no. 50 of 1893).

NO RELIGIOUS CEREMONIES OF ADOPTION AMONG THE KHASAS

As adoption among the Khasas has more a secular purpose than a religious significance, no religious ceremonies of adoption are observed.[1]

Adoption in Hindu law, like other institutions, has an interesting history of its own. The motive for adoption in ancient times was probably not religious but secular.[2] The secular nature of the transaction "for the celebration of name and due perpetuation of lineage" is recognized as a good motive for adoption in the Dattaka Chandrika. The author says that spiritual satisfaction may be received from a brother's sons, but the secular object cannot be so served.[3] In Hindu law "an adpoted son is assimilated to the adoptive father by a legal fiction that upon the ceremonies of adoption having taken place, he is, by reason of the mysterious force of those ceremonies, to be treated as if reborn in the family of the adopter."[4] "In so far as adoption was supposed to establish a certain non-sensuous religious relation carrying with it certain religious and juristic consequences, it could only be reached by the due performance of the religious ceremonies prescribed."[5] We can see thus why the doctrine propounded in the Dattaka Mimansa,[6] that "without observance of form filial relation is not produced," has no place among the Khasas.

[1] K.L.C., para. 1; Padua *v.* Bhawan Singh (K.R. 7), The formalities required by Hindu law are never gone through except among the inhabitants of large towns or rich persons; Raturi, para. 158.

[2] Sarkar, p. 26. The Hindu codes appear to have invested an existing social phenomenon with a religious colouring; Sarkar, 142, on spiritual and secular objects of adoption.

[3] *Dattaka Chandrika*, I, para. 22.

[4] *Hindu Jurisprudence*, 237.

[5] *Hindu Jurisprudence*, 240.

[6] *Dattaka Mimansa*, V, 46.

HOW CAN ADOPTION OR APPOINTMENT BE MADE

The result of adoption is to divert succession from those persons who would inherit to a sonless person in its absence. It operates as a sort of alienation of land so far as they are concerned. It is only reasonable to suppose that the exercise of any power which has such a consequence is liable to be controlled by those whose interests are affected thereby at a time when they have the power to do so. The recognition of the adopted or appointed person by the *biradari* or agnates must have been essential in the past, where village organization was strong. In those places where the Raja claimed to be the heir of a sonless person, his consent to an adoption would be essential. We find that such was the case in the Tehri State. A man could keep a Gharjawain, or adopt a son, only with the permission of the Raja. He had to pay a fee called *warisi-bhent* for this purpose.[1]

Where the rights of the village brotherhood were not arrogated by the Raja, the consent of the brotherhood would be sought. With the growth of a sense of individual ownership and the weakening of communal bonds the consent of the brotherhood may cease to be imperative. We find this stage among the Khasas. A man can appoint an heir or Gharjawain without the consent of the village community. The nature and purpose of adoption indicate the necessity for two acts[2] :—

1. An unequivocal manifestation of the intention to appoint or adopt.

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[1]Raturi, para. 163, p. 314. *See* "Mountaineer", p. 204, about escheat to the Raja of all effects of a person when he died issueless.

[2]*See* in this connection the judgment of Sir H. M. Plowden in Ralla and others *v.* Budha and others (F.B.), no. 50, P.R., 1893; Roe and Rattigan, Chapter III, paras. 13, 14.

2. Publication of this fact to the *biradari*, or village community, whose consent alone could in the past confer on the adopted person a recognized position as heir.

The case of a *Jhantela* son is very simple. He enters the family of his adoptive father with all the publicity attendant on the marriage of his mother.[1] No further formalities are needed to make his adoption complete.[2] In order to avoid litigation by the greedy reversioners, some persons execute a deed of adoption long after the boy has come with his mother to the adoptive father's house. A deed, however, is not necessary. He has a right under the Khasa law to succeed with other sons of the adoptive father. In other cases, "A regular feast is only given by those who are well off. Otherwise what they do is to get a cake of *gur* (molasses), break it and distribute it among a few *biradari* people who are invited on the occasion.[3] Some kill a goat and give a dinner to the *biradari* in the village. The Padhan, whether a *biradar* or not, and even a Thokedar, if near, are *ex officio* honoured guests on these occasions."[4] A feast to the *biradari* is not considered essential.[5] The adopter generally declares his intention to the *biradari*, but that, too, is not a vital condition to the validity of an appointment.[6]

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[1]K.L.T., p. 51, about *Dhanti* marriage. "A ceremony is performed by the family priest and frequently the man proclaims the entry of the woman into his family by killing goats and feasting his *biradari*."

[2]Padua *v.* Bhawan Singh, K.R., 7.

[3]We notice a similarity between this custom and that in the Punjab about the assemblage of brotherhood and distribution of sweetmeats. No. 50, P. R., 1893; Roe and Rattigan, Chapter III, para. 14.

[4]Mr. B. D. Joshi on Question 10 (Adoption, Appendix A).

[5]Answers to Question 10, *ibid.*

[6]Answers to Question 11, *ibid.*

The *biradari* is in many cases left to infer adoption from the conduct of the adopter.[1]

Owing to the absence of any particular formalities "the practice has grown up of executing a deed (*lekh*) describing the fact of the adoption, and in most cases transfering the property also to adopted son."[2] Such documents clearly indicate the intention of the adopter and also notify the fact in a manner to the *biradari*, if an adoption in fact has taken place. The practice of executing deeds is not universal.[3]

Mr. Lall says that "a written instrument of adoption is essential"[4] and "the rule of general application is that an adopted son proper can only be constituted by a written deed declaring the fact of the adoption."[5] That statement goes too far. A *lekh*, or document, is meant for probative purposes only; its omission can in no way affect the fact of adoption if otherwise well established.[6] Mr. Lall notes :—"There were cases in the past where the succession of an adopted son who had no *lekh* in his favour was not disputed by any reversioners, due to (1) agreement, (2) poverty, or (3) ignorance."[2] It must be a queer custom indeed which was not known to the people among whom it existed! Adoption deeds are a

[1]Mr. B. D. Joshi on Question 11, *ibid*; Mr. Gairola says :—"It is enough if the adopter keeps the boy for a considerable time and treats him as his son." "Keeping the boy in his family and payment of his marriage expenses by the adoptive father" are considered enough for a valid adoption according to Mr. Juyal. Answer to Question 12, *ibid.*

[2]K.L.C., para. 234.

[3]K.L.C., para. 235.

[4]K.L.C., para. 1.

[5]K.L.C., para. 236.

[6]Mr. Lall himself notes that the practice has grown up to facilitate proof. K.L.C., para. 234.

recent innovation to facilitate proof.[1] Mr. Lall remarks :—"It is, however, now unanimously stated that in disputed cases an adoption without a *lekh* is inoperative."[2] This is a legally impossible position. Would an adoption, made with the consent of the *biradari* and acted upon for a considerable time, become invalid simply because someone gambles with litigation and tries to dispute it? The writer would say that it is usual now to execute deeds of adoption when a dispute is anticipated. In disputed cases the court must give due weight to the fact that no document is produced and be satisfied by a proper explanation about the omission. The decument is nothing more than a piece of documentary evidence of the fact of adoption itself. It never had, nor has, any higher value.

In this connection it may also be said that bequests are not recognized by customary law, and a mere deed without some other act which shows that the adoptee was treated as a son would probably be invalid.[3]

An adoption may be made by taking a boy as son and treating him as such openly. An appointment of an heir or an adoption analogous to Kritrima form, which are common in Kumaon, are really merely the public installation of an heir by a sonless person of one of the

[1]Mr. Stowell does not mention adoption deeds as being essential. There was no deed in Padua *v.* Bhawan Singh, K.R., 7. Messrs. Gairola and Pant say that "Adoption deeds are not common." Question 12, *ibid.*

[2]K.L.C., para. 234.

[3]*See* no. 50, P.R., 1893, where the necessity of a public act besides a deed is considered in case of adoption among the agriculturists of the Punjab. Roe and Rattigan, Chapter III, para. 14.

presumptive heirs.[1] A formal declaration of appointment made to the *biradari* would be sufficient to validate it. As there is no prescribed mode in which the appointment should be made, the only essential requirement is that the appointment should be made manifest, so as not to be left an equivocal act. Conventionally a deed of adoption has come to be regarded as good evidence. It is in cases of appointment of an heir that documents are frequently executed, and in the absence of a deed, clear and convincing evidence of appointment must be forthcoming.[2]

RIGHTS OF THE APPIONTED HEIR

Appointment of an heir among the Khasas should not be confused with adoption as known to Hindu law. An appointed heir is called a "Dharma-puttra," but his rights are not the same as that of an adopted son in Hindu law. For a proper appreciation of adoption among the Khasas we must go to the backward parts of the province. We find here that the appointed heir does not become a member of the adopter's family and does not succeed to collaterals.[3] It is only, as Mr. Lall says, imperfect adoption.

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[1]The writer is of opinion that appointment as heir of non-agnates does not take place among the Khasas except of a son-in-law or *Jhantela* son. The *Jhantela* son of a near agnate may be so appointed, as he is incorporated in the village community. The rules of Khasa law tend to keep strangers away from the village land. It is for the courts to see if adoption of an entire stranger has ever taken place before the latitude of appointing strangers can be said to have become embedded in Khasa society.

[2]Raturi, para. 163, pp. 314-315. Adoption may be made by registered deeds in Tehri State. Absence of a deed would be a matter of suspicion. Mr. Pant on Question 12 (Adoption, Appendix A). Adoption deeds are not common. If an outsider is adopted, then deeds are generally executed. It seems to the writer that the case of a non-resident son-in-law claiming as an appointed heir with no deed to support him would be a matter for great suspicion.

[3]K.L.C., para. 235.

Under the customary law it is not necessary that the *biradari* must consent to the adoption.[1] A written declaration, followed or preceded by some treatment consistent with deliberate appointment, is enough for purposes of inheritance to the adoptive father. It is absurd to suppose that a community would recognize the entry of a person within the brotherhood for all purposes unless they had a voice in the transaction. No one would be allowed to create heirs for others by his own act. We find thus that the right of collateral succession is not generally conceded to the appointed heir.[2] Mr. Lall says that an adopted son does not inherit to collateral relations of his adoptive father, "unless he has changed his own caste and *gotra* for his adoptive father's and observed the necessary funeral rites for the collaterals also."[3] Here we find the confusion caused by not distinguishing between the Khasas and the higher castes. The Khasas have no real *gotras*. Mr. Atkinson noted that they all stated themselves to belong to the Bharadwaj *gotra*, and had no idea of what "*gotra*" meant.[4] The exception thus does not apply to the Khasas. Mr. Raturi, too, notes that the common form of adoption in Garhwal and the Tehri State is in the Kritrima form,[5] under which there is no right of collateral succession, and rights in the natural family are not lost.[6]

[1]Mr. Pant on Question 11 (Adoption, Appendix A) "A person can adopt against the wishes of the *biradari* even".

[2]Mr. B. D. Joshi on Question 22, *ibid*; K.L.C., para. 235.

[3]K.L.C., para. 8.

[4]Atkinson, XII, 439.

[5]Raturi, pp. 287, 302.

[6]Mayne, para. 201; 1 MacN. 76 Mst. Shibo Koeree and others *v.* Joogun Singh and others, 8 Sutherland W. R., p. 155: "The relation of Kritrima for the purposes of inheritance of extending to the contracting parties only.

We must not forget the history of adoption in Hindu law, or the fact that an adopted son came to occupy his present position at a very late stage of Brahmanical juridical thought. We take the right of an adopted son to collateral succession in Hindu law as a matter of course at the present day, but there is abundant evidence that this right was not possessed by him in early times. Vasishtha, Yajna Valkya Narada, Sancha and Lichita, Harita, Devala and Yama all put a Dattaka adopted son later than sixth in the list of twelve kinds of sons, and declare that the first six inherit lineally and collaterally, but that the last six are heirs only of their adoptive father[1]. Manu, Gautama[2], Baudhayana and Vrihaspati give a higher place to the Dattaka son. On the two sets of authorities about the right of an adopted son to collateral succession Mr. Mayne observes :—"The real fact, of course, is that these two sets of authorities represent different historical periods of the law of adoption; the former relating to the period when the adopted son had not obtained the full rights which he was recognized as possessing at a later period"[3]. There is a fiction of rebirth in the adoptive father's family in the Dattaka form of adoption, and the limitations imposed by law tend to make that fiction as complete as possible[4]. A son adopted in that form has all the rights of a legitimate son as

[1]Vasishtha, XVII, paras. 9—21; Yajna, II, 130; Narada, XIII, paras. 45-46; 3 *Col. Digest*, 151. Sancha and Lichita say that the last six sons are not heirs to collaterals, nor to their own father jointly with other sons; Harita, 3 *Col. Digest*, 152; Devala, 3 *Col. Digest*, 154; Yama, 3 *Col. Digest*, 155, "Being of mixed origin are not heirs except to their own father." *See* the admirable list on the point in Mayne, p. 81.

[2]Manu, IX paras. 158—160; Gautama, XXVIII, paras. 32-33; Baudhayana, II, 2, 3, 31-32; Vrihaspati, 3 *Col. Digest*, 162.

[3]Mayne, p. 225.

[4]*Hindu Jurisprudence*, p. 237.

regards inheritance *ex parte paterna* or *ex parte materna*[1]. There is no fiction of rebirth in a Khasa adoption, and an appointed heir is not entitled to succeed collaterally[2]. Where Brahmanized Khasas practise adoption as directed in Hindu law the result may be different, but such adoptions are rare. The appointed heir succeeds to the rights and liabilities of the appointer or adoptive father.

APPOINTED HEIR AND AFTER-BORN SON

An adopted son, or appointed heir, shares equally with sons born after the adoption or appointment[3]. The text of Vasishtha, "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a part," has no place in the customary law of the Khasas. The adopted son does not only share equally with an after-born legitimate son, but at times gets Jethon (i.e. the elder brother's excessive portion), and has even succeeded to heritable offices such as Padhanship and Thokdari[4], in preference to his after-born "adoptive" brother.

[1]Mayne, paras, 165, 166. Kali Komul Mozoomdar and others *v.* Uma Shunkur Moitra, 10 I.A., 138; Sarkar, p. 395.

[2]*See* Rattigan's *Digest*, para. 49, about the Punjab. There is no right of collateral succession as the relationship is purely a personal one between the appointer and the appointed heir, where no formal adoption has taken place.

[3]K.L.C., paras. 3, 239; Raturi, p. 324. *See* p. 329 too.

