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constitute the majority of the literature of Hindu law, we find mention of large families. The division that those books speak of is generally a division either between the father and his sons, or between brothers, and on rare occasions, between uncles and nephews, and sometimes a grandfather and his grandsons and uncles. In re-union again, which as an incident of joint property is peculiar to India, we hear of a second coparcenaryship possible only between a father and his son, between two brothers, and between an uncle and his nephew.[1]

From all this it is a legitimate inference that families in those days ordinarily divided in two generations, rarely remaining in union when the common ancestor of the male members was the third in the ascending line, counting from the members who were the eldest in age. Under such circumstances the exclusion of the widow by her husband's coparceners did not work so great a hardship as when joint families began to assume a larger size, and when the widow had to give way to relations who could not entertain feelings of affection for her,—who in fact were comparative strangers to her. The appearance of these large families, is attributable, probably to the establishment of Mahommedan rule in India. In spite of some highly creditable specimens of good sovereigns in the long list of the various Mussulman dynasties, the Mahommedan rulers could never spread such a general security of life and property, as the Hindus had previously enjoyed under the mild despotism of their Kshatriya monarchs, or as they are now enjoying under the sovereignty of Britain. An unsettled political condition amongst a people is conducive to such unions as are exemplified in these large joint families of later days; for the instinct of self-protection leads people having some mutual tie to

Large joint families probably date from the period of the Mahommedan rule.

[1] Mitak. chapter II, section 9, para. 8.

come together and to be of assistance to one another. Another cause of the general prevalence of these large joint families may be found in the complicated system of land tenure, which appears to have been first introduced contemporaneously with the establishment of the Mussulman supremacy. Under this complicated system,—the parent of the zamindari method of the present day,—landed property assumed new forms unknown to the ancient Hindu law. These new forms of immoveable property could not be so easily divided with satisfaction to all, by applying the principles deducible from the body of Hindu partition law. It may even be questioned, whether in that law a name can be found for rent. The thing that can be called as the nearest approach to rent is the 'Nibandha,' which Colebrooke and all the succeeding translators have rendered by the word 'Corrody.'[1] The division of rent-paying lands therefore when joint property assumed the form of large estates paying revenue to the Mussulman rulers, came to be unusual, because it was difficult. Under even the butwarrah law of the present day, although it has been framed by jurists from England whose consummate skill equals their eminent practical knowledge, the partition of zamindari property is so cumbrous an affair, that coparceners often prefer to remain joint, in spite of the manifold inconvenience of an undivided condition, rather than setting in motion the butwarrah machinery to unsettle everything for ten or fifteen years.

Butwarrah rarely resorted to.

Another result of the rule of survivorship in a Mitákshará family is that in no case can a female be a leading coparcener in such a family; she may be a member, entitled to certain rights and privileges; but she can never have a voice in the management of the undivided funds.

In a Mitákshará family, a female never a leading coparcener.

[1] Mitak. chapter I, section 5, para. 4.

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Her position in the family is necessarily subordinate. The only instance in which she can lay claim to anything like an equality with the male members is, when she has minor male children, and when the joint interests of her sons are jeopardised by the acts of the senior members of the family. Sometimes it may be her own husband, the father of her sons whose interests she is desirous to protect, whose acts become injurious to the sons. Thus[1] the High Court has held that under the Mitákshará law, the rights of the minor sons in the ancestral property may be protected by their mother who can bring a suit for declaration of right of partition as vested in her sons, when the father's acts are likely to imperil the minor's estate. In another case,[2] it has been held that although ordinarily it is the managing member of a joint Hindu family governed by the Mitákshará law who is entitled to a certificate under Act XXVII of 1860, yet when the members, appear to have fallen out, and do not agree with each other, it would not be the right course to pursue to grant the certificate to one of them as the managing member of the family. In the judgment in that case, it was also observed, that the certificate for a particular deceased member could not be withheld altogether, inasmuch as although the family was a joint Hindu family; still the debts that were due to the members of the joint family were the debts due to the deceased as well as to the other members of the family, and under section 2 of Act XXVII of 1860, so far as the deceased was concerned, no debtor could be compelled to pay the debts due to the joint family unless a person obtained a certificate under the Act to represent the deceased in the joint family. Therefore, there was a clear necessity that somebody should

[1] Muss. Lekraj Kooer *v.* Sirdar Dyal Singh, 25 W. R. 497.
[2] Chowdhry Kripa Sindhoo *v.* Radhacharun Das, 23 W. R. 234.

obtain a certificate to represent the deceased for the purpose of collecting debts. From these observations it is evident that if a member left minors under the guardianship of his widow, the widow, as representating the minors, would be entitled to the certificate on account of her deceased husband, where disagreements and quarrels have commenced to take place among the surviving members. Under such circumstances, even in a Mitákshará family, a female member would vicariously occupy a position of some authority generally denied by law to the female member on all other occasions.

In Bengal, a female's position often equal to that of a male.

But in Bengal, joint families frequently exhibit instances of female members holding a position in all respects equal to that of the males. The reason is that the doctrine of fractional ownership does not make any difference in the course of succession, whether the family be joint or divided in interest. Whenever a member dies without leaving male issue down to the third generation, a female, either as the widow, or as a daughter, or as the mother, or even as the paternal grandmother, obtains a share in the joint estate; she in fact becomes a coparcener, having all the rights and privileges of the other male parceners; she has a voice in the management of the property; she can even have a partition effected; and although her powers of alienation be of a qualified character, yet so long as she lives, hardly any distinction can be made between such a female member and her male coparceners.

Double course of succession in schools of aggregate ownership.

This leads us to that double course of succession laid down by the school of aggregate ownership, which is one of the many results of the above rule of survivorship, and which has added a fresh complication to the Mitákshará law. The line of succession in a separated family is entirely distinct from the persons in whom the property vests when an undivided member dies. In fact, it may

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in one sense be said that there is no succession or descent in a Mitákshará undivided family, or in a family of that school which has been formed by re-union after one separation. If the family is composed of different stocks, as for instance, if it consists of, say three brothers with the sons of each, then on partition the sons of each brother jointly take one-third of the estate, where all the brothers have died; or if any brother lives at the time of the partition, then he with his own sons takes one-third to be afterwards re-distributed in equal lots in case his sons demand a partition.[1] This may be said to be something similar to a succession or descent, inasmuch as where persons descended from different fathers constitute a joint family, then the shares to which the members are severally entitled must be calculated by considering the mutual position of their fathers in the family tree. Otherwise, whenever a person dies, what takes place is a lapse of his share or interest to the joint estate. When he leaves any male issue, such male issue quietly fills the place of the deceased member, but they cannot exactly be said to succeed the deceased to his interest in the family property, inasmuch as every male member as soon as born has his own substantive vested interest in the common property.

While therefore in a joint Mitakshara family, there is hardly anything like a succession to, or descent of, the interests of a deceased member, but only lapse of his share by virtue of survivorship; on the other hand, when the deceased was separate in interest, at the time of his death, such interest is succeeded to by a line of heirs, which is briefly indicated in the well-known text of Yájnavalkya, which forms the para. 2, section 1, chapter II, of Colebrooke's Mitákshará, and which is made up of the

[1] Mitak. chapter I, section 5, para. 2.

latter half of the 137th, the whole of the 138th, and the first half of the 139th slokas of the second chapter of Yájnavalkya's Institutes.[1]

Yájnavalkya the only Rishi who propounded a clear rule of succession.

Throughout the whole Hindu law, this text of Yájnavalkya is the only methodical and business-like statement of the course of succession; all the schools therefore have laid their hand upon it. All the schools have made of it what use was most subservient to their particular opinions. For in spite of its clear arrangement, the text fails after a few steps, and is enveloped in the obscurity of such general terms as an 'agnate' and a 'cognate,' which are interpreted by different schools in numberless different ways, almost every original writer on this part of the law having his own particular views to support. As for the rest of the Rishis, the law of succession has been laid down by them in a bewildering way; one may well despair of deriving any practical benefit from their texts in a disputed question of Hindu succession. It is not easy to understand how in Hindu days the practical administration of succession law was carried on with the help of such perplexing declarations of the line of heirs. The task of extracting from those texts anything like a general principle, so as to cover all the possible questions of inheritance has not yet been fulfilled, though the number of *nibandha* works commenting upon those texts is not small. In this most important branch of law, a branch having its application in the every day concerns of life, a systematic statement based upon clear principles that one can easily lay hold of, is still a want in the literature of Hindu law. The truth seems to be that after a certain number of heirs, I believe after the brother's

[1] Colebrooke in a footnote cites it as Yájnavalkya, 2, 136—137; while Viswanáth Mandlik in his Edition of Yájnavalkya makes it as the 135th and 136th slokas of the 2nd chapter.

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sons, the Hindu administrators of justice used to do just as their particular inclinations led them, and that there was no certainty whatever in this law. In those days, communications between different parts of the country were extremely difficult, and what was done in the practical working of the law of succession in one part of the country, never came to be known in another part; possibly as many schools of opinions grew up as there were tribunals. In the present course of Lectures, the law of succession does not legitimately fall within the province of my subject, namely, a joint Hindu family; I shall therefore dismiss this matter simply by giving the general enumeration of heirs contained in Yájnavalkya's text, whose list is as follows;—(1) the wife; (2) the daughters; (3) the parents; (4) the brothers; (5) the son thereof; (6) one born in the gotra; (7) a bandhu; (8) the pupils; (9) the fellow-students.

Questions of succession under Hindu Law were always unsettled.

Having thus briefly contrasted the joint families of the two descriptions, one prevailing in Bengal, and the other in the remaining parts of India, I shall now explain certain expressions, which are used with regard to both in the judge-made law. Thus in cases we often find a joint family described as joint in food, worship, and estate. What it is to be joint in estate, has to a certain extent already appeared,—it is to have and hold in common the various kinds of property in which persons can be interested. This interest is one and the same for every member in a Mitákshará family; it is several and fractional for the different members in a Dáyabhága family; yet so long as the properties themselves have not been severally allotted to those members, in a Dáyabhága family also, the interest is in one sense joint or common at least, although there is no survivorship. To be joint in food implies only, that the arrangement for cooking the food of the family,

The expression 'joint in food, worship and estate.'

is single and the same for the whole family. Generally speaking, it is in the matter of this arrangement for cooking that the family separates first of all. Such separation in mess does not in every case necessitate a separation in estate or worship. Separation in mess is the easiest of all to be effected. It is necessitated usually when the male members begin to make earnings on their own account and are desirous to secure greater comforts for themselves and their own wives and children than can be afforded by the common family means. It, in most cases, co-exists with residence in a common dwelling-house, only particular apartments being set apart for each married couple.

Joint worship of the present day.

As regards joint worship, the meaning of this expression, in Bengal at least, is in modern days somewhat different from what was formerly attached to it as used in our text writers. In Bengal it is tacitly supposed that every joint family has a common idol in the dwelling-house, and that all the members participate in the daily worship of that idol, either by themselves or vicariously with the help of a ministering priest. This supposition is so far accurate that in Bengal the well-to-do families generally have a household god, for the purposes of daily worship. These families also, in different seasons of the year, set up earthen idols for temporary worship on certain festival days, generally during the period from the beginning of September till the end of March. On these occasions, large sums are spent from the common funds, the whole family being supposed to be participating in a common worship. The permanent idols kept in a family dwelling-house have their special festival days in different parts of the year, which also furnish occasions for extraordinary expenditure of the family funds. It may even be said without exaggeration, that our Brahmanic religious instructors have

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elaborated so minute a system of household devotion, that almost every day in the year may be made an occasion for spending goodly sums of money, if the members of the family were so piously inclined. These pious observances are generally practised by united families of large means, and so far they constitute what is known in law as joint worship. But our original text writers did not understand joint worship exactly in that sense. The custom of keeping permanent idols in private dwellings seems to have originated at a later period than when most of our original digests were written. It is remarkable that these digests nowhere mention Debutter property. Public opinion even now reprobates the profession of a *devala* Brahmin,—that is, one whose calling it is to worship the idol of another person for wages received; household gods are seldom mentioned in the majority of the *nibandha* treatises; nor is it said in those works that the worship of these divinities is an indispensable liability attaching to the family property. On the contrary, the pious works alluded to by most original treatises are generally srads and other obsequial ceremonies. Thus Raghunandana[1] says:—

Joint worship as formerly understood.

"The father being dead, the rite should be performed by the son as ordained. When there are many sons of the father, dwelling at the same place,—what is performed by the eldest, having taken the consent of all, and with undivided property, that is to be taken as performed by all * * Ending with the sapindíkaraṇa, the sixteen srads that

[1] मृते पितरि पुत्रेण क्रिया कार्य्या विधानतः ।
बहवः सुर्यदा पुत्राः पितुरेकत्र वासिनः ॥
सर्व्वेषां तु मतं कृत्वा ज्येष्ठेनैव तु यत् कृतम् ।
द्रव्येण चाविभक्तेन सर्व्वैरेव कृतं भवेत् ॥
+ + सपिण्डीकरणान्तानि यानि श्राद्धानि षोड़श ।
पृथक् नैव सुताः कुर्य्युः पृथक् द्रव्या अपि क्वचित् ॥
Suddhitattwa, p. 212.

there are—the sons should in no case perform them separately,—though their property be separated." Mitra Misra says:[1]—"Partition with a view to the increase of pious deeds, however, is spoken of by Manu and Prajapati. 'Thus they should either live together,—or separately, with a view to pious deeds. Pious deeds increase by separation; therefore partition is conducive to piety.' And the piety consists in the worship of gods, &c., for that alone is spoken of as separate when there is no living together. Thus Vrihaspati,—'of persons dwelling under one arrangement for cooking, the worship of the forefathers and gods and Brahmans is single; but among the separated, that same worship takes place in every house.' The author of the Sangraha, however, says that the expression 'increase of piety' means and includes also the increase of piety by means of the establishment of the sacred fires, &c.; thus he says, by partition the paternal property is rendered the property of the sons: when the right of property arises, they commence, hence separation is pious;—'commence,' *i. e.*, accomplish the ceremony of establishing the sacred fires, &c. But this has already been refuted by us when establishing the right of sons to the performance of the ceremonies enjoined by the Sruti and the Smriti, even before partition, by reason of the son's right to the paternal property accruing by birth alone. Therefore by the expression 'pious deeds' are to be understood such pious deeds as the five great sacrifices."

These five great sacrifices are thus described by Manu, ch. 3, sloka 70. I am here giving the purport of the sloka, referring to the translation of Sir W. Jones for a more literal rendering of the original. The first is the sacrifice for the sacred writ, that is, the veda; this is performed by daily recital of its verses. The sacrifice for

Five great sacrifices.

[1] Viramitrodaya, ch. II, Part I, sec. 7.

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the forefathers is the libation of water to the manes; the sacrifice for the gods is the making of burnt-offerings in the fire; the sacrifice for the organized beings is the strewing of food, cooked or uncooked, on the surface of the earth; and the fifth and last is the sacrifice for mankind, which consists in hospitality to the strangers who unexpectedly visit the house and seek hospitable reception for the day. We must not therefore think that when our treatise-writers mention the worship of gods as a pious deed, they mean thereby the worship of such household idols as are permanently kept or periodically set up within Bengal families. The treatise-writers mean the making of burnt-offerings on the fire, mostly as an essential feature of the worship of such ancient Rig Veda divinities as Indra and Rudra and Varuna and others. Váchaspati Misra[1] says:—"Or let them divide for the purpose of doing pious deeds. So says Manu, 'Either they should live together; or separately, with a view to pious deeds. Pious deeds multiply by separation, therefore separation is a pious act.' How are religious duties multiplied by partition of property? Vrihaspati speaks on this subject: 'A single performance of the ceremonies of forefathers and of the worship of the deities and Brahmans may answer for brothers, who reside together and eat food dressed in the same place. In a family the members of which live apart, these duties are separately performed in the house of each of them.' Divided estates being the exclusive property of every heir, each may perform the ceremonies, sacrifices, &c., according to his own choice, without reference to the others. Hence partition multiplies religious performances."

Smriti-Chandriká (Kristna-Swami Iyer, p. 18, para. 41, &c.)

[1] Vivádachintámani, p. 227.

"But where the co-heirs become divided, religious duties increase, as observed by Gautama in the passage, 'religious duties increase in case of partition.' If it be asked how they increase, Narada:—"The religious duties of unseparated brethren are single. When partition, indeed, has been made, religious duties become separate for each of them.' 'Religious duties,' duties relating to the worship of manes, deities and Brahmins. Vrihaspati too. 'Among co-heirs living in commensality, *i. e.*, with one dressing of food, the worship of manes, deities, and Brahmins takes place in one house only; but in a family of divided brethren, the above acts are performed in each house separately.'"

Vyavahára Mayúkha, (p. 73 Viswanáth Márdlik). "The religious duty of unseparated brethren is single. After partition even that becomes separate for each. * * In an unseparated family, whether it consist of father, grandfather, sons, grandsons, father's brothers, brother's sons, the religious duty is single." After this the author enumerates a number of religious observances, mostly consisting in the above-mentioned five great sacrifices, and a number of srad ceremonies, enjoined to be performed at particular seasons of the year, and on certain special days, such as the new moon immediately before the Durga pujah. In this passage I find the only mention of something like our modern household deities, the worship whereof is directed to be single in an unseparated family. This is not to be wondered at; for Nílkantha, the author of the Vyavahára-mayúkha, is of a comparatively recent date; he must have flourished within two hundred years from the present time, as appears from a date given in a work of his paternal grandfather Náráyan Bhaṭṭa.[1]

The result therefore is that when we meet with mention

[1] *Vide* Mandlik Introduction, p. lxxv.

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of joint worship in the original texts, we are to understand such religious ceremonies as the srad and the five great sacrifices enjoined by Manu; while in modern times, that expression stands also for the celebration of the worship of permanent household idols, and likewise the great periodical festivals, at the head of which stands the Durga pujah, so far as Bengal is concerned. This change in the worship performed by a joint family marks a silent change which has gradually supervened over the religion itself of the people. The five great sacrifices of the days of Manu are no more; hardly one in a hundred understands their nature. The worship of fire is altogether obsolete; while hospitality to guests arrived at the house by chance would be a religious duty too expensive to be performed by middle class families of the present day; for the facilities of intercourse between different parts of the country being great, the number of such unexpected guests would be a legion, were it understood that joint Hindu families were prepared to welcome them. The place of these old religious duties is now occupied by the periodical feeding of Brahmins on special days, and also in wealthy families by the daily worship of the permanent household gods.

Having thus explained the expression "joint in food, worship and estate," I shall here cite a number of propositions promulgated in the original texts and in the decisions of our Courts, in connection with that community of interest which obtains among the members of a joint family.

Inequality in consumption of joint effects not taken an account of.

On account of this common interest, so long as the joint character lasts, it is settled law that any inequality in the enjoyment of the common effects is not to be taken an account of. Where the value of the interests vested in the several members is the same, in other words, where

the members on a partition would each be entitled to an equal share, it may be that one member has many children, and therefore the expenses of his special section of the family are much larger than those of any other member; one member may have more daughters to give away in marriage; and the marriage of a daughter in all high caste respectable Hindu families involves an amount of expenditure which is almost becoming oppressive day by day. As the marriages in all these families are invariably arranged by the parents or other guardians of the bride and the bridegroom,—the consequence is, that when the bridegroom is a particularly suitable match, both on account of parentage and also on the ground of good worldly circumstances and of being an educated person, the sums or perquisites demanded by the guardian of such a bridegroom are so exorbitant, that the parent of the bride is often reduced to very great straits for paying the same. Instances are not rare of the father of a number of girls having had to sell his dwelling-house to meet the expenses of their marriage. Sometimes these parents are absolutely ruined and are brought to penury and a state of starvation from a comparatively prosperous worldly condition. This state of things is becoming intensified day by day, inasmuch as the spread of education under the beneficent British rule has made it easier for parents to train up their sons with greater perfection than was ever known amongst the Hindus in ancient days. As a result, eligible bridegrooms of high attainments are appreciated to a great extent; parents of girls are also alive to the fact that these high attainments lead to success in life, whether in the form of a lucrative professional career, or of highly paid Government situations. These bridegrooms therefore command their own price in the market of matrimony. Their parents, even though educated and of enlightened

Expenses of daughter's marriage.

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principles, in practical affairs do not abate a jot of their exorbitant demands, taking shelter under an excuse that they themselves have to give their own daughters similarly exorbitant marriage portions. This social abuse has become peculiarly deep-rooted in our country, inasmuch as its mischievousness cannot not correct itself by the influence of mutual love between the bride and the bridegroom; for all our marriages are marriages of convenience, in which anything like a reciprocal attraction or mutual choice has no place. From time immemorial we have been married by our parents to whomsoever chance leads our parents to select; we thus become encumbered with families before we know that we are ourselves inclined in that direction, and but literally fulfil the duty of perpetuating the race. Domestic happiness in the European sense of the term is beyond the reach of a Hindu living in the shell of Brahmanic social usages. Even now those amongst us who have had the blessing of an education under the guidance of principles from Western Europe, are willing slaves to this social despotism. So ineradicable is the conservative instinct of the race, that these men of education have now learnt to despise the idea of a marriage by reciprocal choice, and to cite the instance of Byron and Landor to show that even marriages by reciprocal choice often end in disastrous consequences. They argue therefrom that it is hardly worth our while to combat the usage that governs us in matrimonial concerns.

Considered as family expenses.

These large marriage expenses must be met from the family funds in an undivided group of Hindu coparceners; one coparcener cannot complain because the expenses of another in this respect are unduly large. Nor will these inequalities be taken into account at the time of the future partition.

Again the education of the children of one member may be unusually costly; his sons may possess peculiar aptitudes for learning; it may be thought proper to nurse and cherish such aptitudes, and to spend money that they may be adequately developed and may bear good fruit. In such a case, it is not open to another coparcener to say that a single coparcener's concerns ought not to engross so large a proportion of the family funds. If the means of the family admit of incurring such legitimate expenses, and if the managing member or the majority of the coparceners think it proper to go to these expenses for the education of the sons of a particular parcener, these expenses must be borne notwithstanding that it may excite the jealousy of another wrong-headed parcener. All that the latter can ask for is that his own concerns also should be looked after with the same assiduity. It is no doubt always open to him to demand a partition; but partition of large properties is so cumbrous a transaction, that coparceners seldom willingly resort to it, unless goaded by some insufferable inconvenience or by some instance of injustice specially injurious to the interests of a particular member. Although therefore the remedy of partition is lawfully open to any member dissatisfied with the way in which the joint effects are being dealt with, in practice this remedy is not commonly sought. On the other hand, the law is clear that unequal consumption by different members is not a matter for which any special liability attaches to those members; the principle on which such unequal consumption is allowed being that all such concerns of a particular member, as are legitimate and reasonable, are the common concerns of the whole family. Thus the marriage of a daughter of the family is an obligation incumbent upon the whole family so long as it continues joint, and the expenses incurred on account of it must be necessarily

Expenses of educating the youthful members of the family.

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borne by all without reference to the respective interests of the members. This is so because a joint Hindu family is not in all points subject to those principles which determine the reciprocal rights and obligations of a partnership. Joint families are often likened by English text-writers to corporations; but it would be erroneous on that account to suppose that they are partnerships to all intents and purposes. In a partnership concern, every member is accountable to his co-partners for every pice that he has spent over and above his legitimate share in the business.[1] But in a joint Hindu family, whether the shares of the members be equal or unequal, the unequal consumption of the family property by the different members, is sanctioned by law, and the greater or smaller necessities for legitimate expenses under which the members may lie are the necessities of all. By way of textual authority for the above proposition, I may cite Víramitrodaya.[2] "By reason of the right being common, the text of Kátyáyana, which says:—'A coparcener is not liable for the consumption of any article which belongs to all the undivided relatives,'—becomes consistent in its literal sense; inasmuch as his own right extends over every article; accordingly there can be no theft in such a case, as will be shown hereafter."