[4]K.L.C., para. 239. *See Dattaka Mimansa*, V, para. 43, where the text of Vriddha Gautama is quoted which directs equal division between legitimate and adopted sons. Nanda Pandita explains it away as meaning an after-born son destitute of good qualities. The author of *Dattaka Chandrika*, V, para. 32, says it refers to Sudras only. Under the Punjab customary law the appointed heir succeeds equally with a natural born son subsequently born. Rattigan's *Digest*, para. 52.

"APPOINTMENT" OF HEIR AMONG THE KHASAS COMPARED WITH THE "KRITRIMA" FORM OF ADOPTION

The Kritrima form of adoption mentioned in Hindu law books is now obsolete except in Mithila and perhaps among the Nambudri Brahmans of Malabar[1]. Adoption or appointment of an heir among the Khasas is by no means on the same footing as a Dattaka adoption in Hindu law. But it has some analogies to Kritrima adoption as described by Macnaghten[2] :—

1. No religious ceremonies are necessary among the Khasas[3]. It would be more proper to say that religious ceremonies are seldom observed at the appointment of an heir. In Kritrima adoption no ceremonies or sacrifices are necessary for its validity.[4]

2. There is no restriction about the age of the appointed heir among the Khasas[5]. There is no limit of age in Kritrima adoption; as a matter of fact the adoptee should be an adult[6]. Among the Khasas, too, the adoptee is ordinarily an adult male. He must consent to the appointment[7].

3. A marked feature of Kritrima adoption is the absence of the fiction of a new birth into the adoptive family and the limitations consequent on that fiction

[1]Mayne, para. 204.
[2]Macnaghten's *Hindu law*, vol. I, p. 76. See Raturi, pp. 287, 302. It is clearly said that Kritrima form of adoption is common in Garhwal and the Tehri State.
[3]Padua *v.* Bhawan Singh, K.R., 7; K.L.C., paras. 1, 234.
[4]Mayne, para. 206; 1 MacN., 76.
[5]K.L.C., paars. 7, 213.
[6]Mayne, para. 202; 1 MacN., 76.
[7]Messrs. Gairola and Pant on Question 13 (Adoptions, Appendix A). Those who say that minors are adopted really think of the adoption of a *Jhantela*. Mr. Gairola rightly says :—"The very object of adoption among the Khasiyas is that the adoptee should be able to help to support the adoptive father's family."

which are found in the Dattaka form[1]. A Kritrima son "does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs obsequies and takes the inheritance"[2]. An appointed heir, or Dharma-puttra among the Khasas, has no right of collateral succession as such[3]. The relationship in Kritrima adoption is contractual, and no rights of succession are acquired by the adoptee in the adoptive father's family[4]. The case is practically the same among the Khasas.

Where the Kritrima adoption is recognized a female may adopt to herself under it and the adoptee inherits her individual property[5]. As a Khasa woman has to all intents and purposes no separate property or *stridhan*, there is no custom of adoption by females.

[1] Mayne, para. 203.
[2] 3 *Col. Digest*, 276. Section X note; see 1 MacN., 76, "Kritrima does not lose relation to his own natural family, but inherits in both.
[3] *Ante*, p. 271; K.L.C., para. 235, about adopted son who does not inherit to collaterals.
[4] Mayne, para. 204; 1 MacN., 76.
[5] Mayne, para. 205.

CHAPTER IX

(1) SUCCESSION, (2) WIDOW'S ESTATE, (3) STRIDHAN, AND (4) MAINTENANCE

(1) *Succession*

GENERAL OBSERVATIONS

IN every system of law provision has to be made for a readjustment of things and goods on the death of human beings who owned or enjoyed them"[1]. The law of succession represents the view of society at large as to what ought to be the normal course of succession in the readjustment of property after the death of the citizen. These rules are inter-related with the political character of the society, its history, culture and its ideas of ownership. "The source and history of a law, which in any community ascertains a dead man's successor, and defines the manner in which the devolution of his legal position, of his rights and obligations, takes place, bear the closest relation to the constitution and character of that community. Death and its consequences compel men, in any stage of social existence, to ascertain, by some conscious or unconscious process, what was the relative position of the deceased to the community of which he was part, how that position is to be transferred to another, and upon what principle his successor is to be

[1]Vinogradoff, *Encyclopaedia Britannica*—"Succession", Vol. XXVI (11th edition), p. 2.

selected"[1]. We have seen the secular nature of Khasa customary law in the topics discussed so far and we find the same characteristic freedom from religious ideas in the rules of succession among the Khasas.

SUCCESSION IN PUCCA KHAIKARI VILLAGE

We can properly speak of succession only when the individual is regarded as owner of the property in his possession, Among the Khasas the individual was a subordinate member of a higher organism, i.e. the village community. We have seen that no individual property was recognized among them, and so there was no succession in the strict sense of the word. In a *pucca* Khaikari village, held by the Khasas from prehistoric times, we find that the holding of a deceased Khaikar, who has left no male issue or widow, reverts at once to the entire village community[2]. A family in such a village has, properly speaking, only a usufruct over the land in its possession, and the cases of succession are merely a relapse of certain land used by a member of the community to that community.

SUCCESSION IN TEHRI STATE

The intimate relationship of rules of succession to ideas of ownership are disclosed by the conditions in Tehri State. We have already referred to the fact that the Garhwal Rajas succeeded in reducing the rights of the landholder to those of a mere tenant[3]. Land was claimed as belonging to the Raja. The rights of reversion which a village community possesses in a *pucca*

[1]Cowell, *Lectures on Hindu law* (1871), p. 95.
[2]K. L. T., p. 85, Upan Deo *v.* Bachi Singh quoted.
[3]*Ante*, pp. 198-199.

Khaikari village were usurped by the Raja, and so the rules of succession became simplicity itself. All the property owned by a person who died sonless became the property of the Raja. The wives and unmarried daughters even were reckoned as movable property for purposes of escheat[1].

Some kind of inheritance is now allowed by the Raja. The rules of inheritance about land and other kinds of property are different. In case of land male agnates within four degrees are allowed to inherit[2]. The Raja claims it in their absence. The land received by escheat is let out to others, but near agnates who are beyond four degrees are preferred and land is granted to them on receipt of a *nazrana* (fee)[3]. Movable and immovable property other than land goes to the heirs who are determined according to Hindu law[4]. A daughter or her son, however, cannot take in the presence of agnates within four degrees[5]. The rights of these agnates are defeated, and a daughter and her sons inherit, when either a "Gharjawain" is kept[6] or a gift is made in his lifetime by a person to his son-in-law and daughter[7].

The law of succession in Tehri State is partly of modern growth. It is just a heterogeneous mass of the rules of Khasa law and Hindu law, brought about by a partial waiver of his prerogatives by the Raja.

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[1]Raturi, p. 624. "Mountaineer," p. 204; *ante*, p. 112.
[2]Raturi, para. 278, p. 538, cl. (7), para. 347.
[3]Raturi, para. 347, p. 620.
[4]Raturi, para. 347, p. 620.
[5]Raturi, p. 603, cl. (*a*).
[6]Raturi, p. 604, cl. (*c*).
[7]Raturi, p. 604, cl. (*d*).

SUCCESSION AMONG POLYANDROUS KHASAS

The polyandrous Khasas, as we have seen, form a joint family of a very perfect type. The wives and children in the family belong to all the brothers jointly. The death of an individual does not matter to the family corporation. When a brother dies, the surviving brothers continue to hold the family property together with their sons. "If there are no surviving brothers, then the sons take all. Failing a son, the widow takes, but only for her lifetime, and she forfeits this right if she marries again in a village other than the one her deceased husband belonged to. If there is no brother or son, and the widow is disinherited, first cousins, on the father's side, if there be any, may succeed"[1]. Daughters can claim no shares in the paternal property. They have only a right to get married at the family expense[2]. The rules in the Dustoor-ul-aml (records of customary law) mainly deal with the contingency of separation and disruption of the joint household[3]. When division of family goods and land is made, the eldest brother has an excessive share, one thing of each kind and one field is deducted for him and half of the field specially allotted to the eldest brother is also deducted for the youngest; the remaining property is divided equally[4].

CUSTOM OF JETHON

The custom of Jethon, or the practice of granting a bigger portion to the eldest brother when the family

[1] *Dehra Dun Gazetteer*, p. 90.
[2] William's *Memoir*, Appendix VIII, para. 12, cl. (6).
[3] Williams' *Memoir*, Appendix VIII para. 12.
[4] "Dustoor-ul-aml", para. 12, cl. (2), in William's *Memoir*, Appendix VIII.

property is divided, is fairly widespread among the Khasas of our study[1] in Nepal[2], and in the Kangra hills[3]. This special right of the eldest brother is mentioned in early law books of the Hindus[4]. It is considered to be a survival of the time when the dignity of the patriarch descended on the eldest son. There are indications in early Hindu law of a sort of primogeniture[5]. We say a sort of primogeniture as "If the family remained undivided, the eldest son did not take the family property as owner; he only became an uncontrolled manager of it. So far as there was any notion of ownership of the family property, and it was in these times quite rudimentary, it was in the nature of what we call corporate ownership"[6].

The customary law of the polyandrous Khasas in Jaunsar Bawar suggests an explanation of the increased share granted to the eldest brother. The position of the eldest brother is very high, even now, in a polyandrous family. The joint wife or wives belong to him in a special sense. The younger brothers cannot appropriate

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[1]K.L.C., paras. 21, 271; K.R.C., para. 14; K.L.T., p. 50; Raturi para. 312.

[2]Wright's *Nepal*, 33-34.

[3]Lyall's *Settlement Report*, para. 74; Tupper, Vol. II, p. 182, eldest son gets something as Jhetunda in excess of the share which the other sons inherit equally with himself; this something may be a field, a cow or ox, or any other valuable thing. Rattigan's *Digest*, para. 7, Remark 1.

[4]Mayne, para. 488. Sarvadhikari, p. 229, "They distinguish the eldest son by the heritage", text quoted from Taittiriya Sanhita. *See* Sarvadhikari, pp. 231—236, on the various texts about distribution of the estate between sons.

[5]Jolly, pp. 85, 176; Sarvadhikari, 237—239; Sarvadhikari, p. 230, "where the family ties had slackened, and the doctrine of individual rights had attained strength and supremacy, the law of equal distribution prevailed to the total exclusion of the rule of primogeniture"; West and Majid, p. 65.

[6]Sir William Markby on Indian law in *Encyclopaedia Britannica* (11th edition), Vol. XIV, p. 436.

any wives or children without his consent. It may well be that the increased share is to compensate him for loss of authority resultant on a disruption of the joint household, or as Sir Henry Maine suggests this extra share may be but a reward or security for impartial distribution[1].

We are interested in the origin of the custom of Jethon or eldest brother's special right owing to its implications about the past social conditions among the Khasas. We have seen that the well known incidents of a Mitakshara joint-family are not found among the non-polyandrous Khasas at the present day in British territory. The custom of Jethon, however, shows that joint-families must have existed in remote past, and the eldest brother held a pre-eminent position then in the family on the death of the father.

The customary right of Jethon is not enforceable at law, though "on a division the eldest brother usually gets something more than his share, a field, a piece of jewellery, a cow, or the like"[2]. The defect lies in the indefiniteness and uncertainty of the custom. Mr. Lall[3] points out that "The extent of this extra share is not fixed and depends upon consent.....The fact that the extent of the extra share is not fixed is the real reason why the practice has not died out and is not likely to die

[1]Maine, *Early History of Institutions*, 197; *see* also *Maine's Early Law and Custom*, p. 90. At the time of Gautama and Apastamba "the ancient primogeniture was decaying among the Hindus, as we know that it decayed in the barbarous world generally. Under the original usage, the eldest son may have taken everything and maintained his brethren. The small advantage to the eldest in later times may have been meant as an inducement to fairness."

[2]K.L.C., para. 21.

[3]K.L.C., para. 271. *See* Raturi, p. 576, about Jethon. No share is fixed and no claim can be decreed by courts.

out. It is so easy to satisfy it. One may give a piece of jewellery worth a few annas, or an old vessel or a book, and the rule is satisfied''. The common practice of giving something to the eldest brother is not a valid custom as the elements of certainty and compulsion are wanting[1].

WIDOW REPRESENTS HER HUSBAND IN THE ABSENCE OF MALE ISSUE

We have shown that wives among the Khasas were regarded as heritable property in pre-British days. The traditional law had not dealt with the problem created by woman's emancipated position. The Khasas proved incapable of any inventions to adjust her position in the law of inheritance. The doctrine of representation was deeply embedded in the Khasa law of succession. The community met the contingency by resorting thereto. A widow was allowed to represent her husband if he had no male issue[2]. We thus observe the interesting fact that the widow who possessed practically no rights of inheritance a century ago, now occupies a very favourable position under the customary law, simply because the Khasas showed no initiative when her place in the list of heirs was to be determined, but merely adopted the rule of representation with which they were familiar[3].

[1]Kerr's *Blackstone's Commentaries*, Vol. I, 54. Customs ought to be certain and a custom must be compulsory.

[2]K.L.C., para. 15 (c). The enquiry of Mr. Lall has brought out this interesting fact. As the custom seemed uncommon. Question 2 (Widow's Estate, Appendix A) was framed for enquiry. Messrs. Pant and Trivedi answer it in favour of the widow's right to succeed to collaterals. There can be no doubt that the rule as laid down by Mr. Lall is quite correct for the Khasas.

[3]In Kangra district, too, the right of widows to succeed as collaterals is generally admitted. *Kangra District Gazetteer*, p. 190. *See* Tupper, Vol. II, 72, "The right (of representation) would even in

The widow inherits the estate of her sonless husband, whether he was joint with or separate from his brothers[1]. Mr. Lall looks upon a widow's succession in competition with the associated brothers of her husband as proof of the fact that the family law in Kumaon resembles the law under the Dayabhaga School[2]. He found that a widow represents her husband even in collateral succession[3]. Would it not be absured that she should not inherit from her husband, but inherit from collaterals as his widow? Not only does a widow inherit from her sonless husband, but represents him in case of inheritance from the father-in-law[4]. We can only be confused if we look to the Mitakshara or the Dayabhaga, but must stick to the rules of Khasa law itself. The fact that the widow represents her husband explains why she takes in preference to associated brothers.

SUCCESSION TO THOKDARI OR SIANASHIP

Succession to a public office, which denotes political power or is merely a survival of it, takes place according to the strict rules of primogeniture. In Kumaon the office of a Thokdar is strictly hereditary and descends by the

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a manner be extended to include the widow of a deceased agnate without sons, who might have the usual life interest in the share that would have fallen to her husband;" Rattigan's *Digest*, para. 11, Remark 2, about cases and tribes where such right has been upheld.