Joint families not like corporations in all respects.

It has been said in another case[3] that the joint family is a single entity as regards the enjoyment of joint property. As long as the members choose to continue in a state of commensality and joint fruition and enjoyment of the profits of the property, they cannot be said to possess individually any several proprietary right, other than the right to call for a partition. For proprietary

[1] *Vide* Referring order of Mr. Justice Mitter in the F. B. case of Obhoy Chunder Roy Chowdry *v.* Peary Mohun Gooho, 13 W. R. F. B. 75.

[2] English Translation, p. 41.

[3] Chuckun Lal Sing *v.* Poran Chunder Sing, 9 W. R. 483.

purposes, they exist as a whole, somewhat in the character of a corporation. I have already pointed out that although it may be convenient to liken a joint family to a corporation as conceived under European systems of Jurisprudence, yet all the incidents of a partnership concern are not attributable to a family.

"In another case[1] Mr. Justice Markby said :—"Each partner is entitled to consume on his own account no more of the partnership property than the share of the profits. Each partner is the agent of the others, bound by his contract to protect and further the interests of his co-partners, unless relieved from that responsibility by special agreement. If a partner appropriates more than his due share of the profits, he becomes immediately a debtor to the concern. But in a Hindu family, it is wholly different. No obligation rests on any one member to stir his finger, if he does not feel so disposed, either for his own benefit, or for that of the family; if he does do so, he gains thereby no advantage; if he does not do so, he incurs no responsibility, nor is any member restricted to the amount of share, which prior to division, he is to enjoy. A member of a joint family has only a right to demand that a share of existing family property should be separated and given him, and so long as the family union remains unmodified, the enjoyment of the family property is in the strictest sense common as against each other." The conclusion arrived at in this decision by Mr. Justice Markby, namely, that a managing member is not responsible to the other parceners for an account of the family funds, was overruled in the Full Bench case of Abhoy Churn Roy Chowdry ;[2] the Chief Justice Couch observing it to be an extra-judicial opinion not necessary for the

[1] Rungun Money Dassee v. Kassinath Dutt, 3 B. L. R. O. J. 1.
[2] 13 W. R. F. B. 75.

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determination of the particular case. But it does not seem to follow therefrom that the observations made by Mr. Justice Markby upon the character of a joint family have no longer any force. They may be accepted as a correct representation of the legal conception involved in such a family.

General propositions regarding joint family as a whole.

It has been held as a consequence of the community of interest that where the family consists of two brothers governed by the Mitákshará law, both must join in making a mortgage of the family property; and if both have joined, there is no other impediment to the mortgage being valid, if at the time the mortgage deed is executed, there be no other members interested in the undivided estate. If sons are born to one of the brothers subsequently to the date of mortgage, such sons cannot question its validity, inasmuch as their interest had no existence at its date. The mortgage made by the two brothers is also to be considered as a joint transaction;—it is not a mortgage of one half share by one brother, and of the other half share by the other brother. The whole amount lent by the mortgagee is a charge as well upon one brother's share as upon the other brother's share. Where there is nothing to show that the joint family has been separated or the joint property partitioned, neither of the brothers can have any defined or certain share which he can call his own, or for which he can sue alone without making all the members parties.[1] It has been held that so long as a Hindu family under the Mitákshará law is living in the joint enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, so long no member of the family has any such proprietary right as he can alien or encumber. The

[1] Rajaram Tewaree *v.* Luchman Pershad, 12 W. R. 478.

property, under such circumstances, belongs to all the members of the family jointly, as to a corporation; and no one of the individual members has any share in it which he can deal with as property.[1] A member of a joint family cannot be styled the owner of a khas share, that being a term expressly applicable to the members of families who have separated and are in possession of separate shares.[2]

Families expand into village communities.

Sir Henry Maine[3] says, "The possessions of a Hindu, however divisible theoretically, are so rarely distributed in fact, that many generations constantly succeed each other without a partition taking place, and thus the family in India has a perpetual tendency to expand into a village community." He here evidently refers to that particular description of the village community, instances of which are found in the North-Western Provinces and the Punjab, where in many places the whole of the village lands is held by a single set of coparceners, whose descent from a common ancestor is yet remembered, and who jointly are known as the village zemindars, though the share of many a single individual has by division become almost infinitessimal. These village communities must be of modern growth, to my mind after the introduction of the complicated system of land tenure under the Mahomedan rule. Had it not been so, Vijnáneswara would not have defined a village community, as I have abundantly noticed[4] in a previous part of these Lectures, to be consisting of persons belonging to different castes; whereas the very description given by Sir Henry Maine precludes the idea that the village com-

Difference between modern and ancient village communities.

[1] Mohabeer Pershad *v.* Ramyad Sing, 20 W. R. 194.

[2] Lalla Nukched Lal *v.* Futteh Bahadur Lal, 24 W. R. 39.

[3] Ancient Law, p. 228.

[4] *Ante*, pp. 23, 91.

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munities, which expanded from joint families as their root, can be composed of members belonging to different castes.

In his History of Early Institutions, p. 106, Sir Henry Maine has thus described a joint Hindu family—"If a Hindu has become the root of a joint undivided family, which is technically said to be joint in food, worship and estate, it is not necessarily separated by his death; his children continue united for legal purposes as a corporate brotherhood; and some definite act of one or more brethren is required to effect a dissolution of the plexus of mutual rights and a partition of the family property. The family thus founded by the continuance of several generations in union is identical in outline with a group very familiar to the students of the older Roman law, the Agnatic kindred. The Agnates were that assemblage of persons who would have been under the patriarchal authority of some one ancestor, if he had lived long enough to exercise it. The joint family of the Hindus is that assemblage of persons who would have joined in the sacrifices at the funeral of some common ancestor, if he had died in their lifetime."

Joint condition occasionally recommended by Rishis.

The Bráhminic lawgivers declare that the severance of the joint character described above is conducive to the multiplication of pious works. Yet we find some Rishis pointing to the advantages of living together. Thus in the Víramitrodaya, p. 52—"The common abode of the brethren, however, is preferable, as well while the parents are alive as likewise when they are dead. Thus Sankha and Likhita declare;—'They may live together if they choose; since united, they are likely to attain a flourishing state'; the meaning is—'united,' that is, 'dwelling together,' they may attain a flourishing condition through mutual assistance in the acquisition of wealth. So Nárada

says:—'Let the eldest brother alone maintain all, just like a father; or, let a younger brother, if capable, do so; for the preservation of the family requires capacity.'"

In the original texts, speaking of the joint family as a whole, it is said that the undivided members labour under special incapacities. Thus there is a sloka of Nárada cited by each of the five leading authorities for the five schools of the Hindu Law; I mean by the Mitákshará, as representing the Benares school, by the Dáyabhága of Bengal, by the Vivádachintámani of Mithila, by the Smriti-chandriká of Madras and by the Vyavahára-mayúkha of Maháráshtra. The same text is also found in the Víramitrodaya, the supplementary authority for the first of the above five schools. The drift of the sloka is, that when the family is in an undivided condition, there cannot be any gift or sale between the coparceners,—such transactions being only possible between coparceners when they are divided. The sloka also says that in an undivided state one member cannot be a witness for another, or a surety for another. The law as to witnesses promulgated in the original texts precludes the entertainment of the modern idea that any person could be sworn as a witness in his own cause. The Hindu jurists considered the parties in a suit and the witnesses as essentially distinct and separate; they had no conception that the same person could possibly bear two such inconsistent characters. The slokas 72 and 73[1] of the second chapter of Yájnavalkya enumerates number of persons who were legally incompetent to give their testimony as witnesses

Incapacities of undivided members.

[1] स्त्री बाल दृढ कितव मत्तोन्मत्ताभिशस्तकाः ॥
रङ्गावतारि पाषण्डि कूटकृद् विकलेन्द्रियाः ॥
पतितात्मार्थ सम्बन्धि सहाय रिपुतस्कराः ।
साहसी दृष्ट दोषश्च निर्धुताद्यास्त्वसाक्षिणः ॥

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in a cause; among these we find a friend of either party, and one interested in the disputed property. The Hindu Law of evidence in fact bears a close analogy to many other bodies of law upon the same subject which are framed upon the principle of excluding particular classes of evidence,—not upon modern ideas which are for the admission of all kinds of evidence, leaving it to the Judge to determine what weight ought to be attached to such evidence. Under the Hindu law, one who had interest in the property in suit, was precluded from giving his own evidence as to the truth or falsehood of his claim. Practically, it is so even now; for few cases are decided solely on the evidence of parties alone; but the Hindu Law went a step further, and declared interest in the disputed property as a disqualification for being a witness. The sloka of Nárada, therefore, prohibiting one coparcener, from being a witness for another undivided coparcener, only embodies a deduction from the general rule; since such coparceners are interested in the same property. But supposing the disputed property were not common property belonging to all, but separate property exclusively owned by one, it is difficult to see why one member should not be a witness for another, unless we are to suppose that in such a case, he came under the category of a 'friend;' thus it may be, that 'friendship' being one of the disqualifications of a witness, a joint coparcener came, in the idea of the old jurists, within the general rule. The Mitákshará simply cites the above-mentioned sloka of Nárada, to point out by what marks the joint or separate condition of a family may be determined.[1] It says:—"Similarly, other marks of previous separation are specified by the same author. 'Divided brothers may do the duty of a

[1] Para. 4, section 12, chapter II.

witness, of a surety, and may make a gift and an acceptance also; not the unseparated, by any means.'"[1]

The Dáyabhága quotes the same text of Nárada, in para. 7, chapter XIV. Here the translation made by Colebrooke is:—"Separated, *not* unseparated brothers may reciprocally bear testimony, become sureties, bestow gifts and accept presents." In para. 9, Jímútaváhana explains the Rishi text, namely, that of Nárada, by saying that where one brother gives and another accepts, or where one brother becomes a witness in a bond taken by another from a third party on lending money to him, or becomes surety for another brother, then the brothers are inferred to be separate; since the law says that such transactions are illegal as between undivided brothers. In this instance also we see, as I have already noticed more than once, that the original texts seldom speak of joint families as constituted by distant relations, but generally confine their remarks to families composed of brothers, or of a father and his sons.

In the Vivádachintamani the same text of Nárada has been thus rendered by Prasannakumar Tagore:—"Di-

[1] I am at a loss to see how this text has been translated by Colebrooke thus—"Separated and unseparated brothers may reciprocally bear testimony, become sureties, bestow gifts, and accept presents." Unless I suppose that the reading of the text which was used by Colebrooke was entirely different from what I find in the Edition of the Mitákshará, issued by the Committee of Public Instruction, the translation by Colebrooke is inaccurate. Even supposing the text to have been different, we must pronounce that text to be incorrect, since it makes the context meaningless. Vijnáneswara wants to point out certain marks distinguishing separated coparceners, and he cites Nárada's text to shew that certain transactions, if observed to be taking place mutually between the members of the same family, may legitimately lead to the conclusion that they are not joint. These mutual dealings are that one member is becoming a witness for another, or his surety, or is accepting a gift from another. But if both the separated and the unseparated brothers can legally enter into such mutual dealings, how are these transactions to be set down as marks of separation?

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vided brothers can be witnesses to the concerns of each other; can be sureties for each other; can make or receive presents; but undivided ones cannot do so" (p. 311).

Vyavahára-mayúkha[1]:—"Separated brothers and not unseparated brothers, may be witnesses or sureties; or may lend or borrow in respect of each other."

The same text is quoted in para. 8, chapter XVI, Smritichandriká, on which the author remarks that the acceptance of a present, and the fact of one becoming a witness for another, and so forth, are arguments for the inference that partition must have taken place.

In the Víramitrodaya, the text is found in sec. 2, chapter X, and has been thus rendered by Babu Golap Chandra Sarkar. "Separated, and not unseparated kinsmen, may reciprocally bear testimony, bestow gifts, and accept presents."

Although thus we find in the original texts that these transactions are said to be invalid and inadmissible, when taking place as among unseparated members, the law must be considered as practically obsolete now. We shall see in the next Lecture that the unseparated member is not precluded from holding property exclusively to his own use. That being so, there is nothing to prevent the transfer of such exclusive property from the ownership of one member to another, either by sale or by gift or by any other method of alienation. As regards the capacity for becoming a witness, Courts in British India are not bound to administer the Hindu Law of Evidence, and the Evidence Act has discarded almost all the disqualifications of a witness which prevailed in former times. No Court of Justice will now refuse to take the sworn testimony of any person in a suit simply because he happens to be un-

[1] Mandlik, p. 75.

divided in estate with a party in the suit. Nor does the modern law declare that a deed or bond executed in favour of one member is inoperative because attested by his undivided coparcener; whatever weight the Courts may attach to it when a document so attested is proved in the trial of a suit by the sole evidence of such a member. He can also be accepted as a surety provided he has separate property from which, if any default be made by the principal, the proper compensation may be realized.

The members together constitute a single entity.

This old law laid down by the original texts prohibiting the members from reciprocally bearing testimony, or becoming sureties or giving or accepting presents seems to be founded upon the principle that all the members together constitute a single entity in the eye of law. But the conception of this unity has no force when there is an infraction by the members of one another's undoubted rights. Thus where there was a Thakoorbaree belonging to all the members, and there was a certain pathway leading from the family dwelling-house to the said Thakoorbaree, when the passage was bricked up by some of the members, it has been held that the members, whose access to the Thakoorbaree was thus obstructed, had a right to bring a suit to have the obstruction removed. Nor would the mere disuse of the pathway for four or five years constitute an abandonment of the plaintiff's right, inasmuch as such a claim was not a right of user but a right based on the status of a joint family.[1]

This principle of unity not always applicable.

In another case one member wanted to build a nautchghur in an open space of the courtyard around which all the members had their dwelling-houses. On being stopped by another member from going on with the building, the first member brought a suit for a declaration of his right to carry on the building without

[1] Chunder Kant Chowdhry *v.* Nundlal Chowdhry, 16 W. R. 277.

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obstruction on the part of the other members. The courtyard formed a portion of the dwelling-ground upon which the various members of the family resided. It was admitted to be joint and undivided property belonging to the whole family. The plaintiff contended that it was a courtyard or compound attached to the particular house in which he lived, that he had had exclusive possession of it for a long time, and that he could do with it what he liked. It was found as a fact that it had been held by the plaintiff for a long time. No family partition was alleged by the plaintiff. Upon these facts it was held that the plaintiff had no right to build on the spot. Phear, J. observed, "In our judgment, as we understand joint possession under Hindu Law, that peculiar exclusive possession of a plot of a common dwelling house, or set of dwelling houses, which one member of a joint family obtains very commonly without an actual partition having been come to between the members of the family, is a possession which must be referred to the continuing consent of his co-sharers. So long as no actual partition is come to, either as a result of a suit, or formally between the parties themselves, or evidenced by long acknowledgment on the part of the members of the family, the possession is merely that which, for convenience sake, is conceded by all the members jointly to each one of them; and it may be put an end to, and a completely new arrangement come to at any time by the members of the family if they think fit to make the change. As long, however, as this peculiar state of exclusive possession is allowed to remain, it must be taken that the acquiescing members of the family concede to the person who has the exclusive possession, all reasonable rights of user of his separate plot, or separate portion of the dwelling house, as is necessary for the ordinary purposes of resi-

dence, having regard of course to the circumstances of Hindu life; but the concession on the part of the acquiescing members does not go to the extent of enabling the possessor of the dwelling house to alter the character of the property, or to do anything with it which is not consistent with such user of it as might be ordinarily expected to take place. If he desires to build a new and additional structure upon a portion of the house ground, he has no right to do so, and in that way materially to alter the condition of the property without obtaining the assent of his co-sharers."[1]

The exclusive possession by one member of a particular portion out of the joint immoveable property, such as has been described in the case cited above, seems to carry with it a right on the part of the member in exclusive possession to create a mokururee right in favour of a third party. In the case of Jotee Roy *v.* Bhuchuck Meah, 20 W. R. 288, it was held that when such a mokururee right had been created by one co-sharer during the undivided condition of the family without objection on the part of the other members, the said tenure could not be set aside by those to whom on a subsequent partition of the family property that particular portion of the joint immoveable property might be allotted. That a single member is not competent to deal at his pleasure with the joint property is further illustrated by the case of Nundun Lall *v.* Mr. Lloyd, 22 W. R., 74. In this case, Phear, J. in effect lays down that a joint proprietor is entitled to ask from his co-proprietors, to be allowed to enjoy his share of the property in any mode in which it can be enjoyed as an undivided share. And he has a right to insist that neither his co-proprietor nor anybody claiming through him should without his consent take exclu-

[1] Sheo Pershad Sing *v.* Leelah Sing, 20 W. R. 160.

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sive possession of any portion of the joint property to which he has not at the time a subsisting right of exclusive possession. He can complain that in the matter of sowing a crop of indigo, he has not been consulted; that he has good reasons as a joint cultivator to object to its being grown, and to ask for an injunction restraining another co-sharer from sowing indigo upon such joint land. This was not exactly the case of a joint family, inasmuch as the plaintiff alleged his share to be a particular fraction of the whole, whereas according to Appoovier's case, no member of a joint family can predicate of himself that his share is such and such a fraction of the joint property. The above case seems much rather to be an instance of what Sir Henry Maine calls a joint family expanded into a village community. In the eye of law, such a village community, in which different co-proprietors, or groups of co-proprietors are registered as fractional shareholders, ought to be regarded as a group of so many separated families, whose patrimony, consisting of the village lands, has not been yet divided by metes and bounds. We shall subsequently see that the absence of such a division of the land by metes and bounds does not impress a joint character on the family. This case therefore is an authority that although a body of co-proprietors may be so far separated in interest from one another as to call themselves owners of particular fractional shares of the entire village lands, yet so long as the lands have not been divided by metes and bounds, the joint use of the lands must be made by all together in consultation with one another, and one cannot put the land to any use without a reference to the others. This is as regards the *use* of the lands; which in a manner, at least temporarily, alters the condition of the lands; as for instance, sowing indigo prevents the land from being used for sowing other ordinary crops, such as paddy and

wheat, and the winter crops called the *rubby*. These crops are such as may come to the use of every co-proprietor, whereas indigo plant is a special kind of crop, which is not an article of ordinary consumption and which in fact is useless unless manufactured into an article of commerce by an elaborate process. A co-proprietor therefore may very reasonably raise objections if land in which he is interested should be grown with indigo plants without his consent.

If, however, there are tenants upon the land, who have been inducted into their tenures, by the whole proprietary body, in that case it has been held that payment of rent to a single joint proprietor would discharge the tenant from his whole liability, provided the whole rent payable for his tenure has been paid by him.[1] But where no partition had been made of the joint landed property, and a tenant had been admitted into the tenure by some only of the coparceners, and where no such custom was proved as authorised them to admit a tenant without the consent of all, it was held that the tenant was liable to be ejected at the instance of those who did not take part in admitting him as a tenant.[2]

In one case the plaintiff sued for declaration of his right to occupy one half of a Chundee Mundub for *pooja* purposes, to a joint right in which he had been previously declared to be entitled. The Court said that the mode of enjoyment of ijmalee property was a matter for private arrangement, and not for judicial determination. The right having been once previously declared to be joint by the Court, the particular mode of its enjoyment must be left to the parties themselves, there being no rule of law

[1] Baboo Oodit Narain Sing *v.* Mr. H. Hudson, 2 W. R. Act X Rulings, p. 15.

[2] Ghunshyam Sing *v.* Runjeet Sing, 4 W. R. Act X Rulings, p. 39.

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[1] Romes Chunder Bhattacharjee v. Soorjo Coomar Bhattacharjee, 5 W. R. 90.

LECTURE IV.

ON THE MANAGING MEMBER OF A JOINT HINDU FAMILY.

A younger brother may be a manager—Son cannot demand partition of father's self-acquisitions—Father entitled to be the manager—Senior member of the family becomes the manager—The word 'karta' confined to Bengal—Whether in Bengal, father as 'karta' can be restrained by sons—'Karta' accountable—Bengal father as 'karta' not accountable—Manager's acts how far binding upon the rest—Management of ancestral trade—Manager cannot enlarge period of limitation—Manager's power is confined to joint property—Manager's powers terminated by partition—Bengal son cannot demand partition.

The united condition described in the last Lecture of a number of brethren, when the joint family is composed of the sons of the same parents, leads us to the consideration of the managing member, as in the text of Nárada quoted towards the end of the last Lecture, it is a managing member who is alluded to by saying that the family is kept up by capacity; although therefore ordinarily the eldest brother becomes the managing member, yet the text of Nárada clearly indicates that the same rule is not invariably followed, but that even a younger brother, possessed of capacity, may undertake the family management, and thus become its head or organ to the outside world. Instances of such headships vested in younger brothers are not rare in many an existing joint family of the day. I may mention a wealthy family of this very city, which was in a prosperous condition about forty years ago and lived in very great affluence. At present all

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traces of its former prosperity are nearly gone. I allude to the well-known family of Ram Doolal Sarkar, who left two sons Asutosh and Promothonath; of whom the younger brother, Promothonath was universally recognized as the manager of the vast estate left by their father Ram Doolal. When the family consists of a father and his sons, it is the father who ordinarily becomes the head, and even if it be a family governed by the Mitákshará law, the sons are not competent to deal independently with the joint funds. Thus it is said in the Smritichandriká[1] that the sons have no right to independence while their father is alive. The author quotes a text from Sankha, which declares that although the sons obtain a ownership in all property immediately after their birth, yet they should not resort to a partition of the family effects so long as the father lives. They are not competent to do so; for whether in dealing with the property, or in religious works, they are not independent of the father, but should always abide by the father's advice and directions. The author of the Smritichandriká confirms the above *dictum* of Sankha by quoting Hárita also. According to this latter authority, a son during the lifetime of the father, cannot make any acceptance of wealth, or any expenditure; he should not even reprimand the servants for misbehaviour on their part. In all these matters the son must in every case take the permission of the father before he interferes with the affairs of the family. Hárita says that the son is incompetent to accept wealth; this is explained by the author of the Smritichandriká as enjoyment of wealth. But considering that this acceptance of wealth is coupled with the expenditure of wealth; it seems to me that Hárita intends to deny the competency of the son either

[1] Chapter I, section 18.

to give an acquittance or authorise an expenditure without the permission of the father.

Son cannot demand partition of father's self-acquisitions.

Although in the above-quoted text of Sankha, it is declared that the sons are not independent of their father in making a partition, we must take the text to be confined to the father's self-acquisitions; for in the Mitákshará,[1] it is distinctly said that notwithstanding the mother's capacity to bear more children, and notwithstanding the father's unwillingness, the sons are competent to demand a partition of the grandfather's wealth. Similarly (para. 9) if an undivided father makes a gift of grandfather's property, or sells it, the son is not so far dependent as to be bound to abide by the same; for he is entitled to enter his protest against the same. As regards the self-acquisitions made by the father, the son, though a co-sharer, should not exercise his right of prohibition; but should permit his father to make a sale or gift according to his pleasure. The reason for this distinction between the father's own acquisitions and what has descended from the grandfather is stated rather in an unintelligible way by Vijnáneswara. He says (para. 10) that although both in the paternal property and in the property left by the grandfather, the son has a vested right from the moment of his birth, yet the son is bound to obey the father so far as the paternal property is concerned; but in the property of the grandfather, the ownership of both is undistinguishable (such is the language); therefore the son has a right of prohibiting the disposition of the grandfather's property by the father at his pleasure. This mode of making a distinction can hardly commend itself as rational. It is declared that the son's ownership in the paternal property from the moment of his birth is complete; yet he should not

[1] Chapter I, section 5, para. 8.