[1]K.L.C., para. 15(*a*). *See* Rattigan's *Digest*, para. 14, about similar right of the widow in the Punjab. The fact that the husband was joint with others does not ordinarily deprive the widow of her right to succeed to his share.

[2]K. L. C., para. 260.

[3]K. L. C., para. 15(*c*).

[4]Messrs. Pant, Trivedi, Juyal and Gairola on Question 2. Problem 1 (Widow's Estate, Appendix A). *See* Rattigan's *Digest*, para. 9, about similar right of son's widow in some tribes of the Punjab.

rules of primogeniture.[1] In Jaunsar Bawar, too, the eldest son succeeds to the office of a siana. A younger son cannot take this title. It goes in the eldest line.[2] The custom is only an instance of a widely observed rule that "when patriarchal power is not only domestic but political, it is not distributed among all the issue at the parent's death, but is the birthright of the eldest son".[3]

PRINCIPLES OF SUCCESSION AMONG THE KHASAS

Inheritance is the transfer of ownership which occurs at and in consequence of death. It presupposes separate property. The central idea in Khasa Family law was not of individual ownership but of mere usufruct in the village land in possession of a family. With growing looseness of tribal cohesion and with proprietary disintegration, the sense of communal property tends to be partially superseded by that of separate property. Even in this stage it is not the separate property of the individual, but of families. The custom of Mawari Bant (division according to families) as regards gaon-sanjait (undivided village land) which is found in some villages, gives an insight into the Khasa land tenures. Under this custom the undivided village land is actually distributable according to ancestral shares.[4]

We may here repeat that among the Khasas the father is not the absolute owner of the family land. He has a pre-eminent authority over it, as the sons cannot enter into the active exercise of their proprietary rights in the father's lifetime without his consent.[5] The

[1] K.L.T., 118.
[2] Williams' *Memoir*, Appendix VIII, para. 8, cl. (2).
[3] Maine's, *Ancient law*, 247.
[4] K.L.T., 40.
[5] *Ante*, p. 235.

proprietorship of the father is, however, restricted by the right of the sons. When the sons succeed on the death of the father they as a matter of fact take what already belongs to them in a certain sense.[1]

In collateral succession full representation is observed, i.e. the sons of a deceased agnate take the share he would have had if alive.[2] Mr. Tupper says :—"This would be the necessary consequence of the theory that the estate was always either actually held or potentially distributable according to ancestral shares".[3]

The rights of inheritance possessed by the widow, Gharjawain and appointed heir are historically later than those of the agnates. Rules of inheritance grow with the sense of individual property. At the time when alienation of land was entirely forbidden, a person had only a usufruct of his holding. On his death without male issue its devolution would depend upon the state of tribal cohesion or of proprietary disintegration within the village community. It may revert to the entire village community as we find in a *pucca* Khaikari village,[4] or it may only relapse to its immediate parent stock. Agnatic succession to hissadari right seems to be based on the theory that the ancestral holding must revert to the share out of which it had originated. So that when there are no male descendants or other heirs who take before the collaterals, land held by a person relapses immediately to the ancestral share out of which it had been taken and is distributed among the agnates who hold the parent

[1]Raturi, para. 282, p. 513, "The sons take by survivorship".

[2]K.L.C., para. 18.

[3]Tupper, Vol. II, p. 72.

[4]Upan Deo *v.* Bachi Singh, K.L.T., p. 85, A *pucca* Khaikar is, however, not an owner.

share. Movable and self-acquired property also go to the same heirs who take ancestral land.

The general principles of succession among the Khasas are practically the same as we find in the Punjab and are quite simple[1] :—

1. An estate descends in the male line only.
2. Full representation is allowed in lineal and collateral succession.[2]
3. The male descendants of the nearest ascendant take when the question of collateral succession arises. The simple rule of treating "the estate as if left by the last male in the family tree who has left male heirs"[3] seems to apply.
4. Females are excluded from inheritance, but a widow is allowed to represent her husband who has no male issue and hold the estate so obtained on a life interest or till remarriage.

The right of a widow to represent her husband is not universal in the Punjab, and a step-mother is not entitled to inherit there.

ORDER OF SUCCESSION

The order of succession among the Khasas is as follows :—

1. Descendants.
2. Gharjawain or appointed heir.

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[1]Rattigan's *Digest*, p. 14.
[2]K.L.C., paras. 18, 19. Messrs. Trivedi, Juyal, Gairola, Thulgharia and B. D. Joshi on Questions 5 and 6 (Inheritance, Appendix A).
[3]Roe and Rattigan, p. 59, Chapter II, para. 10 (2).

3. Widow.
4. Father.
5. Descendants of father.
6. Mother and step-mother.

If there are no descendants of the father, then grandfather's descendants succeed. Collateral succession is permissible so long as the common ancestor is traceable. The ultimate reversion is to the village community.[1]

DESCENDANTS

Descendants mean for the purposes of inheritance only those in the male line.[2] Relationship through females is not counted. All the male descendants take at once as a single body either directly or by way of representation. Full representation is recognized. The right to inherit does not come to an end with great-grandsons.[3] This rule is stated more on what the people consider ought to be done than on actual cases occurring in practice. The writer has not come across any instance where a man died leaving a great-great-grandson whose father, grandfather and great-grandfather had died previously. Such instances must be quite rare. The Khassas say, however, that a descendant, however remote, would be entitled to inherit, and show thereby that the doctrine of "funeral cakes" has no place in their law of succession. In Hindu law the primary class of heirs does not extend beyond great-grandsons.[4]

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[1] K.L.C., para. 20.

[2] There is no difference between Asal and Kamasal son, i.e son of *Dhanti*, K.L.C., para. 14.

[3] Messrs. B. D. Joshi, Thulgharia, Juyal, Pant, Gairola and Trivedi on Question 5 (Inheritance, Appendix A).

[4] Mayne, para. 473.

The right of a widow to represent her husband in collateral succession is conceded by the Khasas.[1] The widow of a sonless son is also entitled to succeed along with her brothers-in-law.[2] This is but a corollary to the wider right of representing her husband at the time of succession. In a case among the Randhawa Jats of Amritsar district Mr. Justice Lalchand, after saying that the right of a widow fully to represent her husband in matters of collateral succession was proved, observed :— "If the right of representation is by tribal custom conceded so far in favour of the widow, does it not follow as a matter of necessary corollary that she would not be excluded in succession to her own husband by a collateral of her husband? It is difficult to conceive any difference in the two cases from the customary or the logical point of view. The main question in either case is whether a widow represents her deceased husband or not in matters of succession under the customary law. If she does represent, she would take the place of her husband, and as his substitute, being a nearer heir to the last male owner, would exclude the more remote".[3] Mr. Lall has not specifically dealt with this point.[4]

GHARJAWAIN

A Gharjawain[5] takes the estate of the deceased in default of male issue. The daughter can get the benefit

[1]K.L.C,, para. 15 (*c*), para. 262; *ante*, p. 283.
[2]Messrs. Pant, Trivedi, Juyal and Gairola on Question 2. Problem 1 (Widow's Estate, Appendix A). In the Punjab, too, in some tribes such a right is conceded; Rattigan's *Digest*, para. 9.
[3]Premi *v.* Khushal Singh (no. 30, P. R., 1909) at page 86. The widow of a pre-deceased son was held to be entitled to succeed to the property of her father-in-law against his brother.
[4]Raturi, para. 359, p. 641; When a man dies leaving a widow and a son's widow, then the son's widow is entitled to all the property on the death of her mother-in-law.
[5]Chapter VIII.

of the estate of her father in this case and transmit the inheritance to her sons.

ADOPTED SON OR APPOINTED HEIR

An adopted son or appointed heir succeeds to all the rights held and enjoyed by the adoptive father or appointer.[1]

SAUTIA BANT

The custom of Sautia Bant, i.e. dividing the estate among sons by giving an equal share to each group who are sons of one out of two or more wives, is obsolete now and does not merit further consideration. It was organically connected with the law of Khasa inheritance by way of survival only. Now all sons get an equal share.[2]

WIDOW

The widow takes a life interest in the absence of the abovementioned heirs.[3] We shall separately deal with the nature of her interest in the property inherited from her husband.

FATHER, MOTHER AND STEP-MOTHER

Mr. Lall has not mentioned father and mother in the list of heirs, meaning thereby that the rule in the Mitakshara holds good. Under the Mitakshara the mother has precedence over the father.[4] But the rule among the Khasas is different. A mother inherits among them not as mother but as the widow of the deceased's

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[1] *Ante*, p. 274.
[2] K.L.C., paras. 22, 272.
[3] K.L.C., para. 15; Pauw, para. 48, p. 43.
[4] Mayne, para. 565; Mitakshara, Ch. II, sec. III, para. 5.

father. The result is that a step-mother, too, is recognized as an heir and inherits equally and jointly with the mother.[1] The postponement of father to mother and step-mother is contrary to the Khasa social system. A mother derives her right of succession through the father. After a widow the father is the next heir.[2] From what has been said about the Khasas and the position of the father in his lifetime, the instances of a father succeeding to a son are quite rare. When the father grows old he distributes the land among his sons. If one of them dies sonless and without leaving a widow, the father ordinarily consents that the land be divided by his surviving descendants. If he cares to claim the inheritance he can always get it.

A mother and step-mother inherit jointly and take as widows of the father. Mr. Lall has not mentioned them. No decisions on the subject are known. Mr. Raturi says that a step-mother takes after brothers and their sons under the custom.[3] He gives precedence to a mother over brothers, and refers to the Dharma-Sastras.[4] Where the mother and step-mother take jointly there can be no doubt that they would come after the brothers and nephews. Where an actual mother was living with her deceased son, she would be allowed to inherit after the

[1]It was necessary to determine in what capacity the mother inherits among the Khasas, and whether step-mother, too, is recognized as heir or not. Question 14 (Widow's Estate, Appendix A) and Question 7 (Inheritance, Appendix A) were framed to make this point clear. Messrs. Thulgharia, Gairola, Pant, Juyal and Trivedi say that the mother inherits jointly with the step-mother. Messrs. Pant, Juyal and Trivedi who questioned a number of Khasas, say that the mother inherits as widow of the father.

[2]Raturi, para. 340, pa. 610. But when property has been divided according to wives, i.e. by Sautia Bant rule, the mother would be preferred to father, pp. 610-611.

[3]Raturi, para. 341, p. 613.

[4]Raturi, para. 340.

widow, superseding brothers as a matter of decency and by sufference. The mother and step-mother of a person inherit as widow of his father. Their proper place in the list of heirs would be next after the male issue of their husband. A step-mother would never be allowed to take before brothers and nephews.[1]

The mother inherits the estate from her son only when she has not remarried.[2] If a man dies leaving a mother who has remarried and some distant heirs, the mother has no claim, but the estate goes to the distant heirs.[3] If the mother remarries after the estate has vested in her she forfeits the estate received from her son.[4] These incidents of customary law are but a corollary to the rule that the mother succeeds as widow of the father, for on remarriage she ceases to be a widow. Mr. Lall says that on remarriage a mother is not divested of her estate which she got from her son.[5] When we speak of remarriage of women among the Khasas, then we have to note that the bringing of a man, called a Tekwa, by the woman to her own house does not strictly constitute a marriage. So the instances noted by Mr. Lall are not very helpful.[6] If the widowed mother leaves her

[1] In the Punjab it is believed that the mother takes a life interest in default of male lineal descendants and of widow, Rattigan's *Digest*, para. 22, Remark I. A step-mother is not an heir in the Punjab, para. 22, Remark II. The Khasas evidently carry the doctrine of widow's representation to a logical conclusion. As to the position of the step-mother in Hindu law, *see* Mayne, para. 566.

[2] Unanimous answers to Questions 7 and 8 (Widow's Estate, Appendix A).

[3] Unanimous answers to Question 8, *ibid.* *See* Rattigan's *Digest*, para. 22, for similar rule in the Punjab.

[4] Messrs. B. D. Joshi, Trivedi, Gairola, Pant, Juyal and Thulgharia on Question 6 (Widow's Estate, Appendix A). Mr. Sah says she does not.

[5] K. L. C., para. 39, Ex. (1).

[6] K. L. C., para. 296.

husband's house and goes away to live as the wife of another person she forfeits the estate.[1]

DAUGHTER EXCLUDED

Daughters are excluded from inheritance and so are their descendants.[2] A daughter takes the estate only either when her husband is accepted as a "Gharjawain" or when a special deed of gift is executed by the last male owner. All agnates and even the panch hissadars, i.e. the village community in general, exclude a daughter or her son.[3] About the Kangra hills Sir James Lyall noted :—"The general feeling seems to be that a daughter or her children can never succeed by simple inheritance to landed estate, in preference to kinsmen, however remote".[4] A daughter at best takes only the estate for her life, and if she has no male issue it reverts to the heirs of her father.[5]

COLLATERAL SUCCESSION

Sir William Rattigan points out that there are four leading canons governing succession among agriculturists in the Punjab. The one dealing with collateral succession is "that when the male line of descendants has died out it is treated as never having existed, the last male who left descendants being regarded as the *propositus*."[6] The result is that if a man dies sonless his brothers do

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[1] *See* K.L.C., para. 39; unanimous answers to Question 15 (Widow's Estate, Appendix A) are that the mother and step-mother forfeit vested estate on the grounds in which the widow does.

[2] K.L.C., para. 16.

[3] Unanimous answers to Question 14 (Inheritance, Appenlix A); Pauw, p. 43.

[4] Tupper, Vol. II, p. 184; *Kangra Settlement Report*, para. 74.

[5] K.L.C., para. 13.

[6] Rattigan's *Digest*, p. 14.

not inherit as brothers, but as sons of the father to whom the estate reverted on the sonless man's death.[1] We find that the same rule is applicable to the Khasas. After the father the next heirs are all the descendants of the father. Full representation is allowed in this case too. "A predeceased brother is represented by his sons, son's issue, or by his widow".[2] "On the inheritance devolving upon the nephews or grand-nephews alone they do not take *per capita*. They represent their deceased fathers and take the inheritance *per stirpes*."[3]

As the brothers take as sons of their father, no question of full blood or half blood can arise. We find the customary law to be the same. "There is no difference between brothers of the whole blood and consanguine brothers".[4] Mr. Lall found that "among the more enlightened people" a whole brother excluded a step-brother.[5] It is not the law of the "enlightened people", but of those who follow the Mitakshara, as under that system brothers of the whole blood exclude brothers of the half blood.[6] The opposite custom, of there being no distinction between whole blood and half blood, does not result, as Mr. Lall suggests, from ignorance, but from divergence between the principles of succession among the Khasas and in Hindu law.[7] The custom of Sautia

[1]Roe and Rattigan, p. 59, Chapter II, para. 10 (2).
[2]K.L.C., para. 17(*c*).
[3]K.L.C., para. 18.
[4]K.L.C., para. 17 (*a*). *See* Raturi, para. 343, p. 615, "There is no distinction in Garhwal between full blood and half blood".
[5]K.L.C., para. 266.
[6]Mayne, para. 567. Note that in the Dayabhaga whole blood is preferred to half blood on the ground of superior religious efficacy of funeral cakes and in the Mitakshara on propinquity.
[7]Rattigan's *Digest*, para. 26(*b*). When division of shares was Pag Vand (*per capita*), then no distinction between whole blood and half blood is made.