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control the disposition of it; but he should do so as regards grandfather's wealth. No reason, however, that we can undestand is assigned for the difference. It would seem from another passage that upon this point the author of the Mitákshará had not himself a clear conception as to what law he intended to lay down. For in his Preliminary Discourse on the nature of ownership,[1] the author had in unmistakeable terms propounded the doctrine of the father's dependence upon the sons in dealing with all immoveable property, whether self-acquired or ancestral. But in para. 10, section 5 he generally says that the sons should permit their father to deal with his self-acquisitions just as he chooses. Here he does not confine this power of the father to moveable property alone. Probably the real opinion of the author was to declare the uncontrolled power of the father over only the moveable property acquired by himself; while all immoveable property, whether acquired by himself or ancestral, was subject in its disposition to the control of the sons.

Mitra Misra, in his Víramitrodaya, however, has come to a conclusion which involves the conception of a more enlarged power of disposition vested in the father. He says: —(p. 74) "The substance of what is intended in the above texts is this:—Although the ownership of the sons and the grandsons in the property of the father and the grandfather arises by birth alone, still by reason of the texts previously cited, the sons being dependent on the father with respect to the father's self-acquired property, and the father being entitled to superiority on account of his being the acquirer, the sons must give their assent to the disposal by the father of his self-acquired property, excepting land and slaves, by reason of the previously

[1] *Vide* chapter I, section 1, para. 27.

cited text, namely, 'immoveables and bipeds, &c.' With respect to the grandfather's property, however, there is also the power of forbidding any disposal by the father; but with respect to property which was not recovered by the grandfather, but was recovered by the father, the sons are certainly dependent on the father's will, although the property be the grandfather's; but as regards gems and pearls, &c., though inherited from the grandfather, the father alone has independence, by reason of the previously cited texts, namely, 'The father is master of all the gems, and pearls and corals, &c.' "

The two texts referred to in the above extract, are both found in the Mitákshará. The first is the text quoted in the Mitákshará, chapter I, section 1, para. 27, and runs thus:—"Though immoveables and bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons." The other text is found in para. 21, same chapter and same section, and runs thus:—"The father is the master of the gems, pearls, and corals, and of all: but neither the father, nor the grandfather is the master of the whole immoveable estates." Mitra Misra thinks (p. 16, section 29, Eng.) that this latter text is an authority for saying that the moveable property of the grandfather is at the entire disposal of the father. But the Mitákshará does not make any distinction between the grandfather's moveable and immoveable property.[1] On the contrary, the Mitákshará restricts the father's power over even his self-acquired property of the immoveable class.[2] For chapter I, section 5, para. 10, says:—"Consequently the difference is this:—Although he has a right by birth in his father's and his grandfather's

[1] *Vide* Mitak. chapter I, section 5, para. 10.

[2] *Vide* Id. chapter I, section 1, para. 27.

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Now, what is the effect of all these passages, read together? Simply, this:—A son acquires a right by birth both in the paternal and in the ancestral property; that the father can dispose of moveable property, for the support of the family and certain other purposes; that if the other members are minors or otherwise incapacitated

for giving consent to a transaction affecting the family funds, the father as well as any other single member, whereby seems to be intended a managing member, can deal with immoveable property for those purposes; that he can dispose of his self-acquired moveable property absolutely at his pleasure; and that the immoveable property of all kinds is beyond his control, except in the case of what are called legal necessities. The Mitákshará explains the nature of these necessities by the mention of distress, family subsistence, and unavoidable religious duties. Even in the case of legal necessities, immoveable ancestral property can be dealt with by one when the other members are labouring under an incapacity by reason of minority, lunacy, imprisonment, and it may be absence in a far-off land. Vijnáneswara nowhere says that the moveable property received from the grandfather is at the unfettered disposal of the father.

At this place I ought to notice the translation by Colebrooke of para. 24, chapter I, section 1 of the Mitákshará. The conclusion of this para. has been rendered thus;—"So, according to our opinion, the father has power, to give away such effects, though acquired by *his* father." By 'such effects' is intended 'moveable property.' Now the words in the original Sanscrit are:—

एवमस्मन्मतेऽपि पित्रार्जितानामप्येतेषां पितुर्दानाधिकारो वचनात्.

As translated by Colebrooke, this passage of the Mitákshará would seem to sanction the proposition that the father's power over the moveable property inherited from the grandfather is unrestricted. But I am afraid that the translation here is not quite correct. The word '*his*,' in the midst of the words, 'though acquired by *his* father' is not in the original. The original text simply rendered would run:—'In this way, in our opinion also, the power to give on the part of the father as regards these,

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even though acquired by the father, follows from the text.' By 'these' are to be understood 'the gems, pearls and corals.' That is to say, moveable property, in general. What the author of the Mitákshará intends to say may be thus explained. We must remember that these passages form a part of that quaint discussion on the topic of ownership with which the author introduces the subject of partition. In the course of it he notices an adverse opinion which inculcates that ownership does not accrue by birth, but by the death of the previous owner. In fact this is the opinion of the Dáyabhága school. He controverts that opinion on the strength of the text which declares that (para. 21) "of gems, pearls, and corals, of all in fact,—the father is the master; but of the whole immoveable property, neither the father, nor the grandfather is the master." Vijnáneswara says to his opponent—you argue that although ownership arises by death, yet there being an express text giving ownership over moveable property to the father alone, the conclusion is clear that all moveable property is at the father's disposal. But I reply that even the grandfather himself being declared as not the lord of the immoveable property shows that the right of the son accrues by birth: otherwise, why should not the grandfather be the master of his own acquired immoveable property? And that being so, gems, pearls, and corals and such effects, although self-acquisitions of the father, are yet jointly owned by the father and the son. But there being an express text, the father can dispose of his self-acquired moveable property.

That this is the opinion of Vijnáneswara as deducible from the above passages is confirmed by Visweswara Bhatta, the author of the well-known commentary on the Mitákshará, styled the Subodhiní, quotations from which are constantly to be met with in the footnotes of Cole-

brooke's Mitákshará. I cite the whole of that passage below.[1] "This is the purport:—Self-acquired property, other than immoveable,—without even the permission of those entitled to permit (*i. e.*, entitled to be consulted) —can be given from affection. But (an objector says) if this be so, then there would result a conflict with the text of Vishnu, which speaks of an affectionate gift of even immoveable property. Therefore the author says:—[Here Visvesvara Bhatta quotes a part of the Mitákshará text by way of reference.] This is the purport. As regards even self-acquired immoveable property—without the permission of all entitled to permit (entitled to be consulted), whether capable of permitting or incapable of permitting—there is no right to make a gift. As regards the other (kinds of property) there is no necessity for (taking) a permission."

By 'entitled to permit' is evidently meant 'a person whose permission is indispensable in making a transfer, he having a right in the property.' By 'capable of permitting' is evidently meant 'a person who has come of age, or whose consent is valid in law.' The result of what Visvesvara Bhatta writes is that he did not understand Vijnáneswara to sanction the father's unfettered power of dealing with grandfather's moveable property.

The truth seems to be that in declaring the father as having an absolute right over the grandfather's moveable property, Mitra Misra has taken a hint from the Dáyabhága school. Whether this declaration of law will

[1] अयमभिप्रायः। स्थावरव्यतिरिक्तं स्वोपार्जितं वस्तु अनुज्ञार्हानुमतिमन्तरेणापि पित्रा प्रीत्या दातुं शक्यते इति। ननु यद्येवं तर्हि स्थावरस्यापि प्रीतिदानप्रतिपादने-(के?) न विष्णुवचनेन विरोध इत्यत आह। यदार्थं (यत्तु भवो?) प्रीतेनेत्यादि विष्णुवचनमिति। अयमाशयः। स्वोपार्जितेष्वपि स्थावरेषु अनुज्ञासमर्थासमर्थानुज्ञार्ह सर्वानुमतिमन्तरेण दानानधिकारः। इतरेषु तु न अनुमत्यपेक्षा इति।
MS. Cal. Sans. College, No. 1342, leaf 61, p. 2.

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ultimately receive judicial recognition or not, is a matter beyond my foresight, but I thought it my duty here to point out an inaccuracy in the current translation of the Mitákshará, which might be supposed to countenance the view adopted by Mitra Misra.

In these passages just now discussed, we find repeated mention of grandfather's property as contrasted with the property of the father. Here, we must take the word 'grandfather' standing for any ancestor whatsoever. This appears from what Nilakaṇṭha says at the very beginning of that section of his Vyavahára-mayúkha which deals with the subject of Inheritance.[1] "Strictly speaking the word grandfather is indicative of a class, (not of the grandfather alone); otherwise, there would arise an absence of equal ownership of the great-grandson in the wealth received from the great-grandfather, &c."

We have thus seen that so far as the right of partition is concerned, the dependence of the sons upon their father, is confined to the case of the father's self-acquisitions alone. In other matters, however, the sons are bound to be obedient to the father. Although it is now admitted as a proposition of law beyond all doubt that a son takes by birth a vested interest in immoveable ancestral property, although his interest in the father's lifetime and even before partition is a present interest of a proprietary or coparcenery nature; and although he has a right to enforce partition of the ancestral estate; yet until partition takes place, or until the death of the father, natural or civil, the father, by reason of his paternal relation, and his position as head and manager of the family, is entitled to make lawful disposition of the property in the interest of the family. In chapter I, section 5, paras. 9 and 10 of the Mitákshará, a son is said to be dependent,

Father entitled to be the manager

[1] P. 33, Mandlik.

and bound to acquiesce, and has no right of interference, within certain limits; the father is also said to have a predominant interest in his self-acquired property. Paras. 9 and 10 have been held as an authority declaring how far the son's power of interdiction in the father's disposition of property extends, and showing that the power of disposition within certain limits is centred in the father. The son's enjoyment of the property is subject to the dispositions lawfully made by the father, and, if dissatisfied, the son's remedy will lie in any right that he may possess to enforce partition of the estate. Accordingly where a son did not like to live with his step-mother, and had taken forcible possession of an ancestral house after it had been vacated by a tenant, in spite of his father's opposition; it was held that the son was not competent to do so; that he could not insist upon occupying property which the father wanted to let to tenants on rent; that the father was entitled to make such arrangements with regard to ancestral property as he thought proper.[1] In this case the Chief Justice of the Allahabad High Court, observed that the son's right to interfere in certain events to prevent waste, or to enforce partition in the father's lifetime even without the latter's consent, only implies a proprietary interest; it does not carry with it the incident of dominium. The sons have not independent dominion, although they have a proprietary right.

This dependence of the sons upon the father is terminated by certain circumstances which are clearly set forth in chapter I, para. 28, Smritichandriká, and in the following paragraphs. The main result of the explanations embodied in these paragraphs is connected with the question, what are the occasions which can justify sons in demanding partition, or even in making partition,

[1] Buldeo Das v. Sham Lal, I. L. R. 1 All. 78.

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without willingness on the part of the father. At the outset the author says in general terms that the dependent condition of the sons continues so long as the father conducts himself in an unexceptionable way, so long as he is blameless or faultless, as the language goes. Wherein consists this blameableness or faultlessness is sufficiently clear from what follows. If he, the father, be addicted to vices proceeding from passion, the dependent condition of the sons immediately terminates. The word in the original is 'vyasana'; which term has a peculiar meaning, thus explained by Wilson. A vyasana is a fault, vice, crime, or frailty, arising from desire or anger. This explanation is in accordance with what Manu says in verses 47 and 48 of chapter 7. In verse 47 he says:—"The group of vices taking their rise from desire are the following ten: hunting, gambling, sleeping in the day, calumny, whoring, drinking, the three amusements of dance and song and instrumental music, and purposelessly roaming hither and thither." In verse 48 he says:—"The group of vices taking their rise from anger or ill-feeling are the following eight:—ill-natured cavil, violence, malevolence, envy, hatred, misappropriation, abuse and assault." These eighteen descriptions of misbehaviour are to be so called when a person is guilty of excess, some of these acts, such as instrumental music and hunting, being quite innocent when moderately indulged in. Probably Manu's meaning was, that people are naturally prone to run to excess in these propensities. He therefore proscribes them unqualifiedly. If modern Western society were judged by the standard thus set up, hardly a single gentleman would obtain a verdict in his favour as free from vice. Now Smriti Chandriká lays down that this kind of vice disentitles a father to act as the head of the family, and emancipates the sons

from their dependent position. The eldest son, under such circumstances, may assume the headship; may receive money or authorize expenditure or govern the household. Or even a younger may become the manager, if the eldest give his assent to such an arrangement. But the younger must have superior capacity for business, in order to lay claim to such a position. Capacity in fact is the element which determines the qualification for being the head. Fitness and personal efficiency are the principles that guide the election of a managing member. The author of the Smriti Chandriká, therefore says that a vicious life, imbecility and a prolonged invalid condition incapacitate the father from acting as the managing member. Even extreme old age, accompanied by dotage and weakened intellect, is a ground for taking from him the leading position in the family. In all these matters, Hindu Law, as developed by these later commentators, exhibits a just and rational regard for the welfare of the family, and subordinates to that end the claims of the father to respect and consideration. As I have said before, the original texts generally speak of a family as if it were composed wholly of the issue of a single stock; a father and his sons; or a number of brothers living together in a joint condition. But modern administrators have to deal with a large number of cases in which the family embraces cousins and uncles and grand-uncles. In such cases, the question, who ought to be the managing member, receives no assistance from the original texts; the judges therefore will have to apply principles of analogy drawn from the authorities, and from their own notions of equity. The procedure of applying the principle of analogy in cases not expressly provided for, is countenanced by the original texts. Thus in the Víramitrodaya, Chapter II,

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Part I, Section 10,[1] it is said :—" Although this has been ordained with reference to what the husband is to give to a wife who is superseded by the marriage of another wife, still by parity of reason, it is to be applied in the present case where the question occurs (as to what should be allotted to a wife who has received woman's property). For Baudháyana says :—' What is affirmed of even one among many that have a common attribute, same is to be extended to all, since they are declared to be similar.' " This therefore is an express authority for holding that analogy is a principle recognized from very early days, from the days of Baudháyana at least, in the working out of Hindu Law. If we apply this principle to the case of the managing member, we should probably lay down that where the family embraces cousins and uncles, seniority of age, and capacity for business, are the two qualifications constituting a title to the position of a managing member. I do not know the existence of any particular case where it has been so laid down. But Sir Henry Maine in his treatise on Early Institutions, (p. 199) says :—" The family, according to the Hindu theory, is despotically governed by its head; but if he dies and the family separates at his death, the property is equally divided between the sons. If, however, the family does not separate, but allows itself to expand into a joint family, we have the exact mixture of election and of doubtful succession which we find in the early examples of European primogeniture. The eldest son, and after him his eldest son is ordinarily the manager of the affairs of the joint family, but his privileges theoretically depend upon election by the brotherhood, and he may be set aside by it, and when he is set aside, it is generally in favour of a brother of the deceased manager, who on the score of

[1] P. 58, English.

greater age is assumed to be better qualified than his nephew for administration and business."

Senior member of the family becomes the manager.

The proposition that the eldest son of the eldest son assumes the managership is not borne out by actual practice. Nor is there, as far as we can see, anything like a formal election. What takes place is, that on the death of a managing member, the senior member in the fraternity, naturally and without any express sanction from the others, takes up the government of the joint concern. If the senior member be unfit or unwilling, then something like an informal consultation is held among the coparceners, and the member who in the estimation of all stands as a capable person, is nominated to the vacant headship. Sometimes in cases of families possessed of extensive properties, subordinate managerships are constituted, these subordinate managers superintending different departments,—one being placed at the head of the zamindary affairs, another supervising trading concerns, a third superintending the household expenditure, and so forth; while all may be subject again to the general control of a paramount head. In many cases, there is no paramount head, but the general control is vested in the whole of the parceners. No invariable rule, in fact, can be laid down with regard to the organization by which the management of joint family concerns is carried on; this organization being regulated by convenience and mutual arrangement among the members.

The word 'Karta' confined to Bengal.

In Bengal, a manager is called a Karta. This term is not to be found in the original texts; nor does the word bear any signification of that kind in Sanscrit, although it is a Sanscrit word, and means simply 'one who acts, who does something, an agent.' It also sometimes means 'the creator.' But in the Bengali language all other

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primitive significations of the term have been so absolutely merged in this sense of the manager of a joint family, that because the father in ordinary cases is the manager, the father is often called the karta. Thus sons arrived at manhood who live in the same house with their father generally refer to him by this name of the karta. Instead of saying that father did such and such a thing, they would in ordinary parlance say that the karta did such and such a thing. This is somewhat similar to the practice of fast young Englishmen referring to their father as the governor. In the Bengali, the term karta when applied by the sons to their father does not imply the slightest disrespect, and is not indicative of any frivolous spirit on the part of the sons.

The position of the karta in a Bengal family has been thus described in a case:—"The coparceners manage the property together, and the karta is but the mouthpiece of the family, chosen and capable of being changed by themselves. The family may in this respect be likened to a committee with the karta as chairman. No doubt in practice, the members of the family often do leave pretty nearly everything in the hands of the karta and under his control, but this is in most cases the result of the respect which the seniority in age and generation is apt everywhere to engender, and most especially in the case of a Hindu joint family. When it takes place, it is a willing abdication of personal care and supervision. It is not a distinct agency or delegation of separate authority: each member may still at all times interfere if he chooses. And he may always insist upon division if he is dissatisfied with the management; even where the members of the family leave the most unrestricted power in the hands of the karta, it is, I believe, usual to hold a family conclave, at least once in the year to con-

firm and approve of what the karta has done, and to discuss jointly what should be done hereafter as to the family affairs. Unless, therefore, something is shown to the contrary, every adult member of an undivided family, living in commensality with the karta, must be taken as between himself and the karta, to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot, without further cause, call the karta to account for it. Of course, it may as a matter of fact be the case in a given family that the karta is the agent of, and stands in a fiduciary and accountable relation to, one or more of the members. It would be easy to imagine a state of things under which he had become the trustee of the property relative to his adult coparceners, or in which, by reason of his fraud or other behaviour, they or one of them had acquired an equity to call upon him for an account. But he does not wear the character of accountability, merely because he occupies the position of karta."[1]

In Bengal, when the family is composed of a father and his sons, the position of the latter is entirely subordinate; the father must necessarily be the karta, and it would be wrong to suppose, as seemingly countenanced by the observations quoted above, that the sons are competent to set him aside from the position of the manager, or to interfere, or to take exceptions to the mode of his management. Supposing the joint property to consist of what has been inherited by the father from his ancestors, and of what has been acquired by himself, the power of the father in Bengal is absolute. He in fact is the sole owner; he can do just as he likes with the whole; and the sons occupy a position somewhat similar

[1] Chuckun Lal Sing *v.* Poran Chunder Sing, 9 W. R. 483.

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to that of the female members in a family governed by the Mitákshará law. Or we may even go so far as to say that the position of the sons in a Bengal family is even lower than that of the female members in a Mitákshará family; for these female members at least possess a safe and secure right to maintenance; whereas it has been held that the father of a Bengal family is under no obligation to support a grown up son.[1] In the case so deciding Mr. Justice Mitter said that there was no authority either in the Hindu law, or in the Jain Shasters, supporting the right of an adult son to demand maintenance from his father. The parties seem to have belonged to the Jain sect and were domiciled in Murshidabad, which is a part of the country governed by the Dáyabhága law. It has been held that in the absence of proof of any special custom or usage, the Jains would be subject to the law obtaining in the part of the country where they reside.[2]

It may be taken as settled therefore that so far as Bengal is concerned, the adult sons cannot even demand maintenance from their father. Any attempt therefore on the part of the sons of a Bengal family to depose the father from the post of managership is out of the question. A doubt may be entertained as to what the power of the sons will be, when the father of a Bengal family exhibits any such characteristic, as is declared in the passage of the Smritichandriká cited a little while ago, to incapacitate the father for management. For that passage is based upon the texts of Sankha and Háríta, two Rishi authorities whose dicta are binding upon the conscience of all Hindus wheresoever located, although the opinion of the Smritichandriká may not be so binding.

[1] Premchand Pepara *v.* Hoolas Chand Pepara, 12 W. R. 494.
[2] Lalla Mohabeer Pershad *v.* Musst. Koondun Kooer, 8 W. R. 116.

Furthermore, those texts of Hárita and Sankha and Likhita have been, I find, cited in the Dáyabhága, chap. I, para. 42. "Thus Hárita says:—'While the father lives, the sons have no independent power with regard to the receipt, expenditure and bailment of wealth. But if he be decayed, remotely absent, afflicted with disease, let the eldest son manage the affairs as he pleases.' So Sankha and Likhita explicitly declare:—'If the father be incapable, let the eldest manage the affairs of the family; or with his consent, a younger brother, conversant with business. Partition of the wealth does not take place, if the father be not desirous of it. When he is old, or his mental faculties are impaired, or his body is afflicted with lasting disease, let the eldest protect, like the father, the goods of the rest; for the support of the family is founded on wealth. They are not independent, while they have their father living, nor while their mother survives.'" On the strength of these Rishi authorities, it may well be contended that even in Bengal, a father is liable to be deposed from the managership, on the ground of weakened intellect or dotage. It may also be advanced with some force that if the father of a Bengal family gives himself up to a vicious course of conduct, the sons may hold a sort of family council, and may restrain the father from dissipating the property on which the welfare and subsistence of the family depend. In verse 51 of the 2nd chapter of Yájnavalkya, it is enjoined[1] that "if the father be sojourning away from home, or be dead, or be steeped in vice, the debt should be paid by sons and grandsons—when proved by witnesses if the debt be denied." In this, verse, the same word 'vyásana'—which has been already

[1] पितरि प्रोषिते प्रेते व्यसनाभिप्लुतेऽथवा।
पुत्रैः पौत्रैश्च दातव्यं दैवे निह्नवे साक्षिभाविते॥

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explained as indulgence in a vicious course of conduct—has been used by Rishi Yájnavalkya. Being a Rishi text, its operation is not confined to a Mitákshará family alone. Nor can it be said that the injunction directing the payment of the debt is a moral one; for it forms a part of that Rishi's chapter on the law of litigation; there can therefore be no reason for doubting that in a Hindu kingdom, whether the sons received any inheritance or not, they would be compellable in a Court of Justice to pay the debts of their father. If that be so, then a vicious course of life on the part of the father would be a reason for setting him aside from the headship of the family, and for placing the control of the joint concerns in the hands of the eldest son or some other qualified member. This rule might be enforced all over India without making any departure from the genuine spirit of the old Hindu law. Such a law might serve as an effective check on the reckless conduct of a misguided *pater familias* of the province of Bengal, where vast properties, built by generations of hard-working individuals, are not seldom dissipated, and highly respectable families are brought to ruin. The text of Yájnavalkya, therefore, in the hand of our judicial tribunals, might be worked to a salutary end. But the British administrators of justice are guided by far different principles. Interference with absolute rights of property is what they like the least; their training and education engender in them a deep-rooted sympathy for such jural notions as are favourable to absolute proprietary rights. The tendency of the development of Hindu Law in their hands has been towards the multiplication of these absolute rights. The Hindu widow's rights have now been greatly enlarged. The rights of the father of a Mitákshará family, as we shall see in a sub-

Whether in Bengal, father as karta can be restrained by sons.

sequent Lecture, have been now placed almost on a par with that of the Dáyabhága father. Again, they have an instinctive repugnance to the idea of checking vice by the exercise of judicial functions. It is for these reasons a forlorn hope that so far as the Bengal family is concerned, Yájnavalkya's text will be ever availed of in order to stop the ruin of families, or to check the reckless conduct of a vicious father. Nor is it certain that the enforcement of the law for deposing a father from the family headship on account of vicious life would be an unmixed good; in France, it is said that there is an institution of family councils, whereby a member who has overleapt all discipline is brought back to a more rational course of life; but it is also said that these family councils are liable to abuse, and that sometimes by their means mere eccentricities of behaviour are made a ground for putting a person in a lunatic asylum. Who knows that in Bengal, were a similar law established, designing and evil-disposed sons might not take an undue advantage of it?

A karta therefore, so far as Bengal is concerned, may not be readily deposed from his post, when it is the father who occupies it. In any other case, probably the law as laid down in the decision quoted from the Ninth Volume of the Weekly Reporter is unexceptionable. Yet the ordinary remedy being a suit for partition, supposing the conduct of the karta were liable to censure, it might be doubted whether a suit would lie for deposing the karta and making some fitter person the managing member. The position of the karta depends upon the voluntary submission of the other parceners; as soon as the relation between the karta and the rest becomes other than smooth, the inevitable result would be the disruption of the family. Under the Mitákshará also, I believe,

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it would be the same. The texts indeed declare the eldest son as entitled to succeed the father in the post of a manager under certain contingencies; but it is doubtful whether these texts are enforceable in a Court of Justice. If the manager that is, refuses to give up the headship, can the eldest son come to Court and ask to be placed in that position? I believe not. The answer which the Court will make to him will probably be, Have a partition. But it is not so sure that a tribunal presided over by a Hindu Judge trained according to purely Hindu notions would not interpret these texts in their literal sense, and would not place an eldest son in the position of the head when the existing incumbent, whoever he may be, whether a father or any other relation, should bring himself within the purview of those texts, either by dotage, prolonged illness, imbecility, or a vicious course of life.

'Karta' accountable.

With regard to the accountability of the karta, the case from the 9th Weekly Reporter gives an uncertain ring, and another case in which the judgment was given by Mr. Justice Markby, went very near saying that the karta was not accountable for the period during which he had managed the joint funds. In other words, it was held that the other coparceners had no legal right to demand an account of the sums of money belonging to the whole family which came into the hands of the karta, as to what the karta had done with them, whether any surplus had been left, whether all the expenditure authorized by the karta had been proper and above objection, whether his management of funds had been conducted in good faith, and so forth. It was thought by Mr. Justice Markby that the demand for such an account from the karta would be repugnant to the true principle of a joint Hindu family; that such accountability of the karta

would involve the very destruction of the joint family system.[1] At length, it was left for the late Mr. Justice Dwarkanath Mitter, whose honoured name is associated with the elucidation of many knotty questions of Hindu Law, to have it decided by a Full Bench, that the karta of a joint Hindu family could be sued by the other members for account, and that such suit was maintainable even if the parties suing were minors during the period for which the accounts were asked.[2]

In this case the distinction between a joint family and a mercantile partnership was pointed out; it was also held that the managing member would obtain credit from his coparceners for all sums of money *bonâ fide* spent by him for the benefit of the family; as on the other hand he was liable to make good to them their shares of all sums which he had actually misappropriated, or which he had spent for purposes other than those in which the joint family was interested. The result of the referring order in this case, (in which Mr. Justice Mitter, who was a member also of the Full Bench, set forth the reasons for his decision), and of the judgments delivered by the other Judges may be thus summed up:—The managing member of a joint family is not bound to repay, like the managing member of a partnership concern, such sums over and above his own particular share as he may have spent on his own special account, when these expenses are legitimate family expenses. Any other member can ask him what portion of the family income has been actually saved by him, whereupon the manager is bound to give an account of the receipts and disbursements. Chief Jus-

[1] Rungun Money Dasi *v.* Kasinath Dutt, 3 B. L. R. O. J. 1.

[2] Obhoy Chunder Roy Chowdhry *v.* Peary Mohan Gooho, 13 W. R. F. B. 75.

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tice Couch observed :—"The members of a joint Hindu family are entitled to the family property subject to such dispositions of it as the managing member is entitled to make, either by virtue of the power which is given to him by law as manager, or of the power that may be given to him by the consent of the other members of the family. Subject to the exercise of these powers, and to the disposition of any portion of the family property which may have been made by virtue of them, the other members of the family are clearly interested in that property. The principle upon which the right to call for an account rests, is not the existence of a direct agency or of a partnership where the manager may be considered as the agent of his copartners. It depends upon the right which the members of a joint Hindu family have to a share of the property, and where there is a joint right in the property, and one party receives all the profits, he is bound to account to the other parties who have an interest in it for the profits of their respective shares, after making such deductions as he may have the right to make." As the case in the 9th volume of the Weekly Reporter cited before had been decided by a judgment from Mr. Justice Phear, in the Full Bench case, Mr. Justice Phear thus explained his previous decision. Merely because one member happens to be the karta, it does not follow that he is bound to give an account, in a case where the other members were not only adult, but also had taken an actual part in the management of the family property. An adult member living in commensality with the others is to be presumed to take a part in the management of the joint property; this presumption can be rebutted by evidence that it was not actually so. The accountability of the karta rises from the principle of equity that every man who manages the property

of another person, or property in which another person is beneficially interested, upon the foundation of a trust or confidence between the two, is on the principles of equity and good conscience accountable to the latter for the mode in which he does manage it, and for the profits which he has made out of it. The principle of equity is, that a person who has the control and management of another's property upon the footing of anything which amounts to a confidence or trust reposed in him by this other, shall not be allowed to abuse that confidence, and to make a profit out of his management without the owner's consent. Now this fact, whether a profit has been made or not by the manager from the property managed is ascertainable by compelling the manager to disclose the details of his management, in other words by calling upon him to furnish an account; for these details must be within the knowledge of him alone who conducted the business of management. Equity therefore further lays down that accountability is a necessary incident of the position of one who deals with another's property on the ground of trust or confidence.

Besides this principle of equity upon which the accountability of a managing member may be rested, an authority for the very same proposition is also found in a passage of the Digest of Jagannath Tarkapanchánan, quoted in the Reference Order of Mr. Justice Dwárakanath Mitter:—"When some cause is shown for suspecting that effects are concealed, then only shall ordeal be performed. For example: the income is great, but expenditure small; but he who superintends the receipts and disbursements does not satisfactorily account for them."

The above decision by a Full Bench of the Calcutta High Court determines the point of accountability on the part of a manager in a Bengal family. But the principle

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upon which this liability is founded is equally applicable to the case of a Mitákshará family. In this latter there is the same community of interest, there is the same confidence or trust reposed by the others in the managing member, there is the same fact that profits of property belonging to many reach the hands of one among them. The result, therefore that the managing member will be bound to disclose at the instance of any one member what the history of the receipts and disbursements has been, necessarily follows. That it has been so understood appears from Muss. Nowlaso Koeree *v.* Laljee Modi, 22 W. R. 202, in which case, although it was from a District governed by the Mitákshará Law, no question was made that the managing member was generally liable for an account; the point determined in this case being that he cannot be sued for an account with regard only to particular items of money. It was held that such a suit was liable to dismissal; that a suit for a general account of the joint property was the proper remedy open to an ordinary member, and that such a general account would of course embrace and include all those particular items of expense which might have appeared as specially objectionable to the other members.

Bengal father as 'karta' not accountable.

In Bengal, the father as managing member, when the property is entirely ancestral, does not come within the principle of the Full Bench decision, that principle being that the profits of the property of one person, come into the hands of another, must be accounted for,—which is inapplicable when the other members, namely, the sons, are absolutely devoid of all proprietary interest. When it is open to the father to sell, mortgage, give or do anything he likes with inherited property, it would be inconsistent with so absolute a dominion that the father should have to disclose on the demand of the sons what

he may have done with the profits. But the Mitákshará father's rights standing on a different footing, he as managing member is liable for an account at the requisition of the sons; though the law does not seem to deny him a very large discretion in the matter of expenditure, —a discretion larger than that claimable for the managing member when he happens to be some other relation than the father. Thus if there are debts due for which the whole family is liable, the father of a Mitákshará family can borrow money at a less interest than the existing debts bear, and pay off the old debts by the new loans. In one case the father spent large sums in enlarging the family dwelling-house both on the ground-floor, and in building additions, and in adding an upper storey. It was found that the money laid out was not applied to ornamental or unproductive improvements, but to substantial and material additions.[1] In this case the Court observed that although necessary repairs only were a matter of family necessity, and not such improvements; yet the managing member had a discretion and could prudently and in good faith make additions and improvements in the family house. This discretion when exercised in good faith, and for the benefit of the family and of the estate should not be narrowly scrutinized. It should not be made a ground of objection that the money for the purpose of these improvements had been borrowed at a high rate of interest. The family had the benefit of such additions and improvements, which might enable them to take in additional lodgers. In this case therefore the other members, who were the sons, were held bound by the acts of the managing member, who was the father.

Manager's acts how far

The law as regards the question how far the acts of the

[1] Ratnam v. Govindarajulu, I. L. R. 2 Mad. 339.

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managing member are binding upon the other members may be generally stated thus:—When the acts of the managing member proceed from an intention to provide for some family need, or to perform an indispensable religious duty, or to benefit the estate, they are binding upon the others.[1] The manager is the agent for the other members, and is supposed to have authority to do acts for their common necessity or benefit. A creditor dealing with such a manager has a reasonable ground to give credit to the acts of the manager in all matters, apparently and ordinarily within the scope of his authority.[2] In a Mitákshará family also, it is the father who has a right to be the manager of the family composed of himself and his sons.[3] This is a peculiarity in an undivided family composed of a father and his sons. Otherwise there is no distinction between such a joint family and one composed solely of brothers, as regards the powers of the managing member to deal with the joint property.[4] The foundation for the law relating to a managing member seems to be the passage in the Mitákshará which has been repeatedly cited in the course of these Lectures,[5] the purport of which is that even a single member who is labouring under no legal disability and who has capacity for conducting business may enter into transactions relating to the family property if a calamity affecting the entire household so requires, or if it be unavoidable for supplying the means of subsistence to the family, and of performing the religious ceremonies.

[1] Saravana Tevar *v.* Muttyi Ammal, 6 Mad. H. C. Rep. 371; Honuman Prosad Panday *v.* Musst. Babooe Munraj Koeree, 6 Moore, 393.

[2] Kotta Ramswami Chetti *v.* Bangari Seshamma, see I. L. R. 3 Mad. 150.

[3] Soorj Bunsi Kooer *v.* Sheo Prosad Sing, L. R. 6 I. A. 106.

[4] Pounappa Pillai *v.* Bappu Bhai Yangar, I. L. R. 4 Mad. 16.

[5] Chapter I, section 1, para. 27 *et seq.*

This passage seems to furnish an authority for the proposition that ordinarily there is no difference between the position of a father and any other relative when placed at the head of the joint family as its managing member. Vijnáneswara here does not impose any duty on the son, legal or religious, to pay the father's personal debt. Nor can this passage be cited as an authority for saying that the son ought to suffer for the extravagance of the father. If the father, as the managing member, incurs expenses which are palpably unreasonable, it can hardly be said to benefit the estate; it can scarcely be contended that the payment of debts incurred for such expenses is a pious act. It is clear that such unreasonable expenses when authorized by a brother as the managing member would not be binding upon the rest; an elder brother often actually does occupy the position of the manager.

The indispensable duties alluded to in the Mitákshará are undoubtedly the annual sradhs, the ceremony of investiture with sacred thread among the three superior castes, the marriage of the minor girls of the family, where such marriage must be celebrated before the girls arrive at the age of puberty, and other religious ceremonies enjoined by the sacred writings, necessary to be performed at stated times, and the non-performance of which would be a cause of sin, or forfeiture of caste, or would lower the position of the family.[1] According to Giridharilal's case, 22 W. R. 56, the powers of a father as manager are superior to those of any other manager. His dealings with the joint property must stand unless they contravene law or morality. The High Court of Madras in the case just cited, say, that although in the Mitákshará, chapter I, section 5, para. 10, the son is declared to have a power of interdic-

[1] Ponnappa Pillai *v.* Bappu Bhai, I. L. R. 4 Mad. 16.

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We shall see in a subsequent part of these Lectures that the author of the Mitákshará is not in conflict with the Rishi authorities on the question of the son's obligation to pay his father's debts and that his *dictum* does not negative any such obligation.

Since the manager stands out to the rest of the world as the representative and organ of the family corporation, the law has invested him with powers and privileges enabling him to discharge effectively the functions of his position. Thus if any other member of the family dies, debts payable to the family might be evaded by the debtors on the plea that they were unable to pay, there being nobody competent to give them a discharge for the deceased member's share of the debts. The law therefore authorizes the managing member to apply for and obtain a certificate under Act XXVII of 1860 for the collection of the debts which may be owing to the deceased coparcener. The effect of such a certificate granted by the District Judge is, that the managing member when suing for the recovery of sums due to the joint family, cannot be met by any objection of the kind indicated above.[1] But this title to the certificate would be cut short by the

[1] Chowdry Kripa Sindhoo Doss v. Radha Churn Doss, 23 W. R. 235.

fact of disagreements having arisen among the members, in which case it is the legal heir of the deceased member who would be entitled to obtain the certificate.[1]

Management of ancestral trade.

The property of an undivided family often consists of an ancestral trade, which descends like other heritable property upon the members of the family in general. There may be infant members comprised in a group of coparceners whose forefathers may have carried on a lucrative commercial business for many generations. The business may not only be the very foundation of the whole fortune of the family, but often is the only means of their subsistence. When therefore a member dies in such a family, it would be ruinous to apply the principle regulating ordinary partnerships, and to hold that the family partnership in the commercial business is dissolved by the death of a single member. Courts of Justice in consequence have held that a fresh family partnership immediately springs up between existing members, among whom are to be included even the infant heirs of the deceased. As a necessary incident of this fresh family partnership, the manager is immediately invested with all those powers and capacities which were his attributes when no death had taken place in the family. A great many results will follow from the principle of this family partnership carried on from generation to generation. In carrying on a trade of this kind, the infant members will be bound by such acts of the managing member as must necessarily be done in order that the business may not suffer. He is legally authorized to pledge the property and the credit of the family for the ordinary purposes of the trade. Among these necessary acts must be included such as are indispensable for securing the material existence of the undivided coparceners and

[1] Idem.

LECTURE IV. for the preservation of the joint property. In the case of Ramlal Thakursidas *v.* Lakhmichand Moniram, 1 Bom. H. C. Rep. App. p. li, the law upon this subject was elaborately discussed. The following remarks made in the course of the judgment are most important. "Third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the *status* of the family represented by the manager whilst dealing with him on the credit of the family property. Were such a power on the part of the managing member not implied by law, property in a family trade which is recognized by Hindu law to be a valuable inheritance would become practically vulueless to the other members of the undivided family wherever an infant was concerned; for no one would deal with a manager if the minor were at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest; and the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection which the Hindu Law generally extends to the interests of a minor should be so far trenched upon as to bind him by the acts of the family manager necessary for the carrying on, and the consequent preservation of that family property. But the infringement is not to be carried beyond the actual necessity of the case. It is not easy to draw a well-defined line between what is and what is not an act necessarily incident to the carrying on of a trade. But taking into account the intimate and fiduciary position of one partner towards a co-partner, and the anxious protection afforded by Hindu Law to the interests of a minor, I think it safer and more in accordance with

its spirit, to hold in a case like the present (where the property so far as the minor's interest is concerned is of an ancestral character), that the compromise of partnership differences and accounts by a division and transfer of partnership property should not be treated as an act necessarily incident to the carrying on of a trade, but should be left to be governed by the law applicable to ordinary dealings with the manager of an undivided family when the interests of an infant member are concerned."

According to Sir Thomas Strange, the dealings of the manager with the joint property when minors have an interest in such property are liable to be scrutinized more strictly than when all the members are of age. Third persons who enter into transaction with such a manager are more strictly bound to see that the transactions are fair and *bonâ fide* so far as the minors' interests are concerned. The necessity of this precaution on the part of third persons is enhanced by the fact of minors being concerned, who in general will not be bound but by necessary acts or such as are evidently for their benefit.[1]

That a commercial or trading business is an inheritable property descendible from generation to generation in a joint family was laid down by Sir Lawrence Peel in Potum Doss *v.* Ramdhone Dass[2], wherein it was held that an ancestral trade, like other property, will descend upon the members of a Hindu undivided family, and that such a family can by its manager or adult members acting as managers enter into copartnership with a stranger.

In a Bengal case reported in the first volume of Shome's Reports, p. 1, Premchand Bauthra *v.* Radhika Lal Roy, the facts were that a silk-trade had been established by the father of two sons, one of whom appears to have

[1] Strange's Hindu Law, vol. I, p. 202.

[2] Taylor's Rep. 279.

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been a minor when the father died, and for some years subsequent to that event. It was a trade which required at times a large outlay and was subject to considerable fluctuation; while the father was alive, trade had been in a flourishing condition. The trade had been carried on after the death of the father at his express desire, and it appears to have been carried on by the sons in much the same way as it had been previously. The father had been in the habit of borrowing money from time to time for the purpose of the business; and, although the dealings of the sons had been somewhat more extensive than those of the father, the business was carried on in the same manner. The elder of the two brothers had naturally acted as the manager, and had conducted the trading business. He had contracted loans on behalf of himself and of the minor brother in the course of managing the trade, and it was found that in doing so he had been actuated by perfect good faith. The result, however, of his operations, was unfortunate, owing to no mismanagement, but to a fall in the price of silk, which had affected others engaged in the trade in the same way as it did the two brothers. Chief Justice Garth observed, under the above circumstances:—"We cannot see any ground for relieving the minor from his liability. * * It was laid down by the Privy Council, in the 6th Moore's Indian Appeals, p. 383[1] that the power of a manager or guardian of an infant to charge his immoveable property by mortgage or otherwise, can only be exercised in case of necessity and for the minor's benefit, and that a lender under such circumstances is bound to enquire into the necessity for the loan and to ascertain as well as he can, that the manager is acting for the benefit of the estate. And the same principle has been laid down and acted upon in the

[1] Honooman Prosad's case.

cases cited at the bar (6 W. R. 16; 20 W. R. 38 and 372; 23 W. R. 424) and in many others where it has been held that a guardian has no right to mortgage or sell the minor's property unless there is some necessity for it, and the transaction is for the minor's benefit. But a case like the present stands upon a different footing. The loan made by Premchand had nothing to do with immoveable property. They were made from time to time for the purpose of a trade which had been carried on by the minor's father, and which was in fact the patrimony of the two brothers; a trade of this kind is often the only property to which the family has to look for its livelihood, and having regard to the fact that here it was the father's express wish that it should be continued, and that there was no reason to suppose that it would cease to be profitable, the elder son would clearly not have been justified in excluding his brother from participation in it. Then if it was to be continued, it could only be so by borrowing such sums as were reasonably necessary for the purpose; and it would be manifestly impossible for any one lending money to the brothers under such circumstances to enquire how far the state of the business from time to time required that such loans should be contracted. If it could have been shown that the sums borrowed from Premchand had been so unusually large as to excite suspicions in the mind of any prudent man, that the elder brother was exceeding his authority, that either from self-interest or other improper motive, the elder son had omitted to set up any defence upon that ground in Premchand's suit, this Court then very possibly might have interfered by injunction to restrain the execution." In the case of Johurra Bibee *v.* Sree Gopal Misser, I. L. R. 1 Cal. 470, the ancestral trade had been carried on by the members of a Mitákshará family, and when the last

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survivor of the family composed of a father and his son and an uncle, the brother of the father, failed in business, a house the joint property of the family came into the hands of the Official Assignee in the course of insolvency proceedings. The Official Assignee sold the house to Sree Gopal Misser. The widow of one of the members of the joint family sued this purchaser for a declaration of her right to maintenance from the rents and profits of the house. Pontifex, J. held that the widow was entitled to no such declaration, observing,—"Persons carrying on a family business in the profits of which all the members of the family now participate have authority to pledge the joint family property and credit for the ordinary purposes of the business. And therefore debts honestly incurred in carrying on such business must override the rights of all members of the joint family in property acquired with funds derived from the joint business. In other words it seems to me that those who claim to participate in the benefits must also be subject to the liabilities of the joint business." In another case Joykisto Kower *v.* Nityanand Nundee, 2 C. L. R. 443, the father of a family governed by the Dáyabhága had carried on till the time of his death a trading business, which was continued after his death by his two widows, the family then being composed of these two widows and two sons, who appear to have been minors. The widows being *purda nashin* ladies, delegated their authority as managers to a son-in-law, who and the elder son, after he came of age, together conducted the management of the business. During the course of this management, debts were incurred for the purpose of carrying on the business, and the question was whether the other son, the infant, was liable for these debts. Chief Justice Garth said :—"It seems to us, on the authority

of decided cases, that the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor. Consequently the contention raised that the infant is not liable to any extent for the debt is not well-founded. On the other hand, it seems to us only reasonable, as well as in accordance with legal principles, that a minor, on whose behalf an ancestral business is carried on, ought not to be held personally liable for the debts incurred in that business. There must be some defined limit to the minor's liability. The limit apparently laid down by Mr. Justice Macpherson is, that all the ancestral property will be liable. But there may be instances in which this limit would be found manifestly inadequate and unsuited to reach the justice of the case. For example, a petty trade in the time of the ancestor might expand after his death into a large flourishing business in the hands of a manager for the infants. Debts arising from this business would naturally become proportionately large, and it would seem unreasonable to hold that such debts should be recoverable only from ancestral property. On the other hand, the trade might not prosper; and in this case, the minor ought not to be accountable for trade losses, out of any property unconnected with the assets of the business, which he may have received from the ancestor." In another Bengal case, Bemola Dossee *v.* Mohini Dossee, I. L. R. 5 Cal. 793, it has been held that in a joint family supported by the profits of a joint business, if a mortgage of the joint property be made by the managing member for the purpose of carrying on the said business, the same is binding upon all the members.

On the other hand, it has been held that the managing member is not authorized as such to give an acknowledgement for a debt barred by limitation so as to bind the rest. In Kumara Sami Nadan *v.* Pala Nagappa Chetti,

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I. L. R. 1 Mad. 386, the Judges said:—"The first and second defendants and the minor defendants were the members of an undivided Hindu family. The debt had been contracted for family purposes by the first defendant, who was the managing member of the family, and the question is, whether an acknowledgment in writing, signed by him within the period, will bind his coparceners. The relation of the managing member of a Hindu family to his coparceners is a very peculiar one, and does not necessarily imply an authority on the part of the manager to keep alive, as against his coparceners, a liability, which would otherwise become barred. The words of section 20 of Act IX of 1871 must be construed strictly, and the managing member of a Hindu family is not under that section an agent generally or specially authorized by his coparceners for the purposes mentioned in that section."

Manager cannot enlarge period of limitation.