Bant is obsolete now. When such a division was made, then full blood did exclude half blood.[1] So it now does in the Punjab among those who follow a custom resembling "Sautia Bant."[2]

Another result of the principle that brothers inherit as sons of their father is to obliterate the distinction between divided and undivided brothers. "There is no difference between divided and undivided or reunited brothers. They share the inheritance together in equal shares".[3] It is not so under the Mitakshara or the Dayabhaga, where undivided brothers are preferred to divided brothers.[4] Mr. Lall says:—"Whatever the cause may be, the fact remains that in a large number of cases no difference has been made between whole brothers and half brothers, or between divided and undivided brothers".[5] The preference given in the Dayabhaga and the Mitakshara to brothers who are of full blood or are undivided are not found among the Khasas, as the principles of Khasa succession are different.[6]

DISTANT COLLATERALS AND VILLAGE COMMUNITY

When there are no male descendants of the father, then the descendants of the grandfather succeed. Full representation among the heirs of a class takes place in all cases of collateral succession. So long as the common

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[1]Raturi, paras. 297, 343, p. 615.

[2]Rattigan's *Digest*, para. 26(*a*), When division of shares is by *Chanda vand* (*per stirpes*) rule, then full blood excludes half blood. *See* Mst. Kundo *v.* Shib Dial, no. 22, P. R., of 1902.

[3]K.L.C., para. 17 (*b*).

[4]Mayne, para. 568, p. 834. *See* Sheo Soondary *v.* Pirthee Singh, 4 I.A., 147—whole blood excludes the half blood under the Dayabhaga, unless the former were divided and the latter undivided

[5]K.L.C., para. 266.

[6]Rattigan's *Digest*, para. 25. There is no distinction in the Punjab whether collateral heirs were associated with or separate from the deceased.

ancestor can be ascertained heirs are determined by this rule.[1] The utlimate reversion is to the village community (panch hissadars) and not to the Crown, except in the Tehri State.[2]

SUCCESSION AMONG THE KHASAS AND UNDER HINDU LAW. MAIN DISTINCTIONS

The rules of succession among the Khasas are practically the same as we find under the customary law in the Kangra hills.

The distinct feature of Khasa agnatic succession is that the inheritance does not go to an individual, but to a group, which may consist of the male descendants of the *propositus* himself or of those of one of his ascendants.[3] There is no rule of the nearer agnate excluding the more remote such as is found in the Hindu law. The sons of a deceased brother take the share which their father would have received if he had been alive when the inheritance opens. In Hindu law representation is confined to descendants up to three degrees only, and in collateral succession the rule of the nearer heirs excluding the more remote is rigorously applied.[4] The distinction between undivided and divided brothers or between full blood and half blood which we find under the Mitakshara and the Dayabhaga has no place in Khasa customary law. Succession is not determined by propinquity or religious efficacy among the Khasas. A

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[1]Answers to Questions 8 and 9 (Inheritance, Appendix A).

[2]K.L.C., paras. 20, 270. *See* Bach Ram *v.* Chanar Singh (K.R., p. 1).

[3]*See* Maine, *Early Law and Custom*, 235, "Under a rudimentary Aryan usage it is not the individual, but rather a collective group of kinsmen, which profits by the death of a relative".

[4]Travelyan, *Hindu law*, p. 365, The existence of a class of nearer heirs excludes all members of a remote class.

student of Khasa Family law is not interested in the interpretation of Sastric texts.[1] The rules of inheritance are based on the theory that agnates alone are entitled to the estate left by a deceased person, and that the ancestral land held by a person who has no male descendants reverts to the immediate parent stock and is distributable accordingly. We may illustrate it by an example.

A dies leaving three sons, *B*, *C*, *D*, and the family land is divided in three shares among the sons. Now if *B* has no male descendants, the share received by him reverts to the source from which it proceeded, and is distributed among the other descendants of *A* who hold the remainder of the parent share.[2]

In *Soorendro Nath Roy* v. *Mst. Heeramonee* the Judicial Committee remarked :—"There is in the Hindu law so close a connection between their religion and their succession to property, that the preferable right to perform the *shradh* is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be found to be in union".[3] Mr. Mayne has pointed out that "the principle that the right of inheritance according to Hindu law is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor" is not of universal application. It is strictly and absolutely true

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[1] In Hindu law rules of collateral succession have been evolved from the text of Manu, Chapter IX, 187, "to the nearest *sapinda* the estate next belongs." Vijnaneswara interprets Pinda as body and bases the law of succession on propinquity, while the author of the Dayabhaga takes Pinda to mean a funeral cake and introduce the doctrine of religious efficacy—*Hindu Jurisprudence*, pp. 161, 162; Mayne, paras. 501, 508, 509—512.

[2] The principles which govern the devolution of ancestral land are applied to self-acquired land and to movable property.

[3] 12 M.I.A., 81, at page 96.

in Bengal.[1] We must make it quite clear that the doctrine of *shradh* has no application to the Khasas. In their case the tie of blood co-operates with the tie of land to decide the law of inheritance. The heir performs the *shradh* for he gets the inheritance. As Mayne puts it:—"In Bengal the inheritance follows the duty of offering sacrifices. Elsewhere the duty follows the inheritance".[1]

The exclusion of daughters carries with it the exclusion of all cognates from the list of heirs, and there are no heirs corresponding to the Bandhus of Hindu law among the Khasas.

EXCLUSION FROM INHERITANCE

In Hindu law "the Brahmanical theory of wealth is that it is conferred for the sake of defraying the expense of sacrifices. The theory of inheritance is that it descends upon the heir to enable him to rescue the deceased from eternal misery. Consequently one who is unable or unwilling to perform the necessary sacrifices is incapable of inheriting".[2] The Khasa law of inheritance is not based on such ideas. Its foundations lie in the remote past when an individual had but a usufruct over the land in his possession, and agnates, in a sense, received by inheritance what was already their own. The rules of exclusion from inheritance invented by the Brahmans would not thus be found among the Khasas. We find that such is actually the case. Pangus (limbless persons) and congenital idiots are not excluded by custom from inheritance.[3] "Brahmacharis, lepers, blind persons, the

[1] Mayne, para. 9.
[2] Mayne, para. 591.
[3] Unanimous answers (excepting Mr. Sah) to Question 5 (Exclusion from inheritance, Appendix A).

deaf and dumb, lame and impotent are not disqualified from succeeding. But a leper who has left home permanently to go to an asylum or elsewhere is excluded".[1] Degradation from *biradari*, i.e. from caste, excluded a man from inheritance.[2] It has no effect now.[3] The exclusion was on the obvious ground that a man ceased to be akin to the family if he was expelled from it.

(2) *Widow's Estate*

WIDOW REPRESENTS HER HUSBAND WHEN NO MALE ISSUE

The position of the widow[4] among the Khasas is in a sense much better than under the Hindu law. She is entitled to represent her husband in lineal or collateral succession if he left no male issue, i.e. she takes a share which her husband would have received if he had been alive.[5]

NATURE OF WIDOW'S ESTATE

The widow does not take as an absolute owner, but she has only a life interest.[6] She forfeits the estate in

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[1]K.L.C., paras. 24, 273, 274.

[2]Unanimous answers to Questions 1 and 2 (Exclusion from inheritance, Appendix A).

[3]Act no. XXI of 1850 extended to Kumaon and Garhwal, *Gazette of India*, 1876, Part I, p. 606; to Jaunsar Bawar, *Gazette of India*, 1879, Part I, p. 382.

[4]A widow of course means a *Dhanti* widow too, K.L.C., para. 15(*b*).

[5]*Ante*, pp. 283-284; K.L.C., para. 15(*c*). The position of a Khasa widow is better than that of a widow in Bombay, where she has some right of collateral succession and partially represents her husband as *gotraja sapinda*. It was held in Rachava *v.* Kalingapa, 16 Bom., 716, at p. 720, that "a female *gotraja sapinda* in any one line cannot exclude any male properly belonging to that line". According to Mr. Justice West in Lallubhai *v.* Mankuvarbai, 2 Bom. at p. 447, "the right of the widow under the Mayukha may be called almost shadowy".

[6]Unanimous answers to Question 1 (Widow's Estate, Appendix A), Pauw, p. 4.

case of remarriage.[1] It is necessary to emphasize the fact that remarriage of widows in all cases causes forfeiture of a vested estate. The uniform course of decision in the Allahabad High Court has been "that where the rules of the caste recognized the right of a Hindu widow to remarry, a second marriage had not the result of divesting her of the property of her first husband".[2] It will be enough to say that Khasa customary law allows perfect freedom of remarriage to a widow, but the law under which she gets a life interest in her husband's property makes that interest determinable in the event of remarriage.[3] We need not therefore consider the implications of section 2 of Act XV of 1856, as it has no application to the Khasas. The principle it enunciates is well established in Khasa law.

EFFECT OF UNCHASTITY

A vested estate is not divested by mere unchastity of the widow.[4] "As long as a woman continues to live in the family home unchastity brings no legal penalty with it. It is only when unchastity is accompanied by the leaving of the family home and protection that legal notice is taken of it. Thus an unchaste widow living in the home may succeed to property, but she will not if she leaves it. Again, subsequent unchastity will cause forfeiture only if the widow leaves the home, though in

[1] K.L.C., para. 39. *See* Rattigan's *Digest*, para. 32, for forfeiture on remarriage of a widow in the Punjab.

[2] Mayne, para. 556, p. 813. *See* Mula *v.* Partab, 32 All., 489; Abdul Aziz Khan *v.* Nirma, 35 All., 466.

[3] Raturi, para. 361, p. 646; Remarriage causes forfeiture of a widow's estate. She is thereby civilly dead so far as the family of the first husband is concerned.

[4] K.L.C., para. 39; unanimous answers to Question 12 (Widow's Estate, Appendix A). If unchastity is accompanied by leaving the home the widow's interest is forfeited.

similar circumstances the Mitakshara will not divest her of the estate."[1] In the Kangra hills, too, unchastity of the widow does not entail forfeiture of her estate.[2] We find "the Kanets of Kodh Sowar say clearly that, so long as she (widow) continues to reside in her husband's house, she cannot be dispossessed, even though she openly intrigues with another man or permits him to live in the house with her. This is the real custom also of the Girths and other similar castes in Kangra, though they do not admit the fact clearly".[3]

We find among the Khasas of our study in British territory that "A widow who leaves her home to live with her husband's brother as his wife is disinherited",[4] but not if she takes some man to live with her in her deceased husband's house.[5] This distinction will cease to appear illogical when we remember that a marriage results in the former case between the widow and her brother-in-law, but that in the latter the widow retains her character as such. So long as she continues to live in her husband's house mere incontinence does not affect her right to enjoy the estate.

WIDOW'S POWER OF ALIENATION

A widow, in possession of her husband's estate, can alienate it in cases of "necessity".[6] "Necessity" under

[1] K.L.C., para. 293. *See* Rattigan's *Digest*, para. 31, ordinarily no forfeiture for widow's unchasity, onus is on the party to prove custom of forfeiture.

[2] *Kangra District Gazetteer*, p. 190, Unchastity of a widow does not divest her estate unless she deserts her husband's house.

[3] Tupper, Vol. II, p. 184; Lyall, *Kangra Settlement Report*, para. 74. Raturi says in Tehri State subsequent unchastity of the widow divests a vested estate and there are numerous decisions to that effect; Raturi, p. 645.

[4] K.L.C., para. 39, Ex. (2); *see* also K.R.C., para. 19, p. 22.

[5] K.L.C., para. 39, Ex. (3).

[6] Messrs. Thulgharia, B. D. Joshi, Sah, Pant, Trivedi and Juyal on Question 4 (Widow's Estate, Appendix A).

the decisions of the courts has the same meaning as in Hindu law.[1] In the past "the widows used to apply to the District Officer for permission to alienate the estate or any part of it".[2] It was held, however, in *Mathura Datt v. Dharam Sundari and another*[3] that such an application is only a precautionary measure to prevent litigation and does not debar a subsequent suit by a reversioner. It was also decided in that case that "the widow had no right to sell more than her life interest in the property". Her powers of alienation are strictly limited.

WIDOW CAN CLAIM PARTITION

A widow is entitled to have her share separated by partition.[4] Under the Punjab customary law also "a widow may at times obtain a separation of the share to secure her a full participation of the profits'.[5]

WIDOWS TAKE JOINTLY

Two or more widows take jointly.[6] A *Dhanti* widow inherits jointly with a widow who was not a *Dhanti*. The position of a *Dhanti* wife is identical with that of married wives among the Khasas.[7] Mr. Stowell thinks that a *Dhanti* widow inherits only after a lawfully married wife, and that when there are both, the *Dhanti* is entitled only to maintenance.[7] Mr. Lall particularly enquired into the matter and found that no distinction was

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[1]Messrs. Thulgharia, B. D. Joshi, Sah, Pant, Trivedi and Juyal on Question 5, *ibid*. Under the Punjab customary law, too, the widow has powers to alienate land for necessary purposes. *See* Rattigan's *Digest*, paras. 62-63.
[2]K.R.C., para. 19, p. 22.
[3]K.R., p. 18.
[4]Messrs. Thulgharia, Gairola, Pant, Trivedi, Juyal and G. N. Joshi on Question 11 (Widow's Estate, Appendix A).
[5]Rattigan's *Digest*, para. 15.
[6]Raturi, para. 335, p. 601.
[7]K.R.C., para. 11, p. 13.

made among the people who practised *Dhanti* marriages,[1] and this harmonises with Khasa marriage law.

(3) *Stridhanam*

NO SEPARATE PROPERTY OF WOMEN AMONG THE KHASAS

We have seen that women were themselves reckoned as disposable property in pre-British days. Separate property of women is practically unknown among the Khasas, and there are no customary rules about its devolution.[2] No case is known in which the question of woman's separate property came before the courts in Kumaon.[3] From what is observed among the Khasas, the only things which would be reckoned as the separate property of Khasa women are the few ornaments possessed by those who are fairly well off. It is unanimously stated that the ornaments held by a wife are deemed to be the property of the husband and she has no right to deal with them as she likes.[4] Mr. Raturi says that ornaments given to a woman by her parents are not the property of the wife, but of the husband, if a bride-price was paid. The price of the ornaments is debited against the husband in the account kept by the bride's father, so that if a divorce takes place, then that sum is deducted from the bride-price in order to determine the amount which should be refunded to the husband.[5] There was a case

[1] K.L.C., 261.

[2] Messrs. B. D. Joshi and Trivedi, that women among the Khasas do not possess separate property. Others say that they do possess.

[3] Unanimous answers to Question 2 (Stridhan, Appendix A).

[4] Unanimous answers to Question 3 (Stridhan, Appendix A). *See* Rattigan's *Digest*, para. 26, "ornaments made up by the husband and given to the wife subsequent to marriage cannot ordinarily be claimed or disposed of by the wife in opposition to her husband's wishes."

[5] Raturi, para. 205, p. 418

in the Tehri courts.[1] Mst. Munga was the widow of respondent's father. She sought release (*chhut*) in order to be able to remarry.[2] It was contended for her that the ornaments should not be given back to the heir of her husband. The court held that this objection was ineffective.[3] It seems, however, that when marriage takes place without receiving any bride-price, the ornaments given to the bride belong to her as her separate property.[4] Mr. Lall deals with this topic quite summarily. He says :—"The special mode of devolution prescribed by the Mitakshara is not followed. It devolves like other property".[5] We can only say that the idea of separate property of women is in its infancy among the Khasas.[6] We do not find any peculiar rules about its devolution on the death of a woman. A woman holds her ornaments ordinarily subject to the control of her husband. On his death she can deal with them as she likes in Kumaon. On her death the ornaments would go to the sons and grandsons primarily and not to her daughters, and in their default to the near agnates of the husband, in the

[1] Mst. Munga *v.* Bhairbdat, Case no. 99 (16th March, 1906), quoted Raturi, p. 418.

[2] *See ante*, pp. 166-167. In the Tehri State the widow cannot remarry without permission from court. She has to pay back the marriage expenses to the heirs of her husband.

[3] In some of the Deccan castes, on a widow's marriage she has to give to her first husband's family all her property except a gift from her own family. Steele, "Law and Customs of the Hindu Castes," p. 169. *See* Vishnu, XVII, para. 22, "ornaments worn by women when their husbands were alive, the heirs shall not divide among themselves; if they divide them, they become outcasts". This verse implies practices in the past when a widow's ornaments were distributed among the heirs of the husband.

[4] Raturi, p. 419.

[5] K.L.C., para. 25. *See* para. 277, "no caste, high or low, makes any difference between Stridhanam and other property".

[6] Buolnois and Rattigan, p. 115, About the Punjab. In village communities such a thing as a woman's peculium or separate property rarely exists".

same order in which other property held by her is inherited.[1]

(4) *Maintenance*

SONS AND OTHER MALE DESCENDANTS

We exclude from consideration the purely statutory liability of a father to maintain his children.[2] Family land among the Khasas is not the absolute property of the father, but belongs to the family.[3] The sons have an indefeasible right to be maintained out of the family property, and this right arises out of their vested interest in the family property. Mr. Lall thinks that the father is the absolute owner of family land, and so limits the right of maintenance to the attainment of majority.[4] Mr. Raturi says that sons are entitled to maintenance from their father till majority, but that adult sons cannot make their father personally liable for their maintenance. If the father, however, refuses to maintain his children, they can then demand partition of the family land as an exceptional case, though partition cannot ordinarily be claimed by sons against the wishes of the father.[5] The right of adult sons and their descendants to maintenance out of the undivided family property flows from the very nature of their interest therein.

[1] *See* Rattigan's *Digest*, para. 268. The customary law prevailing amongst agricultural tribes usually regards the wife's personal property as merged in that of the husband, who is also deemed entitled to all the wife's earnings.

[2] *See* section 488, Criminal Procedure Code, Act V of 1898. *See* A. Saboriediere's *Trial of criminal cases in British India*, pp. 451—462, Chap. XXV.

[3] *Ante*, pp. 232—235.

[4] K.L.C., para. 26.

[5] Raturi, para. 491, p. 833.

As no heirs are excluded from inheritance for physical defects, there are no rules of customary law about the maintenance of disqualified heirs, such as we find in Hindu law.

UNMARRIED DAUGHTER

An unmarried daughter is entitled to be maintained from her father's property till her marriage.[1] As a bride-price is taken, her marriage never entails any great expenditure and is often a source of gain to her father or guardian.

WIFE ENTITLED TO MAINTENANCE

A wife is entitled to maintenance from her husband and his property.[2] A wife means a woman who is lawfully married and includes a *Dhanti* wife.[3] The wife is bound to observe conjugal fidelity and a husband is entitled to turn out an unchaste wife. A wife expelled for unchastity has no claim for maintenance.[4] The doctrine of starving maintenance for an unchaste wife which is sometimes recognized in Hindu law has no application to the Khasas.[5]

[1] K.L.C., para. 27.

[2] K.L.C., para. 28.

[3] Unanimous answers (excepting Mr. Sah) to Question 13 (Widow's Estate, Appendix A) to the effect that a *Dhanti* wife has a right to maintenance against the husband or his estate; *see* K.L.C., para. 28. Mr. Sah says that a *Dhanti* is not entitled, but his answers on many other topics show a decided partiality for the rules of Hindu law.

[4] Unanimous answers to Question 15 (Divorce and Maintenance, Appendix A); *see* K.L.C., para. 29.

[5] Banerji's "Marriage and Stridhan", pp. 156-157. *See* Mayne, pp. 652-653. "The obligation, if it exists, is dependent on the woman abandoning her course of vice."

WIDOW

A widow when she cannot inherit owing to the presence of other heirs, is entitled to maintenance out of the property left by her husband.[1] The right of a woman to maintenance, whether as wife or widow, exists only when she leads a chaste life.[2] The right to be maintained is thus quite different from that to inherit. A vested estate is not forfeited by a widow's unchastity,[3] but a right to maintenance is undoubtedly forfeited. The effect of unchastity on both vested inheritance and the right to maintenance is thus on the whole the same among the Khasas as in Hindu law.[4] It was pointed out by their Lordships of the Privy Council in the leading case of *Moni Ram Kolita* v. *Kherry Kolitany*[5] that "the right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession". It is interesting to observe that the fine distinction found in Hindu law between the right to be maintained and that to retain a vested inheritance has independently developed on the same lines in customary law.

RIGHT OF NON-RESIDENT FEMALES

A widow in Kumaon cannot usually claim separate maintenance. The right to maintenance ordinarily exists

[1] K.L.C., para. 28. *See* Rattigan's *Digest*, para. 16, for similar right of the widow in the Punjab.

[2] K.L.C., para. 29.

[3] *Ante*, p. 301.

[4] *See* Mayne, pp. 652—655. It may be noted that among the Khasas unchastity accompanied by leaving the husband's house causes a forfeiture of vested inheritance, K.L.C., para. 89.

[5] VII I. A., 115 at p. 151.

only so long as she remains in the family home.[1] As to a non-resident female, villagers argue, as Mr. Lall says :—"She gives the benefit of her labour and industry to one family. Why should another family be responsible for her maintenance."[2] But when a woman has been compelled to leave the home by ill-treatment or other sufficient cause, she does not forfeit her maintenance as long as she remains chaste".[1] Constomary law imposes no duty to maintain a woman who lives apart from the family, but cases of hardship or ill-treatment must needs be dealt with on their individual merits.

WIDOW'S RIGHT OF MAINTENANCE AGAINST THE LAST HUSBAND'S ESTATE

If a woman leaves her husband to become the wife of another man she forfeits all claim to the consideration of the first husband.[3] The effect of remarriage is to cause the civil death of the woman so far as her first husband's family is concerned.[4] She forfeits all claim to inherit or be maintained out of her first husband's estate. It is only when a woman is a man's wife when he dies that she has any such rights.[5]

WIDOW'S MAINTENANCE A CHARGE ON THE FAMILY PROPERTY

So far as the writer is aware, the question whether a widow's right to maintenance is a charge on the family

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[1] K.L.C., para. 29.
[2] K.L.C., para. 281.
[3] K.L.C., para. 280.
[4] Raturi, para. 361, p. 616.
[5] K.L.C., paras. 28, 280, 301. Mr. Stowell's remarks to the effect that when the elder brother's widow is taken to wife by the younger brother she is entitled, on the latter's death, to maintenance from her original husband's estate (K.R.C., para. 8, p. 9; para. 11, p. 12) are based on a misconception. Mr. Lall's careful enquiry has brought out the true rule of customary law.

property has not been before the courts in Kumaon. The extreme attachment of agriculturists to their land makes sales of land uncommon. The widow lives in the family, works for the family and receives maintenance. The fact that the widow represents her husband in the absence of male descendants and cannot usually claim separate maintenance has smoothed over the difficulties which arise elsewhere. Under the circumstances the question can arise only between a woman and either her sons, her stepsons, her Gharjawain or her husband's appointed heir, or between her and those who claim under any one of them. The nature of the right to maintenance is the same among the Khasas as in the Punjab.[1] The widow is entitled to maintenance from the estate held by her husband.[2] This maintenance, it seems, would be a charge against the whole or any part of the estate and enforceable against the heir in possession or those claiming under him.[3] It would be enforceable against a purchaser for value with notice of the widow's claim, unless the sale was for family necessity or for discharge of her husband's debts.[4] It would not be valid against a *bonâ fide* purchaser without notice of widow's claim unless that claim had been fixed and charged by decree of court or by contract on particular property.[5]

[1]Though in the Punjab the right to maintenance is not dependent on residence with the husband's family, Rattigan's *Digest*, para. 21.

[2]K.L.C., para. 28.

[3]Rattigan's *Digest*, para. 17.

[4]Rattigan's *Digest*, para. 18.

[5]Rattigan's *Digest*, para. 19.

CHAPTER X

CONCLUSION

KHASA FAMILY LAW SIMILAR TO PRIMITIVE CONDITIONS OF HINDU LAW

WE may now make a short survey of the field covered by this study. We have seen that the customary law in Kumaon is the family law of the Khasas who settled in these hills in the remote past. These rules are not mere isolated departures from Hindu law, but are a coherent system, amply meeting all the needs of a simple population. The Khasa Family law represents primitive ideas of family organization which was found among the early Aryan societies in the East and the West. It is entirely secular and free from the religious ideas which we find imported into Brahmanised Hindu law. Its freedom from the religious doctrines of Hindu law is mainly due to the fact that the Khasas were cut off from the mighty cultural evolution of the Indo-Aryans who settled in the Gangetic plains. The interest of Khasa Family law lies in the light which it incidentally throws on Hindu Historical Jurisprudence. We find in the Khasas a people whom we have good reason to believe to be an early wave of Aryan immigrants,[1] and we also find that their family

[1] *Ante*, pp. 24—27.

law in the main consists of those rules which we find in the early law books of the Hindus, some of which, however, later on became obsolete. It represents in a way the primeval cell out of which Hindu law has grown by additions and subtractions and by the introduction of religious doctrines at a later date. The main distinctions and resemblances between Brahmanised Hindu law and the customary law of the Khasas have been noticed in the preceding pages, but we may recapitulate some of them for the sake of clarity in defining the relative antiquity of Khasa customary law.

MATRIARCHAL SURVIVALS

Early Aryan society was distinctly patriarchal in the East and West and "Hindu society in vedic period was an aggregation of patriarchal families".[1] The writer does not find any traces of matri-lineal theory of descent in Hindu law. The social organization of the Aryans would make such mode of inheritance improbable. We do find, however, that in some places in the north matriarchal conditions probably prevailed. We are told that among the Arattas in the Punjab sisters' sons became heirs.[2] We have suggested that the custom of Sautia Bant was found in the Khasa law of inheritance as a survival of matriarchal times.

Some avuncular customs which have been mentioned also support this theory.[3] These matri-lineal

[1] Sarvadhikari, 214.

[2] *Mahabharata*, Karna Parva Canto XLV, v, 11-12.

[3] *Ante*, pp. 74-75; Rivers' *Social organization*, p. 94. The special relations between a man and his mother's brother when found in a patri-lineal society is a relic or survival of an antecedent state of mother-right.

traces among a patriarchal people, who we have reasons to think probably belong to an early wave of Aryan immigrants, appear to be the result of influences proceeding from some other people who had matriarchal institutions. The Chinese traveller Houen Tsang mentions Stri-Rajya (kingdom ruled by women) as situated to the north of Brahmapura.[1] We have seen that Brahmapura was the Katyuria kingdom in these hills.[2] Mr. Atkinson says that "the Amazonian kingdom lay in Tibet and was a reality". He refers to the Chinese annals which corroborate the statement of Houen Tsang.[3] The sons there took the surname of the mother.[4] It seems thus likely that the aborigines with whom the Khasas first came in contact in these hills had matriarchal institutions, and that the new comers were influenced by inter-marriage with them. As Sir Paul Vinogradoff says:—"The many stray evidences of matri-lineal arrangements within the sphere of Aryan Settlement do not necessarily imply that among the Aryans the matri-lineal slowly developed into the patri-lineal system, but rather that there has been a collision of different tribes and that the influence of the vanquished has been asserted among the conquerors. The Aryans had certainly reached the patriarchal stage before their dispersion and the few relics of ancient conditions and of the influence assigned to the mother's brother may be simply traces of matri-lineal ararngements belonging to the older Iberian, Finnish or Dravidian settlers".[5]

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[1]Beal, Vol. I, p. 199, "For ages a woman has been the ruler and so it is called 'the kingdom of the women' ".
[2]*Ante*, p. 29.
[3]Atkinson, XI, 458-459.
[4]Atkinson, XI, 459.
[5]Vinogradoff, *Historical Jurisprudence*, Vol. I, 223-224.

It is interesting to see that the customs of Patni-Bhaga—or division of the inheritance according to the number of the wives—was upheld by the Privy Council in a case from Madras in 1921.[1] Patni-Bhaga is the same as the Sautia Bant among the Khasas and "*Chundavand*" rule of division in the Punjab. Sir Thomas Strange called Patni-Bhaga an "unnatural mode of division" and noted that "it is said to prevail in the southern territories of India as much as did formerly the custom of gavelkind in Kent; thus to a certain extent, but still in the Sudra class only, superseding the law of the Sastras".[2] Mr. Ellis refers to Patni-Bhaga as a custom prevalent in many parts of Southern India.[3] He regards the deviations from the ordinary Hindu law among the Dravidian people as showing that the Brahmans "were obliged to permit many inveterate practices to continue which they found it impossible to abolish".[4] The Brahmanical law could not entirely displace the Dravidian customary law in Southern India.