This principle that it is not within the competency of a managing member to give a promise for the purpose of extending the period of limitation with reference to a joint debt does not seem to apply in the case of a family composed of a father and his son. In such a case, it is the father, who, unless labouring under a special disqualification, occupies the position of a managing member. In one case the father of an undivided family had been first sued for the recovery of a debt due from himself; the suit failed, the debt having been barred by limitation, when the father executed a promissory note undertaking to pay the bond. After the death of the father, his son was sued on the promissory note, and it was held that the son was liable to pay it; that this was not an immoral debt; that there was no illegality in the act of the father whereby he bound himself for the payment of a debt barred by limitation; and that limita-

tion does not affect the existence of a debt. The result therefore was that the son was declared bound to pay the amount of the promissory note from any assets of the father received by him.[1] In this case the principle regulating the power and privileges of a managing member was displaced by another for the first time brought into prominence by the Judicial Committee in the well-known case of Giridhari Lal *v.* Kanto Lal, 22 W. R. 56. This other principle is, that it is the pious duty of a son to pay such debts of the father as are neither illegal nor immoral. No court of justice or equity can countenance the notion, that if a man pays a debt which he may not be compellable by law to pay on account of lapse of time, or laches and negligence on the part of the creditor, he thereby commits an illegal or an immoral act. The suit on the part of the creditor for the recovery of a barred debt may in some sense be illegal, since limitation being a part of the law of procedure, such a suit contravenes the law of procedure. But no law declares that a man should not pay a stale or time-barred debt, in other words, a debt of a long standing; all that the law says is that the creditor will not obtain the help of the tribunals in the recovery of a barred debt. Nor is the payment of a time-barred debt immoral. Hindu Law knows next to nothing as to rights being destroyed by lapse of time; in the Mitákshará, in its comments upon verses 27, 28, and 29 of the 2nd chapter of Yájnavalkya, there is an elaborate discussion upon the point. This part of the treatise does not form a portion of Mr. Colebrooke's translation. But the result of the whole of that discussion may be stated to be that Vijnáneswara in certain cases is against granting mesne profits when a suit for the recovery of immoveable property is

[1] Narayana Sami *v.* Sami Das, I. L. R. 6 Mad. 293.

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brought after a long lapse of time. I believe there is no indication in any other part of the original texts which can be construed into even a remote resemblance of the conception involved in the modern law of limitation. Mr. Justice Mitter says in the case of Aparoop Tewaree *v.* Kandhjee Sahay, 8 C. L. R. 192, that it is a pious duty for a man to pay his own debts. Therefore, according to both the principles of Hindu Law and of morality, time-barred debts can be paid by the father as managing member out of the joint property, and any arrangements made by him for such payment are binding upon the sons. This is an instance wherein the powers and privileges of a father as the head of an undivided family are superior to those of any other relative when occupying the position of the managing member.

Although we have thus seen that extensive powers are vested in the head of a joint family, and although he is the organ, mouth-piece and representative of the family corporation, we must not suppose that the legal individuality of all other members is merged in him so long as the family union lasts. A member of an undivided family continuing to be so, and enjoying in common with his co-heirs every advantage incident to the unseparated state may in the meantime acquire separate property to his own particular use in which, upon a division, the rest will have no right to share. This is so said by Sir Thomas Strange and recognized as correct law by Sir Richard Couch in the case of Buckshee Booniadi Lall *v.* Buckshee Dewkee Nundun, 19 W. R. 223. With regard to such property therefore, the managing member is not the representative of the coparcener who owns separate property. The capacity of the member of a joint family to own property solely for his own use is recognized

Manager's power is confined to joint property.

in the Sivagunga case (9 Moore, I. A. 610), where their Lordships observe:—"There being no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed in the first place that the general course of descent of separate property, according to the Hindu Law, is not disputed. It is admitted that, according to that Law, such property descends to widows in default of male issue. It is upon the respondent therefore to make out that the property here in question, which was separately acquired, does not descend according to the course of the law. The way in which this is attempted to be done is by shewing a general state of coparcenership as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of coparcenaryship, this proof or absence of proof cannot alter the case, unless it be also the law that there cannot be property belonging to a united Hindu family which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle." The whole judgment in fact in the Sivagunga case is based upon the idea that the member of an undivided family is competent to hold, at the same time that he is interested in the united funds, property which belongs exclusively to himself. This idea is sufficiently well-grounded on a large number of original texts. It forms the foundation of that chapter in the Hindu Law of Partition wherein is discussed what property is not liable to be divided at a general partition.[1]

Again the member of a joint family, though subject

[1] *Vide* Mitákshará, ch. I, s. 4; Víramitrodaya, ch. 7; Viváda Chintámoni, p. 249; Smritichandriká, ch. 7; Dáyabhága. ch. 6; Mandlik's Vyavaháramayúkha, p. 66.

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Manager's powers terminated by partition.

ordinarily to the control of the manager, has certainly an independent right to put an end to the joint condition by simply demanding a partition. This right is indefeasible, and belongs to a son in a Mitákshará family. Innumerable cases have been decided on the basis of the existence of such a right. I shall cite only two. In the case of Mohabeer Prasad *v.* Ramyad Sing, 20 W. R. 195, the judgment of Mr. Justice Phear lays down that a partition of the joint property among the members of a Mitákshará family, amounting either to an ascertainment merely of the shares in which the joint property is to be thereafter held, or to an actual division by metes and bounds, may be come to by the family at any time; and moreover every member of the family may, whenever he chooses, require that it shall be come to. The principle has been also established by a Full Bench Decision of the Allahabad High Court, Joogul Kishore *v.* Shib Sahai, I. L. R. 5 All. 431.—"It is now settled law that the father and the son have equal vested rights in the joint ancestral immoveable property, and that the son can enforce a partition of his interest against his father's wish." The original texts upon which this right is founded are quite clear. Mitákshará, ch. I, s. V, para. 8. "Thus while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." I have already said that the original texts generally contemplate the undivided family consisting of a father and his sons; it has also been seen that in such a family, the father must be the head and manager; moreover there are many reasons to suppose that the powers of the father as manager are more extensive than those of any other person occupying the same position. Consequently

when the original texts declare even as against the manager whose powers are most extensive, namely, the father, the competency of the son to demand a partition; it follows necessarily that these texts must be in favour of similar competency on the part of the other members as against a manager invested with less extensive powers, such as an elder brother, or an uncle, or a cousin senior in age. This is confirmed by what Víramitrodaya says in ch. II, Part I, sec. 23. Here the author says that there is a partition during the lifetime of the son at the son's desire; and there is a partition after the death of the father, of course at the desire of the sons; both these kinds of partition, which have received special designation in Sanscrit at the hand of Mitra Misra and the author of the Smriti-chandriká, being respectively called 'living partition' and 'non-living partition'[1] can take place even at the desire of a single parcener. For this proposition Mitra Misra cites a text of Kátyáyana, the purport of which is, that if there be any coparceners who have not come of age, and if there be any who are absent, being sojourners away from home, then their portion of the wealth is to be deposited with their kinsmen and friends. This has been said by Kátyáyana in connection with the subject of partition: hence Mitra Misra argues, that in order to proceed to a partition of the joint effects, a unanimity of all the parceners is not indispensable; if the consent of all were indispensable, how could Kátyáyana speak of a partition when there were absent members or minor members? How could he speak of their share of the wealth being deposited with friends and kinsmen? For a minor is legally disqualified to give consent; and there can be no consent from a member who is absent in a remote region, by which no doubt was contem-

[1] Jívadvibhága and Ajívadvibhága.

plated, the case of one who has gone so far away from his family domicile, as to have temporarily severed himself from all communication with his family. We must remember that in those days, in other words before the establishment of postal communication between different parts of India, people gone abroad to travel could hardly keep up a regular correspondence with their home, though they may have never left the soil of the Bráhminik fatherland. Nor were such distant journeys unfrequent; for places of pilgrimage, to visit which a Hindu considers as meritorious from a religious point of view, are scattered over the land from Amarnath in the bosom of the Himálayas to Kanyákumárí opposite Ceylon; from Chandranáth on the borders of the Burmese territory to Dwáraká on the shores of the western sea. When therefore Kátyáyana, quoted by Mitra Misra in the passage above referred to, makes a provision for the divided shares of absent parceners, he lays down a rule which must have had extensive practical application. It is not unlikely that the universal practice of distant pilgrimages undertaken by our orthodox forefathers was the origin of this rule in the law of partition, that a single coparcener has a right to divide himself from the others, irrespective of what they wish. Were it not timely adopted, extreme hardship would have resulted in the matter of enjoying and improving property, in a peaceful and progressive community impatient of control in the free use of individual rights. The principle being once established in the case of absent members, was easily extended by analogy to the case of minors, whose incapacity for giving a legal consent ceased to be a bar to a partition among the rest. Accordingly Vishnu quoted by Mitra Misra in the very same passage says:—"So should be preserved the minor's wealth, until his attainment of majority."

On this question of an ordinary member's competency to demand partition irrespective of the father's or any other manager's desire, the Vyavahára Mayúkha is not very explicit. It reads in a curious way the texts of Sankha and Likhita and Hárita, which I have quoted as showing how the management of the joint property is to be carried on under particular contingencies[1]. Nilakaṇṭha cites those texts, and on their authority bases the proposition that the father being incapable, partition takes place by the advice or consent of the eldest son. He says what in effect amounts to this that any parcener who is capable of supporting a family, or probably the author's meaning is, that any parcener who has arrived at such an age of discretion as to be able to take charge of his family, may ask for partition. From this right, of course the minors would be excluded. Nor is it clear whether the father's incapacity for managing the family has anything to do with this right. At p. 38, the same author says :—"Even when there is a total absence of common property, a partition is effected by a mere declaration, 'I am separate from thee ;'—for partition is but a particular condition of the mind ; and this declaration is indicative of the same." This is an unqualified declaration of a single coparcener's right to divide himself, irrespective of the other members' wish. Nílakaṇṭha therefore, who in general closely follows Vijnáneswara, may be set down as one who not only admits the right of an ordinary member to demand partition irrespective of the manager's wish, but who extends that right to the son living under the managership of a father.

Bengal son cannot demand partition.

The Dáyabhága, however, by its doctrine of the father's absolute right, allows no right of partition to the son while the father is alive. In para. 44, chapter I, it says

[1] Mandlik, p. 40.

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that if the father be degraded, or retires from the world or dies, the sons can divide; or they can divide if the father wills it. Even as respects the grandfather's property, there may be a division when the mother is past child-bearing; even then it must be by the father's will, which will is controlled by the condition of the mother being incapable of bearing any more children. But when there is no father in the case, the Dáyabhága is explicit[1] that union depends upon the will of all the parceners; and the author quotes Nárada who distinctly says that the eldest is to support them like the father, if they be so willing (ichchhatah); and then Jímútaváhana says that 'partition may take place by the will of any one, as before intimated.' Here it is not said that there should be a desire on the part of the eldest as manager in order to bring about a partition. Then Jímútaváhana quotes the very same text of Kátyáyana which we have found cited in the Víramitrodaya, and which provides for the manner in which shares allotted to minors and absent members are to be dealt with.

As indicating the separate individuality of members other than the manager may be cited Babaji *v.* Shesha Giri, I. L. R. 6 Bom. 593, wherein it has been held that a certificate of administration may be granted for the share of a minior who is a member of a joint Hindu family. It has also been held, where a joint family consisted of brothers, that one of these brothers could by a will appoint a guardian for his minor son. In this case the actual competition for guardianship was between the step-mother appointed as guardian by the father, and the natural mother, who claimed under the general principles of Hindu Law, to set aside her husband's will in respect of the minor's guardianship. The Court observed that

[1] Daya., para. 15, ch. III, sec. 1.

although the mother was the natural guardian of her child; although her right would, under ordinary circumstances be supported, were any unauthorized person to deprive her of this right; yet the provisions of Hindu Law did not prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of her minor children. The will of the undivided member, though held to be inoperative as regards the disposition of the ancestral property, was not invalid as regards the appointment of a guardian. This is an authority for showing that an undivided member has a capacity for appointing a guardian for his minor sons; this capacity being declared to be inherent in such a member as the father of his sons, its exercise no doubt will be unobjectionable even though there were a manging member in the case.[1] Where an attempt was made to set up a plea in defence that a son in a Mitákshará family had no right to question fraudulent transfers of ancestral property made by the father, the Judges said that the son had an equal right with his father in the ancestral property; that he could compel his father to divide the property during his lifetime, and that any alienation made by the father after the birth of the son, without the consent of the son, unless for a purpose justified by the Hindu Law as a legal necessity, would not bind the son. If therefore, the father during the minority of the son alienated the property in fraud of his creditors, such fraud would not bind the son, who was neither a party nor a privy to the fraud; for the son did not claim ancestral property through his father, his title from his birth being a title wholly independent of, and equal to that of the father. The acts of the father, therefore, if fraudulent, could not be binding upon the son. (Babu Beer Kishore *v.* Babu Hur Bullubh, 7 W. R. 502.)

[1] Soobah Doorga Lal *v.* Rajah Neelanand Sing, 7 W. R. 74.

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ON LIMITATION AS AFFECTING THE RIGHTS OF THE MEMBERS OF A JOINT FAMILY.

Personal possession not necessary to bar limitation in joint property—Widow presumed to be enjoying her share—Receipt by one member consistent with title of all—Act IX of 1871, Art. 127—Occasional visits to joint property do not bar limitation—Under Act XV of 1877, knowledge of being excluded the starting point—Limitation unknown to Hindu Law—Except as regards mesne profits in some cases—Rights of a member returned after a long absence—Procedure as affected by joint family law.

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Personal possession not necessary to bar limitation in joint property.

We have previously seen that the members of a joint family are said to hold a united possession of the property common to all. It is said as between them that there is a unity of possession and of title. This principle of the unity of possession among the undivided members has given rise to a number of propositions in law which are solely applicable to the case of a joint family in connection with the question of limitation and certain other questions relating to the law of procedure. Thus as early as 1862 it was held that a suit for a share of inheritance by a single member would not be barred by limitation if joint possession were shown within the period of limitation; the issue in such a case being, not whether the plaintiff was in possession up to date of suit, but whether the joint possession continued up to any time within the period of limitation.[1] In this case the fact that the

[1] Musst. Indur Money Debee *v.* Raj Naran, Sp. No. W. R. 52.

defendants had sent to the plaintiff within 12 years some portions of the rents of the estate was held sufficient to bar limitation. Receipt of Rs. 3 per month as a member of the family was held sufficient to show that the plaintiff had had enjoyment of his share of the family property.[1] On the other hand it was observed in a case which was one to enforce a right to a share in immoveable property on the ground that it was family property, that it was incumbent on the plaintiff to show that the estate within 12 years before the institution of the suit was in the possession of persons claiming under his grandfather, namely, his grandmother, or mother, or that if not actually in their possession, that they received a portion of the profits from the defendant as the trustee in possession. This was evidently a case in which the plaintiff could not claim any relaxation of the law of limitation, on the ground of joint family, as his title was based upon inheritance from his maternal grandfather; and there cannot be any joint family as between a person and his mother's relatives.[2] If it had been paternal property, the Judges would not have said that the property would descend from the grandfather to the grandmother and then to the mother. Where two brothers domiciled in Assam had lived together, it was held that the Dáyabhága law applied; that the proper question with reference to a particular property was, whether it had been joint or not? If the property was joint, the fact of one brother having been in possession for 30 years did not affect the title of the other brother or those who claimed under him; for such possession, where the property was joint, was that of a trustee for the widow of his brother and could not be adverse to

[1] Umbikachurn v. Bhogobuttychurn, 3 W. R. 173.
[2] Bydonath Ojha v. Gopalmal, 6 W. R. 170.

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her.[1] On the other hand, if the family were not joint, the possession by the brother's son of a deceased Hindu who had been separate would be adverse as against his widow and as against those who would be his heirs after the death of the widow. The Judges said that the acts of the brother's son, in getting a mutation of their names in the Collector's rent-roll, having taken place more than 12 years before the death of the widow, were hostile to the widow, and the possession held by them of the estate of her husband was adverse to the widow, inasmuch as the husband having been found by a decision of the Court to have been separate in estate from his brothers, and the case being governed by the Mitákshará Law, the widow ought to have succeeded to his estate, and not the nephews, the husband's brother's sons. These latter, however, having obtained mutation of their names, and having held possession of the husband's estate for more than 12 years prior to the death of the widow, that act was hostile to the widow, and that possession adverse to her.[2] Since under the Dáyabhága law, even in a joint family, the widow succeeds her husband to his share of the joint property, and thereupon becomes a coparcener of the male members; in her case also therefore the principle of the unity of possession must apply; accordingly, if she continues living in the family house and in commensality with the family, the Court readily finds as a fact, that she must be receiving, in absence of evidence to the contrary, payments of money or money's worth on account of her share. In such a case limitation does not apply because the widow did not receive payments in money on account of her husband's share and had been driven from

Widow presumed to be enjoying her share.

[1] Chundra Kanto Surmah *v.* Bungshee Deb Surmah, 6 W. R. 61.

[2] Gopal Sing *v.* Kanhya Lal, 11 W. R. 9.

the family house for four or five years.[1] Where the Lower Appellate Court had found in a case from Assam that the widow was actually residing upon a portion of the family lands and held a portion of it in her khas possession; but that the defendant, who was a member of the joint family descended from a common ancestor with the deceased husband of the widow, had been managing the property for the last 30 years since the death of the husband; it was held by the High Court that this was not possession adverse to the widow; that in Assam the Dáyabhága prevailed; that under this law the widow succeeded to her husband's share; that the very fact of her residing actually on the land and holding in her own sole possession a portion of it, was sufficient to prevent limitation; that her name having been entered as a proprietress in the Collector's register conjointly with that of the defendant was enough to keep alive the widow's claim.[2] The Judicial Committee have made the following observations bearing on this unity of possession, in the case of Chand Hurree Maitee *v.* Rajah Norendro Naran Roy, 19 W. R. 231. "It is perfectly well-known to all persons conversant with these matters in India that the receipt by one member of a family may be quite consistent with the title of the whole. One member of the family may be in receipt of one part of an estate, and another may be in receipt of another part of an estate, and they may have afterwards to account the one to the other in respect of the excess of receipts over their respective rights." Their Lordships held that this would not amount to a proof of adverse possession on the part of either. In the case of Amirto Lal Bose *v.*

Receipt by one member consistent with title of all.

[1] Gobindo Chunder Bagchi *v.* Kripa Moyee Debia, 11 W. R. 338.

[2] Deepo Debia *v.* Gobindo Deb, 16 W. R. 42.

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Rojonikanto Mitter, 23 W. R. 214, the Privy Council said :—" Their Lordships are induced by the evidence to believe, that Ram Nursing's widow, Soorjomoney, continued to live with her deceased husband's brothers, and was supported by them, out of the income of the estate. Nothing could be more natural or consistent with the usage of Hindu families than that upon her husband's death, she should continue to reside at the family dwelling-house as a member of the joint family. Indeed the principal defendants state in their answer that 'they retained their brother's wife, the said Soorjomoney, and unmarried daughter under their own support and guidance, and they effected the marriage of the unmarried daughter into a suitable family and in a proper manner.' If the widow and her daughter continued to live as the members of the joint family, the presumption would be that they were maintained out of the widow's share, which she inherited from her husband unless it could be distinctly shown that she received only maintenance as distinguished from a participation in the profits of the estate, for even if she did not receive her full share of the profits, limitation would not run against her in the same manner as if she had been actually dispossessed of her husband's share of the estate." Where the family was admittedly a joint undivided one, the High Court held, that a single brother's possession would be the possession of all the brothers, and there would be no adverse holding.[1] On the other hand, Chief Justice Couch observed in the case of Gossain Dass Koondoo *v.* Seroo Coomaree Debia, 19 W. R. 192 :—" The question being whether a suit for the share of one of seven brothers in a tank was barred by the law of limita-

[1] Prithee Sing *v.* Court of Wards, 23 W. R. 272.

tion, the Judge has held that it was sufficient for the plaintiff who claimed the share to show that Hullodhur whose share she claimed was one of seven brothers, being a joint family, and that the presumption that the possession of one was the possession of all, was sufficient to throw the burden of proof upon the defendant who set up the law of limitation. It appears that there have been conflicting dicta, if not decisions, in this Court upon the matter. * * *. The clause 13, s. 1, Act XIV of 1859 is clearly intended to apply to cases of joint family property, and it says distinctly, that although it is a joint family property, the suit to enforce a right to a share in it must be brought within twelve years from the date of the last payment to the plaintiff on account of the share. If the law laid down by the Judge be correct, that in such a case it would be sufficient for the plaintiff to show that the property is joint family property, this provision in clause 13 would be practically inoperative, because all that the plaintiff need show is, that it is joint family property. But the clause says that the action must be brought within twelve years from the last payment on account of the share, plainly showing that the plaintiff, to be entitled to sue, there must be something more than the fact of the property being joint, and the possession of one being therefore the possession of all. We do not see how effect can be given to this provision of the law without holding that the suit must be brought within twelve years from the date of the last payment on account of the share, where one person is in possession of the property, or twelve years from the time of the plaintiff's being in possession of his share, for we agree that it was not intended to bar plaintiff's right of action where he had been in possession of his share in any way within twelve years. If he is in possession of his share, there

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can be no payment by any person on account of his share. * * *. It is not enough for the plaintiff to prove his title to the property which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation by proving when the plaintiff was last in possession."

Some members of a Hindu family had been absent from home for thirty years; it was not clear whether they were still joint with the remaining members who had all along remained at home, and had in the interval granted a mokurraree of a portion of the family property. The High Court held that this mokurreree could not be set aside by the members who had been absent, although their claim as against the other members for the family property might not have been barred under Article 127 of Act IX of 1871; for the mokurrereedar had got his lease from the members of the family who were in actual possession and managing the joint property, and had a perfectly good title as against the whole family, unless it could be shown that they had acted dishonestly.[1] If two brothers were joint in estate, on the death of one, the other would, according to the Hindu usages, be the manager and trustee for his brother's widow. His possession could not be adverse as against her.[2] The possession of one member of a joint family is to be regarded, as the possession of himself and his brothers; it is not adverse to the brothers.[3] In a suit by a widow to obtain her husband's half-share in property which had belonged to the paternal grandfather of her husband, it was held that if her husband had survived his grandfather, and thereby had inherited the property; then her husband and the

[1] Poshun Ram *v.* Bhowanee Deen, 24 W. R. 319.

[2] Bheemram Chuckerbutty *v.* Hurree Kishore Roy, 1 W. R. 359.

[3] Deelah Sing *v.* Toofanee Sing, 1 W. R. 307.

defendant, another descendant of the grandfather, must have formed a joint family, and the fact that the widow lived in the same house, and in commensality with the defendant was sufficient to prove her joint possession, so as to bar limitation.[1] Since the decision of the Chief Justice Couch construing clause 13, sec. 1, Act XIV of 1859, there have been two fresh enactments which govern the law of limitation relating to a suit for a share of joint family property. The first was Article 127 of Act IX of 1871, and the second the corresponding Article of Act XV of 1877. The three successive enactments may be as well cited here in order to see in one view the alterations made by the Legislature within the period of twenty years. Clause 13 is worded as follows:—"To suits to enforce the right to share in any property, moveable or immoveable on the ground that it is joint family property, the period of twelve years from the death of the person from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share." Under Act IX of 1871, the provision is, as laid down by Article 127 of the Second Schedule, that a suit by a Hindu excluded from joint family property to enforce a right to share therein must be brought within twelve years from the time when the plaintiff claims and is refused his share. Under Act XV of 1877, such a suit is to be brought within twelve years from the time when the exclusion becomes known to the plaintiff. It would seem that the principle of the unity of possession among the members of a joint family has been put upon a stronger footing by the last two Acts than it occupied before, inas-

Act IX of 1871, Article 127.

[1] Bindoo Basinee Dassee v. Anundo Chunder Paul, 2 W. R. 179.

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much as at first the plaintiff had to receive payment on account of his share, which payment might be supposed to consist even in receiving food in the family house, as some of the cases quoted above show. Under the Act of 1871, there must have been a demand by the excluded member, and a refusal by the others, to set the period of limitation running; so that if a member did not make any demand, although he might not have been receiving anything on account of his share for very many years, his right would not have yet been barred. The latest law says that the period runs from the plaintiff's knowledge of his being excluded from the joint enjoyment; so that under it, if the other members anyhow act adversely to the plaintiff within his knowledge, (whereby as a reasonable man he must conclude that he has been excluded, as for instance, by the sale of the joint property, and by the purchaser taking possession of the same), possibly the period would run from the date of the purchaser's taking possession, unless the plaintiff was not aware of the fact by absence from home or for any other reason. In one case Mr. Justice Kemp held under clause 13, sec. 1, Act XIV of 1859, that occasional visits paid by a widow to the house of her husband's brothers were not sufficient to bar limitation.[1] In a recent case, the facts were that the Maharajah of Chota-Nagpore had made a grant of land to three brothers who constituted a joint family governed by the Mitákshará law. The grant was made for the performance of certain religious services in the temple of Juggurnath at Puri. The plaintiff was the adopted son of one of these brothers, and the defendant of another. During the minority of the plaintiff, the defendant had managed to get himself registered in the

Occasional visits to joint property do not bar limitation.