In the abovementioned case their Lordships of the Privy Council observed about the Patni-Bhaga rule:— "It is possible that the matriarchal theories of the earlier inhabitants of Southern India may have led to the prevalence of this custom and caused the difficulty in the way of its being extirpated by the Brahmans. If this theory were sound it would naturally lead us to expect that the extirpation of the custom would be less effective in the lower castes".[5]

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[1] Palaniappa Chettiar *v.* Alayan Chetti and others, 48 I.A., 539.

[2] Strange's *Hindu law*, p. 205 (1864 edition).

[3] Strange's *Hindu law*, Vol. II, pp. 289—291 (1825 edition).

[4] Strange, *Elements of Hindu law* (1825), Vol. II, p. 143.

[5] 48 I.A., at p. 548.

We thus find division according to the number of wives among the lower castes in Southern India, a country where matriarchy still exists among the Nairs and other castes in Malabar, we find it in the Punjab, where matriarchy was alleged to exist among the Arattas, and among the Khasas who still have some avuncular customs. The custom of Sautia Bant thus seems to have originated from matri-lineal ideas of succession.

TEKWA UNION AND NIYOG

Tekwa union resembles to some extent Niyog or direction to the wife or widow to raise issue for her husband.[1] It is not confined to childless widows and the purpose is secular and not spiritual. In Hindu law Niyog at the time of Manu was confined to childless widows, and the avowed purpose was the procreation of male children for the spiritual salvation of the deceased. It may well be that the limitations imposed on Niyog in the Dharma-Sastras had a reformative purpose, and that the association of a widow with her brother-in-law prior to these treaties may have been free and unrestricted. Messrs. West and Majid remark on the subject:—"The rules, preserved in Manu, IX, 58 ff, for regulating the intercourse with the childless wife or widow of a brother, point back to a previous institution which the gradual refinement of sensibility had thus ameliorated. The limitation of the practice to the lower castes mentioned by Manu does not occur in Narada, who further allows this connection even with a woman who has had children, if she is 'respectable and free from lust and passion'."[2]

[1] *Ante*, pp. 100—103.
[2] West and Majid, p. 276, foot-note (*m*).

The son of an appointed wife or Kshetraja son ranked very high in the list of heirs in early Hindu law.[1] The legal consequence of a Tekwa union, too, is the affiliation of the child to the husband of the widow.[2] We find that the practice of raising issue on the wife of a brother prevailed in Orissa in the time of Mr. Colebrooke.[3] Mr. Sarvadhikari refers to the Statements of Jagannatha and Colebrooke and says :— "The practice is highly reprobated among the higher classes in Orissa, and if it exists among the lower classes at all, it exists in such a form that it is of no importance whatever from a juridical point of view".[4] He adds that though the practice of Niyoga is obsolete among the rich classes, it has probably assumed the modernized form of "marriage with an elder brother's widow".[5] We have seen that the Khasa Family law makes a distinction between association with a brother's widow as husband on the one hand and as Tekwa on the other. In the latter case the widow remains in her deceased husband's house and the children are not affiliated in law to their natural father.[6] They inherit the estate of their mother's husband. The growing moral consciousness of the people is offended by the custom, and it is getting obsolete in some parts. The custom of keeping a Tekwa is still prevalent in Garhwal. There the land of a sonless person reverted to the Raja and not to the

[1] *See Smruti Chandrika*, Chapter X, 3, about the right of Kshetraja son to inherit the property of her mother's husband to whom he was affiliated. Mayne, Table on p. 81.
[2] *Ante*, p. 95.
[3] 3 Colebrooke's *Digest*, 276, 289, "In the country of Orissa it is still the practice with some people to raise up issue on the wife of a brother".
[4] Sarvadhikari, 528.
[5] Sarvadhikari, p. 528, foot-note (2).
[6] Kirpal Singh *v.* Partab Singh, K. R., 12.

agnates [1] It seems that the custom was probably perpetuated to save the village land from escheat to the Raja.

MARRIAGE IS SECULAR AND PRIMITIVE

Marriage among the Khasas is not a sacrament. No religious ceremonies are necessary for a valid marriage.[2] It is freely dissolvable by mutual consent at any time.[3] A wife also can terminate the marriage subject to the payment of marriage expenses.[4] We have noticed the similarity between the marriage customs of the Khasas and those in the Kangra hills. In *Pirthi Singh (minor)* v. *Bhola and another*[5] Rattigan, J., observed :—"It is well known that Kangra stands apart from the rest of the Punjab in the preservation of these primitive organizations of the family which successive waves of conquest and intercourse with neighbouring peoples have tended to obliterate to a large extent in the plains of the Punjab proper. . . Indeed, the history of the primitive tribes of the Punjab merely teaches us what we find also in the history of Europe down to the Council of Trent (1563 A.D.) that marriage, apart from its sacramental character, is a mere civil contract made *per verba de presenti* or *per verba de futuro Subsequente Copula* and requiring no religious or other ceremony to complete it. The Hindus law itself contains a trace of this early notion, common to most nations, in the Gadharba

[1] "Mountaineer", p. 201; *ante*, p. 112.
[2] *Ante*, p. 123.
[3] *Ante*, p. 152.
[4] *Ante*, pp. 155—158.
[5] No. 29 P.R. of 1883 at p. 89. *See* Baudhayana, I. 11, 20, 16, "Some recommend the Gandharba rite for all castes, because it is based on mutual affection". It shows that the secular Gandharba marriage was not prohibited at one time in the case of the Brahmanas.

form of marriage, whih originally depended merely upon the agrement of the contracting parties, though in the age of Devala nuptial rites were said to be ordained for it (*Colebrooke's Digest, Bk.* V 500). We find a survival of it also in the law of Scotland which recognizes a long continued course of open cohabitation of the parties in the avowed character of husband and wife as sufficient to constitute marriage". We noticed the primitive and secular character of Khasa marriage and how far it resembles a "Free Roman marriage".[1] The Gandharba form of marriage in Hindu law is probably the survival of an earlier secular marriage.

KAMASAL SON AND JHANTELA

The marital tie is easily determined among the Khasas, and remarriages of widowed and divorced women are common. We have thus some kinds of sons recognized by the customary law which have long been obsolete in Hindu law. Widow marriage and divorce were practised in early times by the Hindus.[2] The result was the recognition of a "Paunarbhava" son. "He whom a woman, either forsaken by her lord or a widow, conceived by a second husband whom she took by her own desire, is called a 'Paunarbhava' or 'the son of a woman twice married'".[3] We find, however, that the Hindus did not favour widow marriage or divorce, and the rights of "the son of a woman twice married" were inferior to those of an "Aurasa" son.[4] The Khasas have no objection to divorce and widow

[1] *Ante*, pp. 146—149.
[2] *Ante*, pp. 158-159.
[3] *Smruti Chandrika*, Chap. X, section 4, para. 9.
[4] Mayne, p. 81.

marriage. The son by a *Dhanti* wife thus inherits equally with an "Asal" son.[1]

Divorce raises the problem of the custody and care of infants. We have seen how the Khasas have met this social necessity. The infant (i.e. *Jhantela* son) who follows his mother is affiliated to the second husband of his mother and inherits equally with his other sons.[2] His affiliation is like that of a Kanina or Sahodha son in Hindu law.[3]

AGNATIC KINSHIP AND EXCLUSION OF DAUGHTERS FROM SUCCESSION

The recognition of agnatic kinship for succession (with practically no recognition of cognates) shows the patriarchal nature of the Khasa social organization.[4] Daughters and their sons are excluded from inheritance among the Khasas just as they were excluded among the Vedic Aryans.[5] We have seen that a daughter can take her father's estate only when she lives in her father's house, and the institution of Gharjawain is analogous to the "Special appointment of a daughter."[6]

The interest of this institution to a student of Hindu law lies in its being the means by which daughters and their sons came to occupy a place in the list of heirs

[1] K.L.C., para. 14.

[2] *Ante*, p. 173.

[3] Mayne, para. 74.

[4] Maine, *Early Laws and Custom*, p. 244, "Where there is agnation there must almost certainly have been paternal power".

[5] Mayne, para. 517; Sarvadhikari, 271—277.

[6] *Ante*, pp. 241—243; Sarvadhikari, 6. 271, "From the earliest times an exception was made in the case of an appointed daughter, and her right was almost universally acknowledged by the ancient legislators of India."

among a people who recognized only agnatic relationship for purposes of inheritance.[1]

The writer thinks that the institution of "Gharjawain" originated in an attempt to reconcile the claims of a daughter with the interest of the village community in keeping a stranger away.[2] Sir Henry Maine's conclusions about ancient societies throw much light on the institution. We are told that in primitive law relationship is coterminous with *patriae-potestas*, and a person could not be under two distinct *patria-potestates* at the same time.[3] The existnec of exogamy in a way explains the exclusion of daughters. The married daughter ceased to be under the power of her father. When she went to live with her husband, her children belonged to another stock. But when she stayed with her father, the case was different. She remained under his power, and so the strict rule of agnatic succession could be relaxed.[4]

AGNATIC SUCCESSION

Agnatic succession in the Khasa customary law is an archaic Aryan institution. Relationship through females was not recognized for purposes of succession in early law, as the whole organization of the family would be broken if its property were allowed to pass through

[1] *See* Bhau Nanaji Utpat *v.* Sundra Bai, 11 Bom., H.C.R., 249 at p. 274, where West, J., says that the right of daughters as heir in Hindu law grew out of "appointment." Maine, *Early Law and Custom*, p. 94; *ante*, 242-243.

[2] *Ante*, p. 240.

[3] Maine, *Ancient law*, 155.

[4] Tupper, Vol. II, pp. 57, 75.

females to persons of a different family or tribe. We find that collateral relations through females did not inherit in early Hindu law.[1] Even under the Mitakshara succession is mainly agnatic.[2] Five females only are recognized as heirs.[3]

With the exception of a daughter's son, all cognates under the Mitakshara have but a remote expectancy, which for practical purposes is useless. They cannot take so long as any agnate can be ascertained.[4] For our purposes it is sufficient to note that strict agnatic succession, which we observe among the Khasas and in the Punjab, is well established in early Hindu law.

THE KHASA FAMILY LAW AND THE PUNJAB CUSTOMARY LAW

This study of the different topics of Khasa Family law has brought out its identity with the main features of the Punjab customary law, and particularly with the customary law of some Jat tribes and of the dwellers in the Kangra hills. The minor variations, too, have been noticed.[5] It seems to the writer that this remarkable coincidence is not fortuitous. The main purpose of customary law in each case is "to secure the common interests of a body of clansmen agnatically related to each other in village lands, which provide the subsistence of the group, and must not leave its possession."[6] Both

[1]Mayne, para. 514; Sarvadhikari, p. 288. Yajna-Valkya first recognized the Bandhus as heirs.

[2]Mayne, para. 512.

[3]Mayne, para. 517, p. 751.

[4]Mitakshara, Chapter II, section VI, para. 1, "on failure of gentiles, the cognates are heirs" Agnates take so long as consanguinity is ascertainable. Mitakshara, Chapter II, section V, para. 6.

[5]It may be noticed that customary law in the Punjab varies among different tribes, and it cannot be said that a rule is applicable to all persons. The identity is with the main features of customary law.

[6]Tupper, Vol. II, p. 77.

represent early Aryan usages and have been free from the religious doctrines of Hindu law. In Hindu law the chief attempt is to preserve the joint-family, but in Kumaon and in the Punjab customary rules operate towards the preservation of the village community. Mr. Tupper says about the Punjab customary law :— "Not a single sacerdotal reason would be either given for any rule, or in fact, with one slight exception, influence any practice. The whole system would be founded on the practical necessities of the case. Save for small grants to religious persons or places of the village by way of alms, there would never be any motive but a secular one."[1] These remarks equally hold good for the Khasa Family law.

WHERE AND WHY THE TWO DIFFER

The striking difference between the Punjab customary law and the Khasa customary law at the present day lies in the powers of alienation that are possessed by an individual landholder. It probably arises from a historical cause. Kumaon came under British rule in 1815. The science of comparative and historical jurisprudence was unknown even among the Western Jurists at that time.[2] Sir Henry Maine called attention to village communities and kindred subjects only in the early sixties of the last century. We cannot wonder if collective landholding and its legal implications were not noticed in the early days of British rule. A hissadar was, therefore, considered to be a full owner of his share

[1] Tupper, Vol. II, 76-77.

[2] *See* Vinogradoff, *Encyclopaedia Britannica*—comparative jurisprudence, Vol. XV, p. 580 (11th edition). Comparative jurisprudence dates from the 19th century, and especially from its second half.

in the village land. After looking at the purposive character of the customary law among the clannish Khasas, the legal ideas disclosed thereby, and the absence of sale in the past, except in case of extreme necessity, we are inclined to say that full ownership was not recognized under the customary law. The fact was not appreciated in the early days of British rule as the juridical nature of village communities was unfamiliar at that time. The history of proprietary right has been different in Kumaon and in the Punjab, so the rules of customary law regarding alienation by a landowner have not been equally recognized in the two places.

It is unfortunate that the records of nearly all the cases decided up to the latter part of Sir Henry Ramsay's commissionership were destroyed.[1] Valuable material has thus been lost. We could perhaps have gathered from some of them how the people viewed alienations of land in the beginning, and what claims agnates made.[2] The basic juristic conception that ancestral land should not be diverted from agnates explains the suits in the Tehri State, in which near agnates challenged gifts of land by sonless landholders to their daughters.[3] The courts, however, upheld the gifts on the ground that Hindu law allowed them.[4] A Gharjawain cannot be kept in the Tehri State by a sonless land-owner without the consent of all agnates within three degrees.[5] It shows in a way

[1] K.L.T., p. v.

[2] Khasas call pre-emption *wirasat*, i.e. a sort of inheritance probably indicating the idea that the land should not have been diverted from presumptive heirs and that they claim it as such.

[3] *Ante*, p. 246; Raturi, p. 361.

[4] Raturi, p. 361.

[5] Raturi, p. 360.

the vested nature of a reversioner's interest in the ancestral land.

In the Punjab according to Clark, C. J., the right of the reversionary heir, under the customary law, amounts to a right in property the enjoyment of which is deferred. It is a vested interest in the sense that person in whom it inheres has a present fixed right to its future enjoyment.[1] Among the agriculturists the person in possession of ancestral landed property is not a full owner and is not entitled "to defeat the expectations of those who are deemed to have a residuary interest and who would take the property if the owner died without disposing of it."[2] In early Hindu law, too, "we do find scattered texts which evidence the continuance of the village system, by showing that the rights of a family in their property were limited by the rights of others outside the family."[3] Some texts[4] in the Mitakshara appear to relate back to the time when the reversioners had the right "to forbid acts by which that reversion might be affected".[5] The text of Usanas that land is "indivisible among kinsmen even to the thousandth degree",[6] the text of Vrihaspati that "separated kinsmen, as those who are unseparated, are equal in respect of immovables, for one has not power over the whole to make a gift, sale or mortgage",[7] and the text which says that land passes by consent of kinsmen[8] indicate practices which are

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[1]Sadhu Singh *v.* Secretary of State for India and others, 18 P. R., 1908, at p. 118.
[2]Gujar *v.* Sham Das, no. 107 P. R., 1887.
[3]Mayne, para. 236; Jolly, 88-89.
[4]Mitakshara, Chapter I ,i. 30, 31; Mitakshara, I, iv, 26.
[5]Mayne, para. 236.
[6]Mitakshara, I, iv, 26.
[7]Mitakshara, 1, i, 30.
[8]Mitakshara, I, i, 31.

found in the Punjab customary law. Vijnaneswara, however, explains away the texts to harmonize them probably with the law of his day. Mayne says :—"But it is more probable that they were once literal statements of a law which in his time had ceased to exist".[1] Mr. Bhattacharyya points out that ownership of land has passed through successive stages among the Hindus as it did in other parts of the world; "we have first the absolute prohibitions of the sale of immovable property. . . . . we have then the gradual decay of this principle of inalienability. . . . . we have also indications of the gradual transformations undergone by the proprietary right, which was at first vested in the whole village, then in the smaller body of Jnatis, then in the still smaller body of Dayadas, till ultimately the individual became clothed with full dominion, inclusive of the right of using the subject of proprietary right absolutely at his own pleasure."[2]

Mr. Traill observed that the people of Kumaon did not sell land except under extreme necessity. He thought it was due to the extreme attachment of the landholders to their estate.[3] It seems to the writer that absence of sales otherwise than for necessity was also due to the idea that individual ownership was subject to the residuary interest of the agnates, as we find in the Punjab and in early Hindu law. It may be noted that if sale of land is limited to extreme necessity, as was the case when Mr. Trail wrote, then the customary law in Kumaon would be the same as the customary law of the agriculturists in the

[1]Mayne, p. 318, foot-note (*p*). *See* K. K. Bhattacharya, "The Joint Hindu Family", pp. 97, 103—105.
[2]Bhattacharyya, p. 105.
[3]Batten's Report, p. 32.

Punjab.[1] The hissadar has been recognized as full owner for over a century now in Kumaon as against his agnates. They have no power left to challenge alienations of ancestral land such as the agriculturists in the Punjab possess.[1] Agnates, when co-sharers, have merely the right to get back the land sold by means of pre-emption.[2] The change, however, has been progressive in the evolution of property rights. Male descendants alone can object to alienations of ancestral land made without necessity.[3] Communal bonds regarding alienations have largely vanished, but the family bonds remain.

CUSTOMARY LAW SUGGESTS ARYAN ORIGIN OF THE KHASAS

Sir Herbert Risley says that there exist three tests in India for ethnology, i.e. physical characters, linguistic characters, and religious and social usages.[4] The Khasas have Aryan features[5] and use an Aryan language.[6] This study has brought out the remarkable identity between the customary law of the Khasas and the customary law of the early Indo-Aryans. The conclusion about Khasa ethnology is thus supported by a study of their social institutions.

KHASA LAW AND HINDU LAW

Hindu law as known to us deals with a society in which village communities had ceased to exist for practical purposes. The lowest unit is the joint-family.[7] One

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[1] Rattigan's *Digest*, para. 59.
[2] K.L.T., 45.
[3] *Ante*, p. 233.
[4] Risley, *The people of India*, p. 6.
[5] *Ante*, pp. 19-20.
[6] *Ante*, p. 20.
[7] Jolly, p. 89.

of the contributory causes for this disintegration may be the contact of two peoples with distinct ethnic affinities. In the absence of external intergrating forces disruption of village communities is a likely event where the village and the clan are not vitally compact. In a typical Khasa village the landholders are all agnates with strong clannish feeling, who take their surnames from the village of their origin.[1] The Khasa customary law thus meets the social necessities of a group bound by ties of agnation and of land, while "Hindu law is the product of a stage of society that has passed beyond the stage of the communal village, or of the village held on ancestral shares. It seems to be designed throughout for families joint as amongst their members, but family with family in severalty. The bond of the village and the bond of the clan and tribe have disappeared".[2] "The Hindu law", says Tupper, "extravagantly exalts the Brahman; it gives sacerdotal reasons for secular rules; it draws the prohibited degrees from kinship, it is true, but after that from caste, not from clanship; it is silent, so far as I am aware, about pre-emption, the rules preventing alienation by members of the undivided family taking the place of that; it has a mass of learning about acquired and ancestral property, about associated and dissociated brethren; its rules of partition refer to the family property, not to village waste or the village arable lands. In the order of heirs the village community is not enumerated."[3] In the Khasa Family law marriage, adoption and succession are free from the religious doctrines of Hindu law. "It is essentially", in the words of Tupper,

[1]Pauw, para. 33; p. 31; K.L.T., p. 31.
[2]Tupper, Vol. II, 86.
[3]Tupper, Vol. II, 87.

"unsacerdotal, unsacramental and secular" and "the principles of divergence lie in the elevation of a priestly class and the obsolescence of tribal and village organization."[1]

We close our study of Khasa Family law by repeating that the Mitakshara and other Hindu law treatises have no application to the Khasas. It represents legal ideas of family and property rights which are much older than the Brahmanised treatises. It is a simpler version of Hindu law, earlier in date, and free from the religious innovations of the Brahmans. Messrs. Roe and Rattigan have said of Hindu agriculturists in the Punjab that "If he has ever heard of the 'Dharma-Sastra' at all, which is very improbable, he has only done so as a Spanish peasant may have heard of the Bible; he knows nothing of its contents and principles, nor could the Brahman himself enlighten him".[2] The Khasa is equally ignorant of them.

The inapplicability of Hindu law to the Khasas cannot be too strongly emphasized.[3] It is recognized that the law of the Brahmans has not displaced the customary law of the masses in many parts of India.[4] Perhaps the Hindu sages themselves had no illusions on the subject that their doctrines had not permeated or could not permeate all the strata of Hindu society; hence the dictum "immemorial usage is transcendent law".[5] It may

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[1]Tupper, Vol. II, 87.

[2]Roe and Rattigan, p. 11; *cf.* the remarks of Mr. Wyndham in Fateh Singh *v.* Gabar Singh (K.R., 47) at p. 51, "The persons are residents of Northern Garhwal and probably have never heard of the Mitakshara law".

[3]*Ante*, pp. 42-43.

[4]Mayne, para. 2.

[5]Manu, I, paras. 108—110; Yajna-Valkya, I, 342.

be said that the customary law of the Indo-Aryans is moulded from time to time under the guidance of the different sages, and that the Dharma-Sastras probably represent party the living customary law and partly the ideals of a particular law giver[1]. To the student of the evolution of Hindu law the Khasa customary law is an important link in the process of growth. The Mitakshara or other Hindu codes resemble it because of their probable common origin. Khasa law is as old as or older than the "Divinely inspired" law, which failed to displace it in the hills. We may say that the Khasa Family law is not a mangled version of Brahmanic law, but that it substantially represents the rough hewn figure which the Hindu sages by their skilful chiselling and religious polish have presented to the world as the elegant present-day Brahmanised law.

[1] *See* Maine, *Ancient law*, p. 15.

APPENDIX A

NOTE.—All questions relate to Khasas (i.e. Khas-Brahmans or Khas-Rajputs, except where otherwise specified)

ADOPTION

1. Can a widow adopt at her own pleasure?

2. Can she do so with the consent of reversioners? If so, is the consent of the immediate reversioners only or that of the entire body of adult reversioners needed?

3. Can a widow adopt in pursuance of the consent of her husband given before death?

4. Is such consent ever sought or considered effective?

5. Should the adoptee be an agnate necessarily or preferably?

6. Is there any instance known where any person other than an agnate was adopted?

7. Can a Khasiya-Rajput adopt a Khas-Brahman boy or *vice versa*?

8. Must the adoptee at least belong to the clan or tribe?

9. Is a daughter's son or sister's son adopted among Khasiyas or Doms or the high castes?

10. Is the *biradari* (brotherhood) collected and feasted more or less at the time of adoption?

11. Does the adopter declare his intention to adopt to the *biradari*?

*12. When three were no adoption deeds in the past, were 10 and 11, i.e. declaration of intention and presentation of the adopted child to the *biradari*, deemed necessary? If not, how was an adoption made, and what ceremonies or acts were essential for a valid adoption?

13. Is the adoptee ordinarily an adult male?

14. Is the adoption of mere boys very rare, if not non-existent, among Khasiya agriculturists?

15. Can an adoption be made among Khasiyas by (1) lunatic, (2) minor, (3) impotent person, (4) leper, (5) a son in the lifetime of his father with or without the latter's consent?

*16. Must a man adopt a child who is one degree below him in the agnatic group, (*a*) can he adopt his brother or cousin, (*b*) can he adopt his father's brother or cousins or any person higher up in the pedigree table?

*17. Can a man adopt a person older than himself?

*18. Must there be any difference in age between the adopter and the adopted; if so, what is the minimum limit?

19. Does the adopted son succeed to Khaikari right in *katcha* or *pucca* Khaikari villages?

*20. Does the adopted son lose his rights of inheritance to his natural mother as regards her *stridhan*?

*21. How far the Khasas observe the Sastric injunctions that "a person whose mother could not have been married by the adoptive father cannot be adopted as a son"? Please note *particularly*: *A's* mother's sister's daughter is married to his uncle's son and has a son *B*. Can *A* adopt his nephew and agnate *B*?

22. Does a validly adopted son rank as a natural son and succeed to collaterals too?

23. Can a boy be adopted without the consent of his natural father, or must the father hand over the boy formally?

24. Can a widow give her son in adoption? If not, can she do so with the consent of near agnates of the boy?

GHARJAWAIN.

*1. Could a Gharjawain and such daughter or their sons inherit in the past or the early days of British rule without any formal deed of gift?

*2. Was the consent of the agnates or village community needed in the past for keeping a Gharjawain by a man?

3. Can the reversioners object to the succession of a Gharjawain when he got possession of immovable property from his father-in-law in the latter's lifetime without any formal deed of gift? Could they do so in the past?

4. When there are no male descendants of a Gharjawain, then does the property revert to the heirs of his father-in-law?

5. Can a Gharjawain who got land by gift or succession make an adoption and thus defeat the right of the donor's reversioners?

6. Can a Gharjawain keep a Gharjawain himself and make a gift of property to him?

7. When the second Gharjawain's male line becomes extinct, does the property revert to the heirs of the original donor?

*8. If a son is born to the father-in-law after a Gharjawain is kept or gift made to him, what are the rights of the after-born son in the property?

STRIDHAN (EXCLUDING PROSTITUTES).

1. Do women possess any separate property of their own in Kumaon?

2. Have there been any cases in which the devolution of a woman's exclusive property was before the courts, and were any rules laid down in them? If so, what?

3. Are the ornaments, etc., of a woman reckoned the property of her husband or her separate property to do as she likes with them without any control of the husband?

*4. In case any separate property is held by a woman please describe the *order* of its devolution, noting particularly: (*a*) Is a daughter preferred, excluded or reckoned as a son? (*b*) Is there any distinction between a married or unmarried daughter? (*c*) In case of a deceased daughter do her children

take her share? (*d*) Do sisters share with the brothers? (*e*) Preferential rights of husband, father, mother or their agnates. (*f*) Rights of illegitimate children, do they take equally with legitimate ones? (*g*) Does the *Dhant* inherit her separate estate?

Marriage.

*1. Enumerate the relatives with whom marriage is unlawful.

2. (*a*) Can a man marry the daughter of any agnate? If so, what are the prohibited degrees?

(*b*) Do the Khasas have a *gotra*? If so, is it the same for all members of the tribe?

(*c*) Can a man marry within the *gotra*?

*3. How far are the daughters of mother's father's agnates avoided?

4. Doms (*a*) What relations are prohibited in marriage? or (*b*) how far are the daughters of one's agnates or mother's father's agnates avoided?

*5. Do the restrictions of agnatic and cognatic relationship which apply in the case of marriage apply to the choice of a *Dhanti* wife too, i.e. can a man keep as a lawful *Dhanti* wife, whose sons are reckoned as legitimate sons, a woman whom he could not marry?

6. Can Khas-Rajput marry a Khas-Brahman and a Khas-Brahman marry a Khas-Rajputani? Is the rule the same for *Dhanti* marriages?

7. Are marriages in one's own village or that of the mother's parents preferred or avoided by Khasas or Doms?

8. In castes in which remarriage of widows is allowed by custom, what is the particular ceremony or act which makes the transaction complete? (*a*) What differentiates a *Dhanti* from a mere concubine? (*b*) Is mere consent to cohabit with each other (without any public act to show that the cohabitation is as husband or wife) sufficient?

9. Is there any public declaration or act when the elder :other's widow goes to live with her brother-in-law?

10. Should the widow wait for any period after the eath of her husband before she remarries?

11. Is there a presumption that a woman is a *Dhanti* :om mere cohabitation?

*12. Do the younger brothers consider their marriage :ith the elder brother's widow a *right* or a *duty*? Do elder rothers, too, regard it their right to marry younger brother's :idow?

*13. Can a man take a lawful *Dhanti* among Khasas or)oms any of the following women :—(1) step-mother; (2) mo-ıer-in-law; (3) maternal or paternal uncle's wife or widow; (4) ister's son's wife or widow; (5) a step-mother's daughter by person other than his father; is there any difference when he daughter came to his father's house with the step-mother; 3) daughter-in-law; (7) brother's son's wife or widow; (8) ounger brother's wife or widow?

14. Is bride-price mostly taken by the father or guar-lians of the girl?

15. Irrespective of what the courts say or do—

(*a*) Does custom or public opinion demand that a man who marries a woman without the consent of the father or his heirs should pay a fair bride-price for her to them?

(*b*) When a man died indebted with no assets leaving a widow for whom he paid bride-price, did custom require that the man who takes the widow as *Dhanti* should pay a fair sum for her to the creditor?

(*c*) When a boy dies after a girl has been betrothed to him and her father has received the bride-price, does custom require that she should be married to some one else in the family?

In case of refusal, is the father made liable for compensation or at least for the refund of the money received?

16. Is rice cooked by a lawful *Dhanti* wife eaten by the *biradari*?

17. Is the wife sometimes given by gift to Brahmans on occasions like solar eclipse at Bageswar and then at once paid for in cash and received back?