[1] Krishnadhone Chowdry v. Srimati Har Coomaree Chowdrain, 25 W. R. 37.

Court of Wards at Chota-Nagpore as the sole owner of the entire family property. The High Court in fact observed upon this point:—"We strongly suspect that after the death of Kumla, the defendant No. 1 took advantage of the tender age of the plaintiff, to deprive him of his rights both as regards the property in question and his turn of worship, and to obtain for that purpose an exclusive grant for himself. It is clear from the evidence on both sides, that the plaintiff has taken some part in the services of the idol, although an inferior part to that taken by the defendant No. 1. The only other question is with regard to limitation. It seems to have been considered by the Court below, that the ordinary 12 years' rule of limitation was applicable to the suit; but we think that the appellant is right in his contention that the case comes under section 127[1] of the Limitation Act as being 'a suit brought by a person excluded from joint family property to enforce a right to a share therein.' It is true that under the Act of 1877, the time in such a case begins to run when the exclusion becomes known to the plaintiff; and it is probable that the plaintiff may have known that he was excluded from the property more than 12 years before the suit; but by section 2 of the Act, it is provided, that in any suit in which the period of limitation prescribed by that Act is shorter than the period prescribed by the Act of 1871, the suit may be brought within 2 years next after the 1st October 1877. Now under the Act of 1871, the 12 years under such circumstances would have run from the time when the plaintiff claimed and was refused his share (see Art. 127). It does not appear that the plaintiff ever claimed or was refused his share, at any rate until 1875; and consequently he had 12 years from 1875 within which he brings his suit.

[1] Meaning evidently Article 127 of the Second Schedule.

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That period was shortened by the Act of 1877; because the time under the latter Act would run from the time when the exclusion first became known to him. And therefore under section 2, the plaintiff was entitled to 2 years from the 1st October 1877 to bring his suit. He is therefore in ample time."[1] According to this decision, therefore, the enactment which was the most advantageous for the excluded member of a joint family was the provision under the Limitation Act of 1871.

In the case of Runjeet Sing *v.* Kooer Gujraj Sing, L. R. 1 I. A. 9, their Lordships held that under the aforesaid clause 13 of Section 1, Act XIV of 1859, there could not be any adverse possession by the managing member, although he held the bulk of the family property, and although the other members had received portions of the joint immoveable property for their maintenance. It was proved in this case that the members had continued to be joint and undivided in estate and that no actual partition had been come to. It was also found that important family expenses, such as the cost of marriages, had been defrayed by the manager, and entries had been made in the account books to that effect, and that the marriage of one of the members, all of whom had separate houses and were in the habit of taking their meals separately, had been celebrated at the house of the manager. Their Lordships observed :—"The question is, whether there has been a payment," within the meaning of clause 13, section 1, Act XIV of 1859, "by the defendant to the plaintiffs in respect of their alleged share within twelve years before the commencement of the suit. Their Lordships entertaining the view they have expressed that there was no partition, but that the plaintiffs took the seer land as equivalent to a payment

[1] Narain Khotia *v.* Lokenath Khotia, 9 C. L. R. 247.

in respect of their shares by the defendant, are of opinion that the proceeds of those seer lands have been substantially payments by the defendants within the meaning of that section, payments which have continued to the time of action brought, and that therefore the Statute of Limitation does not apply."

In the case of Kallikishore Roy *v.* Dhununjoy Roy, I. L. R. 3 Cal. 228, Garth, C. J. observed, "The Article 127 of the Limitation Act of 1871 provides that the period of Limitation shall be 12 years, not from the time of the plaintiff's exclusion, but from the time when the plaintiff claims and is refused his share. Consequently if a plaintiff has been excluded for 50 years, and he then claims his share and is refused, he would have 12 years from the time of such refusal to bring his suit; or in other words, he would have 62 years from the time of his exclusion; and if he never claims or is refused, the period within which he may bring his suit appears to be indefinite. This apparent inadvertence has been rectified in the present Limitation Act." The last sentence refers to Act XV of 1877 wherein the provision upon the subject is, that the time will run from the plaintiff's knowledge of his being excluded.

Under Act XV of 1877, knowledge of being excluded, the starting point.

Upon the question as to what would amount to such a knowledge on the part of the plaintiff, it has been held that an order of attachment directing the under-tenants upon the land which constituted the joint family property to cease to pay rent from a particular date, would be sufficient evidence in support of a finding that the plaintiffs became aware of their exclusion on the date of the attachment; Mitter, J. holding that in a suit to obtain a share of joint family property by partition, the proper Article applicable was No. 127 of Act XV of 1877.[1] Where,

[1] Issuridutt Sing *v.* Ibrahim, I. L. R. 8 Calc. 655.

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however, the property in suit has been in exclusive possession of the defendants for upwards of 12 years, and where it is an admitted fact that at the time of the institution of the suit, there was no joint family in existence constituted by the plaintiff and the defendant, it has been held on the authority of Bannoo *v.* Kashiram, I. L. R. 3 Cal. 315, that it is not enough for the plaintiff merely to call the property in suit as joint family property, but it is necessary for him to actually prove that fact. Garth, C. J. observed, "The doctrine that because 30, 50 or 100 years ago the ancestors of the plaintiff and the defendant were joint, any property in the possession of the defendant is to be presumed as joint family property, appears to me a very dangerous one. If that doctrine were well-founded, it would seem to follow that, however long a Hindu may have been in exclusive possession of property, moveable or immoveable, he would always be subject to have his title to it questioned by any distant member of his family, who could prove that at some prior period, even 100 years ago, their common ancestors were members of a joint family; and not only so, but that in all such cases the *onus* of proving that the property was not joint would lie upon the defendant." (Abhoychurn Ghose *v.* Govindchunder Dey, I. L. R. 9 Cal. 237.) In the case of Hari *v.* Maruti, I. L. R. 6 Bomb. 741, the High Court of Bombay held that a suit for possession of immoveable property was not barred, simply because the defendant, another member of the same joint family, had been in possession of the disputed property for more than 15 years. If the plaintiff had not made any claim, the time would not run against him under Article 127 of Act XV of 1877 until his exclusion from the property had become known to him. In this case apparently no circumstance had been alleged on the part of the defendant to indicate any such exclusion of the plaintiff.

Limitation unknown to Hindu law.

I have already said that the Hindu Law as propounded by the original texts had little to do with the question of actual possession by an undivided member. If an undivided member could prove his pedigree, his title to the joint property was at once established by the very law of inheritance, and it did not matter whether any such member was in receipt of the profits arising from the property, or in actual possession of any part of it. There is a text in Yájnavalkya, sloka 24 of the Second Chapter[1] which might seem to countenance the notion that in Hindu days, there prevailed a doctrine very much resembling that of the lapse of legal rights by limitation. That sloka says, that if a person sees another enjoy his lands for twenty years, or sees another appropriate and use his moveable property for ten years without protest, he incurs a loss thereof. The very distinction made in this sloka between immoveable and moveable property in respect of the period during which the adverse enjoyment of each must respectively go on without protest would at once induce a modern jurist to conclude that this is a clear declaration of the law of limitation. Such a conclusion would not remain unconfirmed by many other texts cited in the Mitákshará in connection with its comments upon this sloka, and also in connection with its discussion of the topic of title, and of the topic of possession as securing proprietary right. Those texts might be quoted as embodying a rudimentary law of limitation, and as evidencing a sufficiently advanced condition of the substantive law to necessitate recourse to that expedient of putting an end to litigation. But, however that may be, the commentators on the Rishi texts distinctly deny that rights can cease to exist simply because they have not been asserted or enjoyed for a particular number of years. We must

[1] Mandlik's Ed. p. 203.

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therefore suppose that although in the days of some of the Rishis, such as Yájnavalkya and Hárita, Hindu law had made a progress which is implied by the recognition of prescriptive rights, or rights created by long possession or enjoyment, the progress was checked in the time of the commentators, at the head of whom stands Vijnáneswara. He, in his comments upon the above named sloka 24 of the Second Chapter of Yájnavalkya, dwells upon the question at great length. He sets out by raising the difficulty,—How can rights cease to exist, because a person fails to make a protest? Neither popular usage nor scriptural authority anywhere supports the notion that absence of protest, like an act of gift or of sale, operates in transferring proprietary right from one person to another. Nor can it be said that an enjoyment or possession for twenty years creates proprietary right. At best such an enjoyment can be but evidence of proprietary right; what is simply evidence cannot be the cause of the accrual of the right. He then quotes a text of Gautama, one of the Rishi authorities, who has enumerated in a clear manner the circumstances under which proprietary right does arise; or rather, as the Rishi puts it, under which a person becomes the owner of some particular subject of proprietary right. This text is quoted by all the commentators, and forms a part of para. 8, sec. I, chap. I of Colebrooke's Mitákshará. In the footnote the translator gives a reference to this text of Gautama from the Institutes of that Rishi. The same text is again quoted in the Mitákshará under the above-named sloka 24 of the Second Chapter of Yájnavalkya. This part of the Mitákshará, full of interesting information, is not a part of Colebrooke's translation. I shall here give an abstract of it, so far as may be relevant to the question of the discontinuance of proprietary right by

lapse of time. It will be found at p. 41 of the original Sanscrit. Now the purport of Gautama's text is, that a person can be the owner of property, either by means of inheritance, or by sale, or by partition, or appropriation of something that did not previously belong to anybody, or by the finding of hidden wealth. To these means of acquiring property must be added the act of acceptance on the part of a Brahman, that of conquest on the part of a soldier, and wages on the part of the two other castes. Vijnáneswara argues that in this enumeration there is no mention of long possession or prescription as an expedient for acquiring proprietary right. Nor, continues Vijnáneswara, can we found the notion of long possession creating proprietary right on that very text of Yájnavalkya, construing him as declaring that twenty years' possession is a cause of ownership; for the causes of ownership must be ascertained from popular usage, not from the texts of the Rishis. He then points out certain other texts which declare the liability to punishment suited to a thief, of one who seizes and enjoys property without title, although his enjoyment may have continued for many hundreds of years. Nor can it be contended, he adds, that although the right does not lapse, yet a suit for the recovery of such property after it had been adversely enjoyed for twenty and ten years respectively, would be ineffectual. For it would be inequitable to hold that where there is a right, there should not be a remedy. A suit is nothing but an expedient for enforcing a right; and the cardinal principle which regulates the conduct of a suit is, that truth should be found out by all means in the power of the tribunal; and if an enquiry in that direction ends in establishing a particular state of things as true, the suit will have to be decided in accordance therewith. For these reasons, Vijnáneswara concludes

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that the text of Yájnavalkya must be construed differently from its apparent sense. That construction is that the loss takes place not of the land or of the moveable property itself, but of its profits. This is the intention of the text. That is to say, after an adverse enjoyment for twenty years without any protest on the part of the owner, although the owner on principles of justice and equity gets back the field, yet he does not get any 'fruits' (that is the word used in the original) for the interval. The reason therefor being that he did not protest, whereby he committed a laches; and also because there is this authoritative text. If, however, the enjoyment has been without his knowledge, or in his absence, or in such a way that he could not be cognizant of the fact, then he must obtain the mesne profits also; since the text[1] speaks of one who *sees* another enjoy. Again, if he sees and *protests*, then also he recovers the mesne profits; for the text speaks of one who does not protest. Furthermore, within twenty years, although the adverse enjoyment may have been with one's knowledge and without protest, he should get back the profits; for the text speaks of twenty years. It might no doubt be argued, says the author, that even these profits are the property of the rightful owner, and if the original property does not lapse, there is no reason why its profits should do so. To this argument the author answers that there would be force in such reasoning if the profits had been in existence after so long a period as twenty or ten years; for instance, areca-nut trees or jack trees may have grown upon the

Except as regards mesne profits in some cases.

[1] पश्यतोऽक्षुवतो हानि र्भूमे र्विंशतिवार्षिकी।
परेण भुज्यमानाया धनस्य दशवार्षिकी॥

Yájn. ch. II, sl. 24.

"If one sees and does not protest, he loses in twenty years land which has been enjoyed by another; moveable property he loses in ten years."

land; and the land is recovered along with them. On the other hand, some fruits must be consumed during the wrongful possession; as regards these, they being no longer in existence, there cannot be any ownership in respect of a non-existent substance. Since, however, another Rishi text cited before declares that a person enjoying for even many hundred years, but without title, should be punished by the king with the same punishment which is meted out to a thief, it might be supposed that when land is recovered, what was consumed twenty years ago should be taken an account of, and the payment of a proper compensation for the same in the shape of money should be enforced from the wrong-doer. In order to negative such a supposition, Yájnavalkya says that the rightful owner has no right to obtain such compensation for what was consumed by the wrong-doer twenty years prior to the making of the claim by the rightful owner. This in fact is a special rule overriding the general principle that a thief or robber is to be compelled to give back what was stolen, either by restoring the article itself, or by paying a proper compensation in the shape of money. The punishment by the king, however, adds the author, must in every case take place, even after twenty years; since enjoyment of another person's property without a title, is declared to be legally punishable in every case, and since there is no special rule limiting the rule. Therefore, as Vijnáneswara winds it up, the true conclusion is that inasmuch as there has been a laches on the part of the owner, and inasmuch as there is this express Rishi text, fruits that have disappeared by consumption cannot be got back after twenty years. What the 'fruits' of a moveable property are is not clear from this passage; but I apprehend, from indications given in other parts of the work, that the mean-

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ing of the word 'fruits' in respect of moveable property, may be explained by supposing the case of a milch cow; which may belong to one person, and may have been wrongfully seized by another. After ten years, the rightful owner could recover the cow from the misappropriator; but he could not, under this Hindu Limitation law, get back the price of milk produced by the cow beyond ten years before the making of the claim. He might, however, get back all the calves brought forth. Similar illustrations might be supposed with regard to some other descriptions of moveable property, as a boat for hire, and a bullock for bearing burdens, and so forth.

Rights of a member returned after a long absence.

A like spirit is manifested in a passage of the Smriti Chandriká, the author devoting a special section upon the rights of the member of a joint family returned home after a long absence in a foreign country, when the partition of the joint family property has already been effected by the other members. I allude to paras. 21 to 26 of the 13th chapter of that work. The sum and substance of the law propounded in this passage is, that where a parcener has absented himself from home and been resident in a remote country, during which interval the family estate has been divided by the other parceners, he after his return is entitled only to half a share, which is to be made up out of the shares already allotted to the other parceners. This proposition is based upon the following texts of Brihaspati: "If a man leaves the common family and resides in another country, he will get on his return only half a share. There is no doubt in this." This text is thus explained by the author of the Smriti Chandriká. "Where one quits the place of residence of all his relations, and goes away to a very remote region, and the other parceners not knowing whether he is alive or not, make a partition among themselves of

the whole estate,—if he should subsequently arrive, only half a share is to be given to him out of the estate already divided. In such a case, as the division was made from ignorance of the existence of the absentee, and the absence was attributable to his fault, the alternative of giving him a full share in the estate has not been prescribed in his case. Hence it has been asserted at the conclusion of the passage that there is no doubt in this." A like share is to be given also to one returning after a long absence, subsequent to partition. If the heir of an absentee, such as a grandson or the like, returns after partition, he will receive a share of only hereditary property. Where the lineal descendants of an absentee whom the neighbours and other inhabitants know by tradition to be the proprietor, appear, his kinsmen are to surrender to them his share of only the landed property, though there may be other hereditary wealth. An absentee appearing shall, subject to the above rules, receive a share of such wealth only as he proves, by tests, divine or human, to be common property. The Rishi texts upon which these propositions of law are founded, consist in five slokas of Brihaspati. The first has been already set forth. The 2nd runs thus :—"Debts or documents, or a house or a field,—if all this be property belonging to one's paternal grandfather,—he although long absent and away from home, should, when come back, receive a share." The 3rd sloka is as follows :—"Whether it be the third or the fifth or even the seventh,—on his name and parentage being ascertained, he should receive a share in what has come down in succession." The fourth sloka is as follows :—"He whom aged persons dwelling on all sides round know by tradition to be the proprietor,—to his progeny when come back those born in the same family should allot the land."

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The fifth sloka is as follows:—"Whether a partition has been made or has not been made, in every case where the heir asserts a claim,—he should get a share in whatever may be common property."

That a co-sharer returning after a long absence receives only half a share is what I gather from Kristnasawmy Iyer's translation of the Smriti Chandriká. On referring to the original Sanscrit of that work as edited by Pundit Bharatchandra Siromani, I find that the word, which in the text made use of by the translator must have been evidently *Ardhasah*, (half share) is printed as *Arthasah*, which is rather obscure, but may mean, "from the wealth." In another part of the passage also there seems to be a similar discrepancy between the text before the translator and that before the Pundit editor, one text evidently containing a word which means half, and the other another word which means wealth. It is difficult to settle the real text of Brihaspati here. I would prefer the Pundit's text, inasmuch as the author of the Smriti Chandriká does not give any reason, why a member come back after a long absence should receive half a share, and why his progeny should receive the full share of the landed property; as declared in the fourth sloka cited above. If the Pundit editor's text be correct, then the law, according to the Smriti Chandriká, would stand thus:—How long soever a parcener may have been absent from home, when he comes home after a general partition, he receives his proper share from the existing divided estate.

This passage of the Smriti Chandriká is an authority for holding that there is no limitation as between undivided members of a joint Hindu family; if the law, as it was enacted by the Limitation Act of 1871, had not been altered by the later enactment of 1877, the

Law of Limitation relating to this matter would have conformed almost exactly to the principles deducible from the original texts.

As regards the question how far the procedure in a suit is affected by the circumstance of a party to the suit being a member of a joint family, it has been held, when the family consists of a father and his son governed by the Mitákshará law, that a single member has no right to sue alone for the recovery of property belonging to the whole family. It was observed, "The plaintiff is not the sole person entitled to the property which he seeks to recover, because his father who is not a party to the suit is admittedly a member of the same joint family with the plaintiff. Of course if the plaintiff could not induce his father to join with him in bringing the suit, he might have made him a defendant, and so brought before the Court all the persons who were jointly interested in the property sought to be recovered." The reason assigned for this incapacity of a single member is said to be, that the other members interested in the disputed property would not be bound by the decree, which could not be made use of as a bar or otherwise by the defendant in any future proceedings which the other members might think proper to institute. (Gocool Persad *v.* Etwaree Mahto, 20 W. R. 138.) Something very similar seems to have been in the mind of Markby, J. who said on one occasion,—"As the properties claimed are all portions of the joint family property, the plaintiff's claim for a decree declaring his right to a four-anna share and for possession thereof cannot be granted, although his title to the said four-anna share is not disputed. It seems to me that the answer given by the Full Bench in the case of Sudaburt Persad Sahoo, 12 W. R. F. B. 1, to the 2nd of the two questions which we propound-

Procedure as affected by joint family law.

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ed precludes us from giving any such decree. As I have said, whether or no I concur in the principles laid down by these answers, I feel bound to apply them to the cases before us. And so doing it seems to me impossible to give the plaintiff a decree which he claims, which is a separate decree for possession for his four-anna share." (Sudaburt Persad Sahoo *v.* Lotf Ali Khan, 14 W. R. 339, see page 344.) Upon a similar principle, it has been held that an eight anna shareholder in four mouzas out of six which constituted one revenue-paying estate was not entitled to sue alone under either section 10 or section 11 of Act XI of 1859, because he cannot bring himself under the words of section 10, and is not "a recorded sharer of a joint estate held in common tenancy" within that section. Neither is he "a recorded sharer of a joint estate, whose share consists of a specific portion of the land of the estate," for he has only an undivided moiety of four mouzas out of six. There are other sharers who, together with him constitute the entity which will be the sharer whose share consists of four mouzas out of six. If he had been joined with his co-sharers of the four mouzas, he might possibly have come before the Court with them as a party entitled to sue under section 11. (Nunhoo Sahai *v.* Rampershad Narain Sing, 21 W. R. 38.) In the case of Cheyt Narain Sing *v.* Bunwari Sing, 23 W. R. 395, Mitter, J. observed; "with respect to the first ground urged in Special Appeal, it seems to us that the plaintiff, if proved to be still a member of a joint Hindu family, would be precluded from maintaining a suit for his specific share which would devolve upon him on partition."

LECTURE VI.

ON RIGHT TO MAINTENANCE.

Male member's right to food and raiment—Legal and moral obligations— Hardly known out of the Bengal School—In Bengal, doubtful if son can demand maintenance from father—Male members' wives entitled to maintenance—Wife co-owner with husband—But not to all intents and purposes—Wife entitled to separate maintenance for a just cause—Maintenance a charge upon husband's estate—Wife's maintenance in Bombay—Marrying a second wife no cause for separate maintenance—Superseded wife's rights under original texts—Widow's right to maintenance—As understood by the Allahabad High Court—Widow's maintenance in Madras—In Bombay—Widow's maintenance a charge on joint property—Purchases without notice relieved from widow's maintenance right—Modern case-law as to widows' maintenance not consonant with Rishi texts—Fraudulent purchaser bound to pay widow's maintenance—Widow's right to residence—Not affected by the doctrine of *factum valet*—Widow may live elsewhere than in her husband's house—Separate maintenance from small joint property not allowed—Amount allowed in olden times—Amount once fixed may be altered—Female member occasionally entitled to maintenance in a double capacity—Limitation as to maintenance—Right of a daughter-in-law to maintenance—Texts relating to female members' right—Maintenance-right treated scantily in Nibandha treatises—Daughter-in-law's maintenance in Bengal—Jagannátha's influence on the development of Bengal law—Khetramoni Dasi *v.* Kasínath Das—Position of Mitákshará daughter-in-law more secure—Other female members—How to make a maintenance right secure. LECTURE VI.

In this Lecture I shall take up the subject of maintenance, so far as it bears upon the law of the Joint Family. In dealing with this part of the joint family law, I shall first consider the right to maintenance as vested in the male members, then the case of the wife, of the widow, of the daughter-in-law, and lastly of the other female members.