18. Who are entitled to give a minor girl in marriage or to marry a minor boy?

19. How does marriage by an unauthorized person affect the transaction?

DIVORCE AND MAINTENANCE.

*1. Is the wife entitled to leave her husband at her pleasure if she is dissatisfied, subject to the payment of marriage expenses to the deserted husband by any person who takes her as *Dhanti*?

2. Can a *Dhanti* leave her husband at her pleasure on like condition?

3. Can a woman always leave her husband with his consent and take another husband?

4. How far do (1) leprosy, (2) impotency, (3) excommunication from caste, (4) apostacy justify a wife or *Dhanti* in leaving her husband without his consent and take another husband?

5. Is the second husband liable for marriage expenses to the first one in any case contemplated in (4)?

6. In cases mentioned in no. (4) above if the wife or *Dhanti* does not remarry, can she make the husband liable for maintenance and refuse him her society and services?

7. Are *ladawas* of wives executed on payment of marriage expenses by the second husband?

8. Are not cases of seduction under section 498, I.P.C., pretty often compromised? Do they end mostly in *ladawas* (deeds of release)?

9. Is exchange of wives practised by some people with the consent of wives, and are the issues of exchanged wives deemed legitimate for succession?

10. Are civil suits for restitution of conjugal rights brought? Have they ever succeeded against the wishes of the woman? Were such claims even decreed by courts, or did they end in compromise?

11. Can a husband leave his wife or *Dhanti* at his pleasure and against her wish without being liable for maintenance in case she is not unchaste?

12. A man deserts his wife and goes away. She marries soon after. Is there any objection under the custom? Can the first husband claim back the wife or bride-price?

13. Is a wife bound by custom to wait for a husband who had not been heard of? If so, for what time?

14. If a wife commits adultery with her younger brother-in-law, does she lose her right to maintenance, and does it entitle the husband to turn her out?

15. Has the wife expelled for unchastity any claim for maintenance?

16. Has the deserted husband ever sued successfully for the refund of his marriage expenses?

WIDOW'S ESTATE.

1. Does a widow (including a *Dhanti*) take a life estate in her husband's property in the absence of her sons?

*2. Is the widow entitled only to the estate which had vested in her husband or even the estate which would have vested in him if he were alive at the time inheritance opens?

PROBLEM 1.—*A* owns an ancestral estate. He has three sons, *B*, *C*, *D*, all living jointly. *B* dies leaving a widow. Is the widow entitled to any interest in the property after *A's* death? Is she entitled to maintenance? If so, to what extent?

PROBLEM 2.—*A* dies leaving two first cousins and a widow of a third first cousin. Does the widow get a share in *A's* estate?

3. Is widow's right to inherit in lieu of maintenance?

4. Is widow entitled to alienate her husband's estate? If so, on what grounds?

5. What is "necessity" within the meaning of Kumaon custom?

6. Does a woman who came in possession of her son's ancestral estate on his death forfeit the same by her remarriage?

*7. Does a woman who has remarried at all inherit the ancestral land of her son on his death?

8. E.g., *A* dies leaving a widow *B* and a son *C* by her. *C* inherits the estate. *B* remarries. When *C* dies without any nearer heirs than *B*, then does she inherit the land which belonged to *A* originally, or will it go to distant heirs?

9. In case the answer to 7 and 8 be against the woman, is the rule different for movables or the self-acquired property of the son?

10. Does a widow forfeit her estate even when she takes her husband's brother as husband, and can she inherit as *Dhanti* of her brother-in-law?

Is there any difference—

(*a*) When she leaves her husband's house and goes to her brother-in-law's house?

(*b*) When she continues to live in her deceased husband's house, is the child born of such connection deemed the child of the deceased husband and not of the younger brother?

11. Can a widow claim partition against other joint hissadars or co-parceners of her husband?

12. What is the effect of unchastity on a widow's estate? Is there any difference between (1) secret and occasional unchastity, (2) open and general unchastity?

13. Has the *Dhanti* wife a right to maintenance against her husband or his estate?

*14. Bearing in mind that the general rule is about the succession of male agnates and the right of widow is most probably in lieu of maintenance, please find out if the mother takes as such or as the widow of the father.

NOTE.—It will be profitable to find out if a step-mother succeeds or not to the *ancestral* land, and does she do so jointly with the natural mother?

*15. Do the grounds on which a widow forfeits her estate entail forfeiture in the case of a woman who succeeds as mother or step-mother of a person?

INHERITANCE TO HISSADARI.

1. Is a Tekwa kept by a sonless widow only; can a widow who has sons keep a Tekwa too?

2. Are the sons by the Tekwa affiliated to the deceased husband, and do they inherit the latter's property equally with their uterine brothers, i.e. the other sons of the deceased?

*3. When an *enceinte* woman marries another man, is the child born reckoned as a legitimate child of the second husband?

4. When a wife or widow goes to another man as *Dhanti* with unweaned or weaned child, is such child considered as the legitimate child of the second husband? What is the maximum age limit for such affiliation? In case no affiliation takes place by custom, does such son inherit to his own father?

*5. Is representation fully observed in lineal succession? Do all the male descendants, however remote, take *per stirpes* or is representation confined to great-grandsons only?

*6. Is representation observed similarly in collateral succession too? Does a person always take the share his ancestor would have taken if he had survived the propositus, or does the rule of nearer excluding the more remote apply?

7. Please note the order in which the following relations would succeed to ancestral land or to self-acquired property if there be a distinction between the two :—(1) Father, (2) Brothers [(i) full, (ii) consanguine, and (iii) uterine], (3) Brother's son or grandson, (4) Mother, (5) Step-mother, (6) Uncle, (7) Uncle's son or grandson, (8) Grandmother, (9) Step-grandmother. Note particularly if a step-mother can even be an heir under the custom; would distant agnates exclude her when the property is ancestral and immovable? Is the rule the same for movable or self-acquired?

8. Are all the agnates 5 or 6 degrees removed entitled to succeed, or does agnatic relationship for purposes of succession extend to the descendants of a common great-grandfather and after that to panch hissadars?

9. What is the limit of agnation for collateral succession? Taking the analogy of Hindu law, is it confined to 3, 7 or 14 degrees or ascertainable descent from a common ancestor?

10. Is Sautia Bant ever alleged or noticed in a class in which there is no custom of Levirate (i.e. taking a brother's widow as wife)?

11. How is agnatic relationship counted? Who are agnates up to third degree? Do they mean all the descendants of a common great-grandfather?

12. What are the rights of an unmarried orphan daughter to inherit her father's estate? Is she entitled to retain the estate till married in lieu of maintenance?

13. Is there any custom in any village which shows any partiality to the youngest child like Jethon to the eldest in the distribution of the land or homestead?

*14. Do all agnates or even the panch hissadars erclude a daughter or her son? Is there any distinction about the heritable rights of the daughter or of her son over (*a*) immovable or ancestral property, (*b*) movable or self-acquired property of the deceased?

*15. If all agnates do not exclude the daughter, what is the limit of those who exclude? Are daughters excluded among the high caste Brahmans and Rajputs?

16. Has the son by a lawful *Dhanti* the same rights of collateral succession as the son by married woman? Explain the difference, if any.

Exclusion from inheritance.

1. Do apostacy, excommunication from caste or adoption of a religious order exclude from inheritance?

2. Did apostacy and excommunication disqualify from inheritance in the past or entail forfeiture of a vested estate, and do they do so now?

3. Is a leper disqualified as an heir, or does leprosy entail forfeiture of a vested estate?

4. Has a leper only life estate and no power of alienation?

5. Are *pangus* (limbless) and congenital idiots excluded by custom from inheritance?

Power of disposal.

1. Can you say if before the British rule a landholder could transfer the land in a village against the wishes of the village community?

2. Have you come across any sale-deeds executed before 1815?

3. Are such deeds in the form of a mortgage?

4. Is there not a sentiment against alienation of ancestral land among the people even at the present day?

5. If the village community or agnates controlled the power of alienation, was not a relaxation made in case of small gifts of land for pious purposes or of real necessity?

6. Was an exception also made in case of a Gharjawain?

7. Is delivery of possession considered necessary to complete the gift?

8. Does local custom recognize *donatio mortis causa?*

*9. Sautia Bant being excepted, is the father entitled to make an unfair division of property among his sons *inter vivos* or by will? Is there any distinction between movable or immovable, ancestral or self-acquired?

10. Do excommunication, apostacy, adoption or religious order, leprosy affect the father's rights over ancestral or self-acquired property?

*11. Can a father among Khasas or the high castes alienate ancestral land for immoral or gaming debts?

*12. Can a father make a gift of ancestral land to a prostitute or his mistress to the detriment of the sons?

13. Can a father make a gift of entire ancestral land for religious or pious purposes?

14. How should three degrees in pre-emption cases be counted? Do they include all the descendants of a common great-grandfather, i.e. the group which forms the co-parcenary of Hindu law?

15. Can a man marry or take as *Dhanti* simultaneously or afterwards his wife's sister?

APPENDIX B.

TABLE I.

FROM CENSUS OF INDIA, 1921.

(Volume XVI, Part II, page 448 and page 454.)

Area and population of tahsils and Brahmanic-Hindu and Muhammadan population provincial table no. 1 *and figures of Hindu and Muhammadan population from provincial table no.* 2.

	Area in square miles.	Number of—		Number of occupied houses.	Population, 1921.			Number of persons per square mile in 1921.	Hindu Brahmanic		Muhammadans.	
		Towns.	Villages.		Persons.	Males.	Females.		Males.	Females.	Males.	Females.
Chakrata ..	446	1	66	9,239	55,623	31,567	24,056	125	30,783	26,621	506	241
Naini Tal ..	433	3	524	14,211	60,011	35,425	24,586	189	32,559	22,730	1,348	609
Almora ..	4,136	1	1,587	36,827	167,402	84,6 3	82,749	81	262,557	262,907	1,840	1,183
Ranikhet ..		1	1,254	39,193	167,804	82,345	85,459					
Champhawat ..	1,253	..	1,261	21,048	96,740	49,757	46,973	156				
Pithoragarh ..		..	989	19,575	98,402	48,498	49,904					
Pauri ..	5,612	2	879	27,311	121,001	56,308	64,693	86	229,561	250,664	2,695	1,134
Lansdowne ..		2	1,459	51,162	203,246	99,128	104,118					
Chamoli ..		..	1,045	32,045	160,939	77,427	83,512					
Tehri ..	4,180	..	2,736	68,389	318,414	156,498	161,916	76	155,600	160,993	866	901
Total ..	16,060	..	..	..	1,449,572	..	..	..	..	..	..	..

APPENDIX B—*(continued.)*

TABLE II.

District or State.	Population.			Hindu males married	Hindu females married.	Population supported by agriculture.	Proportion of agricultural population per 1,000 of district population.	Brahmans.		Rajputs.	
	Total.	Urban.	Rural.					Males.	Females.	Males.	Females.
	1	2	3	4	5	6	7	8		9	
Dehra Dun ..	212,243	66,310	145,933	56,225	37,920	112,715	531	12,044	7,125	32,045	20,166
Naini Tal ..	276,875	44,776	232,099	59,717	47,302	201,018	726	23,388	17,499	33,397	22,051
Almora ..	530,338	11,991	518,347	124,216	146,509	489,867	924	62,739	63,533	130,155	130,331
Garhwal ..	485,186	9,511	475,675	110,114	132,499	450,643	928	53,470	60,973	130,125	142,800
Tehri State ..	318,414	..	318,415	78,736	89,017	301,448	947	33,292	25,189	93,013	97,837

NOTES.—1. Columns 1, 2, 3 are from Table I, pages 2 and 3.
2. Columns 4 and 5 are from Table VII, page 82.
3. Columns 8 and 9 are from Table XIII, pages 201 and 210.
} Report on Census of India, 1921. Volume XVI, Part II, Imperial Tables.
4. Columns 6 and 7 are from subsidiary Table III of XVI, Part I, page 173. Census Report, 1921.

APPENDIX B—*(continued.)*

TABLE III.

Extract from general Statement no. IV. (Census Report, IV, N.-W. P. 1865.)

Statement of castes.

District.	Brahmans without distinction.	Kshattriyas.		Vaishyas.	Soodras.		Muhammadans.		Total population.
		Chattri, Thakur or Rajput-Koor.	Khussias (Hill Rajputs).		Khussia.	Dom.	Sheikh, Sayed, Moghal, Pathan.	Miscellaneous Muhammadans.	
Kumaon	41,658	95	204,190	2,988	..	..	519	118,833	368,790
Garhwal	59,463	30,545	.	206	107,627	35,992	110	623	248,742

NOTES—1. The large number of Doms were in Kumaon shown as Muhammadans (Miscellaneous).

2. Khussias were classified as Soodras in Garhwal in 1865, but as Rajputs in 1872; but in Kumaon they were rightly shown as Rajputs.

APPENDIX B—*(continued.)*

TABLE IV.

Population of the hill-depressed classes according to Census Report, 1921, Volume XVI, Part II, page 288.

District.	Males.	Females.
Chakrata tahsil	6,932	5,584
Naini Tal	18,845	14,125
Almora	55,045	53,614
Garhwal	37,772	39,562
Tehri State	27,731	26,594
Total ..	146,325	136,479
	*33	*35

*Enumerated in other districts of the province.

NOTE.—The Census Superintendent has found out 32 occupational sub-castes among these people who form seven distinct groups, among some of whom inter-marriage takes place. There is also an eighth group of unspecified depressed classes. The community shown in Table XIII as Hill depressed classes is better known to the world as the "Dom" community, Volume XVI, Part I, Appendix C, page 21.

APPENDIX B—*(concluded.)*

TABLE V(*a*).

Showing males and females in Chakrata tahsil.

Census year.	1881.	1891.	1901.	1911.	1921.
Males	25,400	28,435	28,349	30,518	31,567
Females ..	19,717	22,262	22,752	24,294	24,056

TABLE V(*b*).

	Increase + or Decrease — in males or females during census years—			
	1881-1891.	1891-1901.	1901-1911.	1911-1921.
Males	+ 3,035	— 86	+ 2,169	+ 1,049
Females	+ 2,545	+ 490	+ 1,542	— 238

List prepared from—

(1) *Census of India*, 1891, Volume XVI, Part I, Provincial Table VI, pages 2-3.

(2) *Census of India*, 1901, Volume XVIB, Part III, Provincial Table I, pages 2-3.

(3) *Census of India*, 1911, Volume XV, Part II, Provincial Table I, page 782.

(4) *Census of India*, 1921, Volume XVI, Part II, Provincial Table page 448.

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