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Under the law of the four Schools other than the Bengal one, the male members are, as a rule, interested in the entire property belonging to the family. If the family consists of a father and his sons, and if the property is ancestral, the sons have a joint right in the property. The father may be the manager; in fact, he has a right to be the head of the family; the control over the undivided effects rests with him. But the sons certainly have a right to receive food and raiment at his hand, which being withheld, they, I apprehend, can compel him by a suit, to make arrangements for the family being provided with the means of subsistence. Any direct text laying down such a rule may not possibly be found; but there are texts which by necessary implication sanction such a rule. Thus the Mitákshará, which is an authority in all the four schools mentioned above, quotes two slokas of Vyasa in chapter I, section 1, para. 27, the last of which purports to say that all persons in existence within the family have a desire or necessity for subsistence; for this reason, the gift or sale of even self-acquired immoveable property would be improper. In the next section, Vijnáneswara sanctions an alienation of immoveable property in order to procure subsistence for the family, when the co-owners, such as the sons and the grandsons are minors, and therefore incapable of consenting to the alienation. Here prominence is given to the necessity for procuring maintenance for the family; and it would be unreasonable to suppose that persons having a substantive right in the property should not have the subordinate right of demanding maintenance. The same right, of the male members, to maintenance out of the joint property, is further inferrible from other parts of the four leading authorities of the above-named four schools, among whom there is hardly any difference

Male member's right to food and raiment.

upon this point, so far as the original texts are concerned. Thus in the Mitákshará, chapter II, section 10, para. 5 says, after persons disqualified for taking a share in the inheritance have been enumerated, that these disqualified members of a family, though entitled to no allotment out of the joint property, are yet to be maintained by the others, who, unless they give them food and raiment, would be committing a sin that will entail upon them what is called a fallen state (*pátitya*) or degradation. For this proposition, Manu is quoted, who in sloka 202 of his 9th chapter, declares that to all these disqualified persons, it is proper to give, until the end of their lives, food and raiment, since if a person does not supply them with such subsistence, he becomes 'fallen'—such is the language of Manu. Kullúka explains the same by saying that the person not giving the same becomes a 'sinner.' Here I may remark, by the way, that our modern administrators of justice are apt to suppose, when such language is used in the original texts, that the language implies only a moral obligation, but does not impose any legal duty upon the person who is threatened with the risk of committing a sin. Thus I find in the judgment of Sir Barnes Peacock, in the well-known Full Bench case of Khettur Money Dossee *v.* Kasheenath Das, (see 10 W. R. F. B. p. 92), certain observations made by the eminent Chief Justice, which might lead one to suppose that no legal obligation can be inferred from the original texts unless they provide that the king should fine the person evading or neglecting to perform the duty promulgated by the text. Similarly in a recent Full Bench case decided by the High Court of Bombay, in which the Chief Justice Westropp delivered one of the most learned and elaborate decisions on the subject of maintenance,[1] I find that the Chief Justice remarked (see

[1] Savitri Bai *v.* Luxmi Bai, I. L. R. 2 Bom. 573.

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p. 602)—"Here no civil obligation is prescribed, but merely a moral duty."

The above rule laid down by modern tribunals for distinguishing legal and moral obligations would fail if applied to Manu's text declaring the right of disqualified members of a family to food and raiment. That this right is legally enforceable will I believe be admitted by all. Sir Barnes Peacock in the judgment already quoted from, elsewhere says that disqualified persons are members of the family in which they are born, and that though on the one hand they do not share in the joint estate, yet on the other, their maintenance is a charge on the estate, which but for the disqualification they would share with the qualified members.[1]

Hardly known out of the Bengal School.

The truth is that the distinction between legal and moral obligations is hardly known out of the Bengal School. It was invented by this school, in order to make that wide departure from the general body of Hindu Law,—the departure which consists in giving absolute power to the father over the joint ancestral property. The hint has been largely availed of by modern Courts, which under the bounden duty of administering Hindu law, have resorted to this expedient in order to avoid the manifest inconvenience of an unqualified application of ancient principles suited to a state of society widely different from what we see in the present day. Ancient Hindu law, in fact, in many instances acts like the Procrustean bed upon the growing necessities of the present advanced stage. The old legal shell is too narrow to accommodate the grown-up modern social organism. Real conformity to Hindu law as it originally stood is not possible for the present Hindu society; the judges, therefore, unable

[1] *Vide* p. 91, col. 2, para. 5, 10 W. R. Full Bench Rulings.

openly to repudiate its rules, have adopted principles which ensure a simulated and outward conformity to the ancient law. In this proceeding, the judges have trodden on the footsteps of Jímutaváhana, whose severance from the traditional system must have marked an era in the development of Hindu law.

With regard to the passage from the Mitákshará quoted above, relating to the disqualified persons, I have cited it to show that the male members in general have a right to maintenance out of the joint property, since even those debarred from claiming a substantive interest are declared to have that right. All the five schools are unanimous on this point.[1] Vivádachintámani quotes sloka 143 of the second chapter of Yajnavalkya, which has been thus translated (p. 243) : "An outcast and his son, an impotent person, one lame, a madman, an idiot, one born blind, he who is afflicted with an incurable disease, and the like, must be maintained without any allotment of shares." Váchaspati Misra does not add any observation of his own to this declaration of a disqualified person's right to maintenance, but seems silently to endorse what is inculcated by the Rishi text. Upon this point, the Smriti Chandriká of the Madras School has dwelt a little more discursively.[2] The author first enumerates the disqualified persons and then adds that all these disqualified persons must be maintained; for an authority he quotes the same text of Yájnavalkya which we have found quoted in the Viváda Chintámani. He then says, that this maintenance is to be supplied by those who take the inheritance. I believe that Smriti Chandriká is the only original authority which is thus explicit as to the party liable to maintain excluded members; though the other original authorities

[1] Víramitrodaya, ch. VIII, sec. 2.

[2] Chapter V, para. 20 *et seq.*

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pretty plainly leave the same to be inferred from the context. As to the party liable to maintain, the Smriti Chandriká cites a text from Vishnu, the meaning of which is that these persons should be given food and raiment by the participators of the inherited wealth. Then the author cites the same text of Manu which we find quoted in both the Mitákshará and the Víramitrodaya, and which is an authority for saying that the excluded persons have a legal claim to a lifelong subsistence. Then the author quotes a text of Kátyáyana which being literally translated, would stand thus:—"Food and raiment, till the end of life, must be given by the *bandhus*. In default of even the *bandhus*,—one should get the father's wealth. The kinsmen, who have received wealth other than paternal, should not be made to give." This text of Kátyáyana is explained by the author of the Smriti Chandriká as meaning that the *bandhus*, or the kinsmen of the excluded person,—the participators of his father's property—should give food and raiment, as laid down by Manu and others. The sense of the latter portion of Kátyáyana's text is that if the kinsmen have not participated in the excluded person's paternal wealth, then the king, in other words, the Courts of Justice, should not compel the excluded person's kinsmen to maintain him. If a kinsman has not accepted or taken or received the excluded person's paternal wealth, then it is not necessary for him to maintain the excluded person. I may here remark that in modern decisions relating to the right of maintenance, we often find it propounded as a principle that a right to maintenance possessed by one Hindu against another is generally based upon the equity, casting that liability upon him who excludes another from participating in the wealth of a third person. This principle explains the rule which makes it incumbent

upon a brother in a Mitákshará family to maintain the widow of his undivided brother. Why should such a brother maintain the said widow? The answer is—he being undivided, prevents the widow from taking the property of her husband after his death; he takes that property; he in fact is in her way; therefore equity casts this liability upon him. Similarly in the case of disqualified members; for qualified members exclude them from sharing in the joint property; therefore equity makes it incumbent upon the qualified members to maintain the disqualified ones. I find the principle propounded by Norman, C. J. in Rajomoney Dossee *v.* Shibchunder Mullik, 2 Hyde 103, cited in p. 616, I. L. R. 2 Bom.; the words of the Chief Justice were—'The present case is wholly distinguishable from those where an heir takes property, subject to the obligation of maintaining persons excluded from inheritance out of the estate of the deceased proprietor, or whom the deceased proprietor was morally bound to maintain, In such cases the Hindu Law seems to annex the duty as a burden on the inheritance in the hands of the heir, and the right of the party claiming maintenance appears to be a legal right analogous to the right of property.' Continuing the passage of the Smriti Chandriká, I find it stated on the authority of Devala, that some of the excluded persons are not entitled even to maintenance; for Devala says that food and raiment are given to those other than the 'fallen person.' To which Smriti Chandriká adds that the issue of a 'fallen person is also fallen; such issue therefore has no right to maintenance.' From a text of Vasistha, the author makes out another disqualified person, namely, one who has become a religious mendicant, or one who having so become is unable to conform to the rules of that life, and re-assumes the con-

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dition of a householder. Both a religious mendicant and one re-assuming the householder's life are excluded not only from a share, but even from an allowance for subsistence.

Referring to the Vyavahára-máyukha, I find it laid down (chapter IV, section 11, verse 9) that persons excluded must be maintained during life by those who take the inheritance. Then the same text of Manu, chapter IX, sloka 202, is quoted which has been cited in the Mitákshará and the Víramitrodaya; and also Yájnavalkya, chapter II, sloka 141, which has been quoted in the Vivádachintámani, and which declares the excluded person's right to maintenance.

From all these authorities, the proposition that male members of a joint family possess an inherent right to have provision made for their subsistence by the person, whoever he may be, that stands out as the head of the family, is clearly deducible. As regards the Bengal school, however, the same proposition is not free from doubt, when the family is composed of a father and his sons, although there may be some ancestral property in the hands of the family. In favour of the sons' right to maintenance in such a case, it may be advanced that admitting the father's power to be absolute over the ancestral property, this absolute power contemplates only his right to alienate the same;—but where no alienations have been actually made, there is nothing to prevent the sons from asserting a right to subsistence out of the ancestral estate. The power of the father has been discussed by Jímútaváhana in paras. 20—31 of Chapter II of the Dáyabhága. The purport of this passage may be thus set forth. "As regards ancestral property, when the partition is made by the father, he takes a double share; it is also the father with whom rests

In Bengal, doubtful if son can demand maintenance from father.

the choice of making a partition at all. Even though the property be ancestral, in Bengal the sons cannot demand that it shall be shared and allotments shall be given to them. Whether a division shall be made or not, the father alone will decide. If any ancestral property was lost to the family, and the father by exerting himself recovers the same, such property also must become the self-acquisition of the father. At the time of the partition, the father may share it with his sons, or may not share it; but may wholly appropriate it to himself. The same power, however, the father has not with regard to other ancestral property. If he thinks of making a partition, he must of force give shares to his sons; though he may reserve a double share out of it for himself; and he may postpone the actual partition to any date he chooses. Again, moveable ancestral property is entirely at his disposal, for Yájnavalkya has in one sloka said that the father is the lord of pearls, and gems and corals,—of all forsooth; though of the whole immoveable property, neither is the father nor the grandfather the lord. From this text of Yájnavalkya, it follows that ancestral moveable property, even the whole of it, can be given away or sold or otherwise disposed of by the father; but not immoveable property, nor the *nibandha* or periodical receipt accruing from land.[1] And since Yájnavalkya says that of the *whole* of the immoveable property, neither is the father nor the grandfather the lord, we must give some force to this word *whole*. In other words, we must take the meaning of Yájnavalkya to be that the father cannot dispose of the *whole*, but he can dispose of a *part*, of the ancestral property. The reason for prohibiting the disposal of the *whole* ancestral property is, that

[1] We shall subsequently consider the nature of a *nibandha* more at length.

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the subsistence of the family depends upon it. To provide subsistence for the family is an indispensable duty. Manu says that the approved means of attaining happiness in the next world is to provide maintenance for those who depend upon us. If they are left in misery, the hell would be in prospect for him who neglects them; for this reason dependents must be provided with subsistence. From this it is gathered that the father is not prohibited from alienating a small portion of the ancestral property, if such alienation does not interfere with the comfortable subsistence of the family. If, however, the family cannot be maintained without alienating the whole ancestral property, even the whole may be alienated for the purpose of subsistence, since the revealed law expressly declares that one must at all events be guided by the instinct of self-preservation. It is true that Vyása in a couple of verses seems to say that a single individual is not competent to make a sale or gift, in the absence of a consent on the part of the others, of the whole immoveable property—property common to the family; whether separated or unseparated, the persons called sapindas have an equal right in the immoveable property; and a single person is incompetent to effect a gift or pledge or sale. But these two slokas should not be cited as authority negativing the right of one to dispose of property belonging to himself; a man having a right to property must be supposed to have a power to do just as he likes with the same. The text of Vyása simply reprehends the conduct of a person of bad character, who unmindful of the claims of the family to receive subsistence out of the family funds, dissipates such funds and brings misery upon the family." I have already said that this passage is rather obscure. From it we cannot gather whether Jímutaváhana admits the father's

power to alienate ancestral property, even though the father were thereby to bring on the starvation of the family. At the same time this passage is ordinarily appealed to as the textual authority of the Bengal school for the father's absolute power over ancestral property. However that may be, so far as the subject of maintenance is concerned, it may fairly be argued on the strength of this passage that even in Bengal, where there is ancestral property, and the sons live in commensality with the father, the sons can claim maintenance at his hand, and may even enforce that claim by a suit in a Court of Justice. Howsoever absolute the father may be with regard to such ancestral property in the matter of making an alienation, so long as the father retains it in his hands, the authorities seem to set a limit to his caprice. In making a partition, he is restricted to taking a double share. If his right be so very absolute, why should he not take three-fourths, or even the whole? In Bengal, therefore, ancestral property actually in the father's hands may probably be charged with the sons' maintenance. It cannot but be owned, however, that this right must be extremely precarious. If the father has quarrelled with his sons, and is seriously desirous to cut them off from all participation in the hereditary estate, all that he need do is to sell the estate. Then the sale is only a morally culpable act, not invalid in the eye of law. Considering the general consensus of opinion among the lawyers as to the Bengal father's absolute right over ancestral property, such a sale would hardly be regarded as subject to a charge for the maintenance of the sons, even though the purchaser took with notice. In spite of the circumstance that Jímúta-váhana gives a great prominence to the duty of maintaining the family, his declaration that sons have no right during their father's life, so often repeated in

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his work and so laboriously established by a general comparison of the early Rishi texts, is a fatal stumbling-block in the way of a Bengal son's right to maintenance. There is scarcely any case law upon the point. The decision I have already once quoted from the 12th Vol. of the Weekly Reporter, p. 494 (see *ante*, p. 226) does not mention whether there was any ancestral property in the hands of the father who was sued by his grown up son. It may be that if the father had been in possession of ancestral property, the judgment of the High Court would have been otherwise. This would seem to be so if we consider the very cautious expressions used by Sir Barnes Peacock in the Full Bench case of Khetter Money Dossee *v.* Kashinath Das, 9 W. R. 413. He there says, "There is no allegation in the plaint that the defendant has any ancestral property or any property upon which the plaintiff's maintenance is a charge," (page 421). Again he says, "There is no ancestral property upon which the daughter-in-law has a charge for maintenance. This is not a question of a charge upon an inheritance. The father-in-law is not stated to have inherited anything." (p. 423, Col. 1, para 2.)

On referring to Chapter V of the Dayábhága, which deals with the subject of disqualified members, we find the same sloka of Yájnavalkya which we have seen cited in the Vivádachintámani and the Smriti Chandriká. This sloka says that the excluded persons must be maintained; and in para. 11, ch. V, Jímúta-váhana says, "Although they be excluded from participation, they ought to be maintained, excepting, however, the outcast and his son." Again in para. 19, he says, "Their daughters also must be maintained until provided with husbands. Their childless wives, conducting themselves aright, must be supported: but such as are unchaste should be expelled; and so

indeed should those who are perverse." It therefore appears that Jímúta-váhana, in common with the authorities of the other four schools, endorsed the opinion that exclusion from inheritance on account of personal disqualification does not work the forfeiture of a person's right to maintenance. That being so, it is a fair deduction from the various passages of the Dayábhága quoted above that in Bengal where the family consists of a father and his sons, and where there is ancestral property in the hands of the father, the sons can demand from the father a provision for their subsistence, so long at least as the ancestral property has not been actually alienated by the father.

In Bengal, however, joint families often consist of brothers or other persons more distantly related to one another. In such a case, in whosesoever management the joint property may be, every member is entitled to receive allowance out of the common funds for the purpose of maintaining himself and his branch of the family. The family may in course of time have grown to such large proportions that it may be inconvenient for the members to live in commensality and to dwell in separate apartments around a single compound. Members may choose to retain the common property in a joint condition, and at the same time to live in separate houses and separate mess. Quarrels and disagreements may have arisen among them, more especially among the female portion of the different branches of the family; and yet the cumbrous operation of having the whole joint property divided by metes and bounds may be deemed undesirable. Under these circumstances the members necessarily live apart from one another and receive an allowance by way of maintenance from the managing member, under whose care and supervision the undivided property is

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left. The property of many wealthy joint families in Bengal consists not only of lands and ordinary moveable property, but comprises profitable mercantile business, money lending business, putnees, durputnees and jul-kurs, and various other subjects of proprietory right. A fair and satisfactory partition of all these different kinds of property, when they have become large and extensive by accumulation during many generations, is a task beset with difficulties. Practically therefore coparceners much rather like to leave them in a joint state even when disagreements have arisen among themselves, and content themselves by living and messing separately. If in such a case a manager withholds the maintenance allowance which may be reasonably claimed by one coparcener, notwithstanding that there are sufficient joint funds in his hands,—I believe the member to whom maintenance is denied may bring a suit to compel the manager to pay him a proper allowance. And I apprehend that the courts of justice will not meet such a suitor with the impracticable advice that his remedy lies in a suit for partition. Cases of this character rarely arise, and the reason is obvious. Wherever the affairs of a joint family are in the management of one coparcener occupying the position of its head, he generally knows how indisputable the rights of the other members are, and therefore scarcely ever ventures to withhold an allowance for maintenance, when a particular member refuses to live in the family dwelling house. He knows that such a member can easily bring a suit for partition and thereby throw the family affairs into utter confusion for a number of years. He himself is interested in the joint property, and therefore knows how to avoid the inconvenience of such a partition suit.

With regard to the right of the wives of the undivided

Male members' wives entitled to maintenance.

members to receive maintenance from the joint property, this right also, like that of the male members, has been nowhere in the original texts declared in express terms, but is inferrible from various passages scattered among those texts. The nearest approach to any such declaration is seen in sloka 55, chap. III, Manu. That sloka is,—"Married women must be honoured and adorned by their fathers and brethren, by their husbands, and by the brethren of their husbands, if they seek abundant prosperity." But this can scarcely be taken as the declaration of a legal right. Here the father and the brother and the husband are all placed on the same footing. But modern Hindu Law as administered by our courts will hardly allow the contention that a woman has a legal right receive maintenance from her brother. On the other hand, there can be no doubt that a Hindu wife is entitled to receive maintenance at the hands of her husband. Such a right on the part of the wife seems to be taken for granted by the writers of the original texts. It is implied by various provisions of law which these texts contain. Thus in the Mitákshará, ch. I., sec. 2, paras 8, 9 and 10, it is said that when the father at his own desire distributes equal shares to all his sons, he should give a share equal to that of a son to every one of his lawfully married wives, unless any peculiar property had been given them by their father-in-law or their husband, in which latter case the wives are entitled to only a half share. Again in ch. II. sec. 11, para. 34, it is said that if another wife is married by the husband during the lifetime of his first married wife, the latter is called the superseded wife. Such a superseded wife is entitled to receive an amount of money from her husband equal to what has been spent by him on his second marriage. The right of the wife to a share on the division of an undivided

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estate, or of the superseded wife to a certain amount of money on the occasion of her being superseded, is generally considered to be in the nature of a maintenance. Again in ch. II, sec. 10, para. 15, it is said that the sonless wives of excluded persons must be maintained when their conduct is unexceptionable. In the Víramitrodaya, ch. V, part 1, sec. 6, it is said, "But if the husband have a second wife and do not show honour to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If food, raiment and dwelling be withheld from the woman, she may exact her due supply, and take a share of the estate with the co-heirs." In the Vivádachintámani, page 265, it is said, "If suitable food, apparel and habitation cease to be provided for a wife, she may by force take her own property, and a just allotment for such a provision; or she may if he die take it from his heir." In page 244, it is said, "their childless wives (meaning the wives of disqualified persons) who preserve chastity must be supplied with food and apparel; but disloyal and traitorous wives shall be banished from the habitation." In the Smritichandriká, chapter V, para. 43, the author says "that the lawfully married wives of those who do not receive a share, if sonless and of unexceptionable behaviour, should be maintained by those very participators of the excluded person's paternal wealth upon whom it is incumbent to give subsistence to the excluded persons themselves." In the Vyavahára Mayúkha, ch. IV, sec. 12, para. 12, the author says, "the childless wives of the disqualified persons conducting themselves aright should also be supported; but if they are unchaste, they should be expelled; and similarly those who are perverse." In the Dayábhága also the sloka 145 of the 2nd chapter of Yájnavalkya has been quoted without any remarks (*vide* ch. V, para. 19, Dayábhága).

This sloka is the authority referred to by the leading treatises of all the five schools to show that the chaste wives of excluded persons have a right to receive food and raiment.

This right is spoken of in connection with the partition of property when effected by the qualified coparceners. As the disqualified parceners do not receive a share, the law of partition lays down that they have a right to receive food and raiment in lieu of a share; the same law also declares a similar right in favour of their wives. The irresistible conclusion from these provisions of law is, that while the family remains undivided, these persons and their wives as a matter of course continue to live in the same mess and in the same dwelling-house with the other coparceners. That being so, we must conclude that the wife of every coparcener in a joint family has a right to maintenance from the common fund. It would be absurd if the law were otherwise. The disqualified persons and their wives are evidently placed on a more precarious footing. If even they have their right to maintenance provided for in unmistakeable terms, the other members and their wives, whose status is certainly superior, must necessarily possess the right given to the less favoured members.

Wife co-owner with husband.

Under the Benares law as administered by the High Court of Allahabad, it is sometimes said that a wife is in a subordinate sense a co-owner with her husband; he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of her maintenance. (Jamna *v.* Machul Sahu, I. L. R. 2 All., 317.) In this case the husband had made a gift of the whole of his property to his nephew, and the wife when she had become a widow, raised a contention before the High Court that the nephew was equitably bound to maintain her, inasmuch as no provision had been made for her maintenance by

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her husband. The High Court allowed the contention, Pearson, J. basing his opinion upon the Privy Council case of Sanatan Bysack *v.* Sreemutty Juggut Soondery Dossee, 8 Moore's I. A. 66. But the doctrine that a wife is a co-owner with her husband in his properties cannot safely be made the foundation of the wife's right to receive maintenance from her husband. Original texts do not uphold the doctrine to its full extent. Víramitrodaya, ch. 3, part 1, section 13, says, "Her (meaning the wife) right is only fictional, but not a real one: the wife's right to the husband's property, which to all appearance seems to be the same as the husband's right, like a mixture of milk and water, is suitable to the performance of acts which are to be jointly performed, but is not mutual like that of the brothers; hence it is that there may be separation of brothers, but not of the husband and wife; on this reason is founded the text, namely,—'Partition cannot take place between the husband and wife; therefore it cannot but be admitted that on the extinction of the husband's right the extinction of wife's right is necessary.'" Accordingly it has been said by Oldfield, J., that too much stress should not be put on any of the texts which speak of wife's ownership in her husband's property. (Sham Lal *v.* Banna, I. L. R. 4 All., 298.) The principle laid down in the above quoted case of Jumna *v.* Machul Sahu has been somewhat qualified by the more recent case of Gur Dyal *v.* Kausila, I. L. R. 5 All., 368, where the wife sued for setting aside a deed of gift of two houses made by her husband, also for a declaration of her right to reside in both the houses, and also for a declaration of her right to maintenance personally against her husband, as well as against the two houses which had been alienated by him. The judgment was delivered by Straight, J.:—"Much stress is laid upon the ruling of this Court in Jumna *v.* Machul

But not to all intents and purposes.

Sahu, I. L. R. 2 All., 315, in which it was held that where a husband in his lifetime made a gift of his entire estate, leaving his widow without maintenance, the donee took and held such estate subject to her maintenance. But the circumstances of that and of the present case are somewhat different; for here the donees of the alleged gift asserted that it was made to them by the husband in consideration of their discharging certain debts due from him, and it would seem that a mortgage of the two houses was first made to raise money sufficient to pay such debts; and then house No. 2 was subsequently sold to the appellant Guru Dayal in order to release the mortgage. Now it must be admitted that the payment of her husband's debts, whether he be alive or dead, must take precedence of a wife or widow's maintenance, and we are unable to find anything in the Hindu Law authorising the notion that such maintenance can stand in the way of sales or alienations being made by the husband during his lifetime or by his heirs after his death to satisfy his creditors."

The High Court of Bengal has held in one case where the wife was obliged to leave the house of her husband under the influence of her religious feelings, because her husband had kept a Mahomedan woman as his concubine, that such conduct was a sufficient justification to leave her husband's house, and that she was entitled to maintenance when she was living a chaste life with her mother. (Lalla Govind Persad *v.* Dowlut Butee, 14 W. R. 451). But it is clear from both text-books and cases, that if a Hindu wife leaves her husband's house without sufficient cause, she cannot claim maintenance from him. It is also clear that adultery on the wife's part terminates all her right to receive subsistence at the hand of her husband, unless her guilt is condoned by him and

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she is taken back into the family. Therefore where her departure from her husband's house is accompanied by unchastity, the reason is the stronger that she should lose all right to maintenance. In this matter the Hindu Law seems to be in agreement with the English Law, under which latter, a wife's departure from her husband without sufficient reason exempts him from the duty of supporting her, and her elopement with adultery discharges him from all obligations to find her necessaries, and he will not be bound by her contracts for them, unless of course he pardons her and takes her back. (Ilata Shavatri *v.* Ilata Narayan Nambudiri, 1 Mad. H. C. Rep. 372.) The Víramitrodaya seems to support the notion that even an unchaste wife receives an allowance of food and raimant. It quotes a text saying that fallen wives should have subsistence given them if they reside in the vicinity of the dwelling-house. The Víramitrodaya says that this text applies only to the husband, it does not intend to favour any right on the part of such unchaste wives to receive food and raiment from the husband's family. (Ch. III, part 1, sec. 10, see last para. page 153). This passage seems to make a distinction between the liability of the husband for the maintenance of his wife, and that of the joint family for the maintenance of the wife of an individual member. In every other case there is no ground for making any such distinction. If when the husband is separate, the wife is entitled to receive maintenance from him, there is no reason to suppose that the said right on her part should be affected by the fact of her husband being joint in estate with others. The law therefore which regulates the maintenance right of the wife as against her husband must also govern her right as against the joint family of which her husband is a member.

In one case the question was, whether a wife who was living apart from her husband could bind him by her loans made for the purpose of supplying herself with necessaries, and of prosecuting a suit for maintenance against her husband. It was held that upon this question, the Hindu law was governed by the same principles which have been adopted by the English law. "A person dealing with a wife and seeking to charge her husband, must show either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessaries is presumed—or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support and maintenance—when of course the law would give her implied authority to bind him for necessaries supplied to her during such separation, in the event of his not providing her with maintenance." In this case it was held that because the husband married another wife, the first wife was not justified in separating herself and remaining apart from him of her own freewill. Any debts therefore that she contracted under the above circumstances were not binding upon her husband (Virasvami Chetti *v.* Appasvami Chetti, 1 Mad. H. C. Rep. 375).

Wife entitled to separate maintenance for a just cause.

Under certain circumstances, the property of the husband has a charge fastened upon it for the maintenance of his wife and sons. If such property is sold to a third person, he may be sued by the wife for a declaration that maintenance be awarded to her out of the profits of that property in the hands of the purchaser. But as it is one of the first principles of law that debts due from the family must be met from the family estate, if the purchaser can show that the sale was necessitated by the exigencies of the family, then neither the wife nor the sons, can demand any maintenance out of the profits of

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Maintenance a charge upon husband's estate.

property come into the hands of a third party by sale. The head of the family is in every case responsible for such debts; his power extends to disposing of the joint estate in order to meet liabilities, and a claim to maintenance gives way to the rights of the purchaser who has advanced money to extricate the family from its liabilities.[1]

Wife's maintenance in Bombay.

In Bombay, the wife's right to maintenance is not based upon the doctrine of her co-ownership with her husband. There the right is said to be latent and inoperative, unless she be deserted. The right comes into operation only when natural affection, which usually prompts the mutual acts of members of families, fails of its proper effects; it is then that law steps in with its rigid rules and imperfect remedies. Such were the views expressed in a case in which the husband had made a gift of a house which was his self-acquisition in favour of his son, after having taken a release from his wife that she would not assert her right of maintenance against that house. The High Court of Bombay decided in this case that the release did not free the house from a liability for the widow's maintenance. In the course of the judgment delivered, the rights of the wife as against her husband were lengthily discussed, and many propositions of law were laid down which are not endorsed in any other quarter.[2] In order to establish the rule that right to maintenance as vested in a wife could not be transferred by her to another person, it was laid down that her right before the division of the family or before desertion or supersession by her husband were of a subordinate character. The other reason for holding, that a release given by a Hindu wife in favour of her husband of all her rights to maintenance is invalid, is stated to be the peculiar necessity for protecting the rights of a Hindu

[1] Natchiar Ammal *v.* Gopala Krishna I. L. R. 2 Mad. 127.

[2] Narbada Bai *v.* Mahadeo Narayan I. L. R. 5 Bom. 99.

female who must ordinarily be presumed to be helpless and liable to be taken advantage of by their male relatives. Her independent contracts to which her husband is not a joint party require close scrutiny before a court of justice and equity. "Usage as well as the law of the Shastras prescribes her submissive dependence; and a release to her husband, in return for a bare maintenance to which she was already entitled, of something going far beyond that maintenance fails to satisfy the essential conditions * * * *. Her position would thus remain after her release what it was before it."

In Bengal the law is not clear how far the circumstance of the husband being a member of a joint family will affect the wife's right to maintenance. But the very same reasons which will disentitle her to assert this right when her husband is separate will also apply when he is not so. Where a wife without her husband's sanction goes away from her husband's house to live with her own family, she has been held to have no right to ask subsistence from her husband. (Kullyanessuree Debee *v.* Dwarkanath Sarma Chatterjee, 6 W. R. 116). From the report of this case it does not appear whether the husband was joint or separate; but it is certain that his being joint would not enlarge the maintenance right of the wife. The only way in which the undivided condition of the husband will affect the question is, that when the husband is separate, the party whom the wife will have to sue for maintenance will be the husband himself, whereas in the case of a joint family, she probably has her choice in suing either the husband or the managing member where there is one; if there be no managing member, then she may probably sue all the coparceners, provided there be joint property in which her husband has an interest. Cases involving the wife's right to maintenance during the lifetime of

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her husband are rare; ordinarily a wife is bound to live under the protection of her husband, which means that she lives in the same house with her husband, and is as a matter of course provided with her necessaries, along with the other members of the family, male or female. It is when ill-usage or improper behaviour on the part of her husband drives her from the family dwelling-house, that her claim to separate maintenance comes into existence. What would amount to ill-usage or improper behaviour is a question on which no general rule can be laid down. In one case we have seen that a Hindu wife can properly quit her husband's house, if the latter so far forgets himself as to consort with a Mahomedan woman, and thereby hurts the religious feelings of the wife. In another case it happened that the wife had left her husband's house and had earned her own living by working as a day-labourer without any objection or protest on her husband's part, or any offer to her to come back to his house. It was held that if the wife under such circumstances were subsequently desirous to return, her right to claim maintenance would revive, and that her previous independent life during which she made her own livelihood was not a bar to, or a waiver of, her claim against the husband. (Netye Laha *v.* Soondaree Dossee, 9 W. R. 475.)

Marrying a second wife no cause for separate maintenance.

Upon the question of the reasons justifying the wife to leave her husband's house, and then to claim a separate maintenance, the case of Sitanath Mookerjee *v.* S. M. Haimabutty Dabee (24 W. R. 377) is a recent authority, which lays down that the fact of the husband having married another wife does not amount to such a justification. The suit was brought by the wife of a Kooleen Brahmin, upon the allegation that she had been compelled by her husband's cruelty to leave her husband's house,

and seek a home among her own relations. The facts were, that she had been married at seven years of age, had been the first wife, and had lived very happily with her husband for several years. She had then gone to live at her father's house where she had been visited by her husband from time to time. After this the husband had married a second wife when the first wife came over to her husband's house, but was not treated by him with sufficient cordiality. A rupture took place between her and her husband chiefly because the two wives could not agree with each other, and then on one occasion the first wife was repulsed by her husband with some show of anger and impatience, and was pushed with his hands away from himself. A day or two after this she left the house, and did not any more attempt or was willing to return to it, but claimed a very large sum by way of separate maintenance. Garth, C. J. observed, "In this state of facts we have to consider whether the plaintiff has disclosed any sufficient grounds for absenting herself from her husband's house, and claiming at our hands a separate maintenance from her husband, either past or future. It is clear according to Hindu Law, a wife's first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection; and although it might be very difficult to deduce from the authorities at the present day any definite rule as to the causes which would justify a wife in leaving her husband's house, it may safely be affirmed that mere unkindness or neglect short of cruelty would not be a sufficient justification." The Chief Justice then refers to the provisions in the Criminal Procedure Code, in order to point out the modern law, those provisions being that the husband will be ordered to maintain his wife who refuses to live with him, if there be satisfactory evidence that

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the husband is living in adultery or has habitually treated his wife with cruelty. Those provisions further say, that she is not entitled to any separate allowance if she refuses to live with her husband without any sufficient reason. Merely because the husband does not speak to, or consort with the wife, she is not justified in leaving him. This decision may at first sight seem to run counter to our original texts. Yájnavalkya says, in sloka 151 of the 2nd chapter (para. 34, sec. 11, ch. II, Colebrooke's Mitákshará)—"To a superseded wife one should give an equal sum of money on account of supersession,—to her, that is, to whom no peculiar property has been given; when it has been given, however, a half is declared as proper to be given." Upon this the comments of the Mitákshará are—"*She* is superseded, over whom a marriage takes place. To such a superseded wife an equal sum of money by reason of the second marriage—equal to so much as has been spent on the second marriage—should be given, provided no woman's property has been given either by her husband or by her father-in-law. In case that has been given, a half of the sum spent on the occasion of the second marriage should be given. Here the word 'half' does not signify an equal moiety of the whole. As much as would make what has been previously given equal to the sum spent on the second marriage ought to be bestowed." This is an authority declaring the first wife's right to a sum of money for the sole and simple reason that her husband has married a second wife. Whether our ancient law-givers intended this liability on the part of the husband as taking the place of his liability for supplying subsistence, is not manifest. The obligation imposed on the husband with such refinement in its details cannot be explained away as a moral obligation. Nor can it be supposed to be confined solely to the

Superseded wife's rights under original texts.

Mitákshará School; for the Dáyabhága recognises it in ch. IV, sec. 1, para. 14. "That wealth which is given to gratify a first wife by a man desirous of marrying a second, is a gift on a second marriage; for its object is to obtain another wife." The decision of Garth, C. J., however, is reconcilable with the original texts by supposing that these texts intend by what they call supersession something like a judicial separation under the English Law; for the husband's right so to supersede is hedged in by certain restrictions. (See Manu, ch. 9, sl. 80-82.) In the case decided by the Chief Justice, the husband apparently did not claim to exercise any such right of supersession according to the ancient law, nor did the wife advance her claim on that ground. It was simply an instance of the practice which has prevailed in Bengal for a few hundred years among the Kooleen Brahmins,—a practice equally repugnant to the law of the shastras and to the dictates of universal morality.

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I now come upon the widow's right to maintenance. This is the most important section of the Hindu Law of maintenance. It may be conveniently dealt with under five heads, first as to a widow's right to maintenance in general; 2nd, as to her right being a charge upon the joint property; 3rd, as to the necessity of her residing in the family house for the purpose of retaining her right; 4th, as to the amount she can properly claim; 5th and last, as to how far the Law of Limitation affects this right. In the schools guiding themselves by the paramount authority of the Mitákshará, this right of the widow stands on the same foundation; but the law in its developement in the course of its administration by the four High Courts has undergone certain separate modifications which may be more conveniently considered apart under the decisions of each High Court. I shall

Widow's right to maintenance.

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begin by noticing the decisions of the Allahabad High Court.

As understood by the Allahabad High Court.

The Allahabad High Court mainly guides itself in questions of Hindu Law by the provisions of the Mitákshará as explained and supplemented by the Víramitrodaya, which closely follows the older treatise and may be said to be a running commentary and gloss upon the work of Vijnáneswara. The author of the Mitákshará has, after a lengthy discussion, established that a chaste and lawfully married wife of a sonless person who died, while he was divided and not re-united with any other coparcener, succeeds as an heir to all his wealth (ch. II, sec. 1, para. 39); but the author nowhere says what her rights are if the husband died undivided. Upon this point we are left by him in the dark. In other parts of his work he quotes a text or two, which might be construed into the widow's right to maintenance. Thus in ch. II, sec. 1, paras. 7, 20, he quotes two slokas from Nárada, which run as follows:—"If among brothers any one dies without leaving issue, or retires from the world, the rest should divide his wealth among themselves, excepting, however, the property of the woman; and they should also provide subsistence to his women, until the termination of their lives, if they keep unsullied the bed of their husband; in case of their being otherwise, they should *snatch* the same." But these two slokas have been put by the author into the mouth of an imaginary opponent whose position denying the widow's right to inherit her husband's property he is combating so elaborately in this part of his work. Again in para. 20 of the same section and chapter, the author refers to those two slokas of Nárada, and says that they are applicable to the case of re-united brothers. There is no doubt that two texts may be an authority for the right of the widow

of a re-united brother to demand maintenance from the coparceners of her deceased husband. So far as the express text of the Mitákshará is concerned, we find no authority for the well understood proposition of law that the widow of an undivided Hindu receives maintenance from the family of which he was a member. We must therefore have recourse to the text of the Víramitrodaya for such an authority. Ch. III, part 1, section 10, para. 3, (p. 153) of this latter work says :—"Hence the chaste wife of a sonless deceased person who was separated and not re-united, is entitled to take the entire estate; but of a sonless person who was unseparated or re-united, even the chaste wife is entitled to mere subsistence, by reason of the texts of Nárada and others, such as,—'If any one among brothers die without issue, &c.' An unchaste widow, however, is not entitled even to maintenance, for it is declared,—'But if she behave otherwise, they may resume the allowance.'" Here Mitra Misra cites the initiatory words of the very two slokas of Nárada which we find quoted in the Mitákshará, as authority for an undivided widow's right to maintenance. He does not notice that in the Mitákshará, the two slokas of Nárada are said to be applicable to the case of re-united brothers. The truth seems to be that writers of the original texts assimilate the undivided condition with re-[illegible]d generally extend the incidents of the one to [illegible]. There is another text in the Mitákshará which [illegible] widow's maintenance. It is found in ch. [illegible]a. 37, and is a quotation from Háríta. "If [illegible]oman, who is in the prime of youth, be [illegible]en subsistence should be given to her for [illegible]enabling her to live her life out." But [illegible]itákshará construes as implying a prohibition against a woman of suspected chastity taking the

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whole wealth. The Víramitrodaya quotes a text of Káty-áyana which seems to be a clear authority on the point of widow's right to maintenance (see page 173, para. 2). "But when the husband dies unseparated, the wife is entitled to food and raiment,—a portion of the wealth, however, she gets till her death." Mitra Misra explains this text by saying that here the word, 'however,' is equivalent to an alternative particle, and means the same thing as the word 'or' would have meant. That is to say, the widow can get food and raiment in kind, or she may get as much money out of her husband's property as would be sufficient for her subsistence and for the performance of such religious ceremonies as it is competent to her to perform. This contemplates both the alternatives open to the widow of an undivided member; she may either choose to live in the same mess with the coparceners of her deceased husband, or she may receive a separate maintenance and live apart from them. A little further on, another text of Nárada is quoted,—"All the chaste widows should be maintained with food and raiment by the eldest, or by the father-in-law, or even by any other person born in the family." The author explains it by saying that in every instance it is to be understood that the person responsible for the widow's maintenance must be one who has appropriated the husband's property, for the liability to give maintenance is an incident to the participation of wealth. Here is an authority for the well-known rule of law which has been generally adopted in decisions involving the question of a Hindu's maintenance, the rule, namely, that if one person anyhow intercepts another's right of inheritance to the property of a third person, the first is liable for the maintenance of the second.

In the F. B. case of Gunga Bai *v.* Seetaram, I. L. R. 1 All. 175, Pearson, J. observed, "In the case of Lalty Kuar *v.* Gunga Bishen, H. C. R. N. W. P., 1875, p. 261, to which allusion is made in the referring order, I assented, not without doubt and hesitation, to the doctrine that a Hindu widow was entitled to be maintained out of the joint ancestral estate of the family of which her husband was a member, although he had pre-deceased his father. That doctrine, although not expressly laid down in the Hindu Law, was supported by many considerations of reason and equity, and had been recognised by several decisions. But I am not prepared to go further that a widow is legally entitled to be maintained by her husband's relations after his death merely in consequence of such relationship. The texts which countenance such a view appear to be of the nature of moral or religious precepts." Oldfield, J. said, "The legal right of a widow to maintenance from her husband's family can, I apprehend, scarcely be supported with reference solely to those texts of Hindu Law which indicate the position a woman obtains by marriage in her husband's family, and those which generally inculcate the duty of maintenance of the female members of a family."

In an early case decided by the Privy Council, it was held that where there was joint ancestral property, the widow was entitled to maintenance out of it, although the rights of three of her sons had been confiscated by Government on account of absconding to evade a summons to appear and answer a charge of rebellion.[1] This was a case from Benares and therefore governed by the Mitákará law.

The High Court of Madras holds that a woman di-

[1] Golab Koonwar *v.* Collector of Benares, 8 Moore I. A. 447; S. C. 7 W. R. P. C. 47.

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Widow's maintenance in Madras.

vorced for adultery who has continued in adultery during her husband's life, and who has lived in unchastity after his death, is not entitled to maintenance out of the property of her deceased husband.[1] In this case, the Court in its judgment alludes to a rule of Hindu law which allows a bare subsistence to an adulterous wife, but draws a distinction between the case of such a wife and that of a widow, who leads an unchaste life after her husband's death. This distinction is also made in the passage from the Víramitrodaya I have already quoted (see p. 298), which imposes a duty upon the husband alone to give a bare subsistence to his unchaste wife.

The widow, though entitled to maintenance at the hand of the members of the family who have appropriated her husband's undivided share, cannot, however, bind them by her contracts for necessaries supplied to her. The heir no doubt is liable to pay the proper debts of the person from whom they inherit property; it is also a rule of law that debts contracted for necessary family expenses whilst the family are living together, must be paid from the family property. The power of contracting such debts is possessed even by a wife or a widow living in the family. But this rule cannot create a liability on the part of the heir to pay debts contracted by a widow to obtain her own necessaries.[2]

In Bombay.

According to the Vyavahára Mayúkha, if a coparcener dies without leaving issue, his widow is entitled to maintenance where he was unseparated or re-united with the rest.[3] It says:—"But says Narada:—'Among brothers, if any one dies without issue, or enters a religious order, the rest should divide his wealth, except the wife's

[1] Muttammal *v.* Kamakshi Ammal, 2 Mad. H. C. Rep. 337.

[2] Ramasami Aiyan *v.* Minakshi Ammal, 2 Mad. H. C. Rep. 409.

[3] Chapter IV, section 8, paras. 4—7.

separate property. They should allow maintenance to his wives to the end of their lives, provided they preserve unsullied the bed of their lord. If they behave otherwise, the brothers may resume that allowance.' It relates according to Madana to the wives of one dying unseparated or re-united; because the text occurs under that head. Kátyáyana says:—'If her husband have departed for heaven, *stri* (the wife) obtains food and raiment; if unseparated, she will receive a share of the wealth, so long as she lives.' The term 'unseparated' is illustrative of the class, such as the re-united. The word 'but' has here the sense of 'or.' There would thus result two propositions according to Madana, the latter referring to a wife lawfully married; the former to a concubine. The foundation of this exposition is questionable. The same author (Kátyáyana) thus makes a correct statement:—'She who is intent upon her service to the elders of the family, is fit to enjoy her legitimate share: should she not perform her proper duty, raiment and food [only] should be assigned to her.' The meaning is, that at the elder or *guru's* pleasure, she may receive a share; otherwise merely food and raiment. The same:—'A wife who does malicious acts, who is immodest, destroys wealth, or is unchaste, is not fit to inherit wealth.' As for the text, [illegible] course should be followed in the case of de[illegible]es; food and raiment are to be given to [illegible] they should reside near the house'—it, in the [illegible] some authors refers to the husband while [illegible] this passage, the same texts of Nárada and [illegible] are cited which are found in the Víramitro[illegible] and are explained in the same manner. It assimilates non-separation with re-union in respect of the law of maintenance; it recognises the rule that an

[1] Mandlik, p. 78.

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unchaste wife gets a bare subsistence at the hand of her husband, but not a widow at the hand of the coparceners. It notices the alternative of the widow's getting a share of the wealth, even in case of non-separation; only it makes a dutiful conduct on her part a condition to that alternative.

The question that even an unchaste wife gets a bare subsistence, or what is otherwise called a starving maintenance, arose in the case of Honamma *v.* Timanna Bhat, I. L. R. 1 Bom. 560, where Westrop, C. J. held that a widow who has already obtained a decree for maintenance does not forfeit her right under it merely because she has since then been leading an incontinent life. The Chief Justice refers to the Mayúkha, ch. IV, sec. 8, pl. 9, and the Mitákshará, ch. II, sec. 1, paras. 37, 38. This passage from the Mitákshará I have already noticed (see p. 306). The text of the Mayúkha referred to is as follows :—"To even a woman suspected of incontinence, only maintenance should be given. Since Hárita says :—'If a widowed woman in the prime of youth be self-willed, then subsistence should be given in order that she may live out her life.' 'Self-willed' means 'suspected of incontinence.' So says the Mitákshará." This is but an echo of the Mitákshará passage. I am afraid that this text of the Mayúkha does not support the rule that an incontinent widow gets starving allowance, as the Chief Justice of Bombay has supposed. Were it so, the author of the Mayúkha would not be consistent with himself. A few lines back the author has said that an unchaste woman can advance a claim of that kind solely against her husband—a view of the law adopted by the Víramitrodaya (Víram., p. 153). Therefore an incontinent widow is precluded from demanding a starving allowance from her deceased husband's family. The meaning of Hárita

as understood by the authors of the Mitákshará and the Mayúkha seems to be this:—The widow of a separated Hindu ordinarily inherits his property; if, however, she be very young and disobedient to those whom by usage and law she is bound to defer to, law gives her only a bare subsistence; this rule applies when there are good reasons to suspect her unchastity. It does not apply to the widow of an unseparated Hindu. Hárita is interpreted as laying down a special rule limiting the ordinary rule of widow's succession to her husband. This succession does not occur unless her husband had been separate; the special rule must therefore regard the case of separation. At the same time it is impossible to question the soundness of the decision arrived at in the particular case quoted above. There a decree had already been obtained by the widow; and though Nárada says (see *ante*, p. 306) that in case of subsequent lapse, the widow's allowance may be *snatched* or resumed, yet modern courts have on considerations of equity turned a deaf ear to those harsh directions of the ancient Rishis. Equity necessarily implies impartiality. Were the law, as laid down by the ancient Rishis to be strictly enforced, many a Hindu youth who in the heyday of life has walked roughshod over the religious directions of our shastars by eating forbidden food and drinking forbidden beverage, would be disinherited, if he may not have to give back inheritance already vested in him. If in his case, the rigorous ancient law is to be overlooked and disregarded, I do not see any reason why the weaker sex should be tied down to a more rigourous interpretation of those very texts. The above decision of the Chief Justice Westropp was dissented from in Valu *v.* Ganga, I. L. R. 7 Bom. 86, in which the judgment was delivered by Sargent, C. J. Referring to the above-

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quoted text of Hárita, the Chief Justice says:—"It is plain therefore that the authors of the Mitákshará and Mayúkha regarded the text of Hárita as exclusively intended to qualify the right of the widow on her not being a person of such conduct as to subject her to grave suspicion, or to make it likely that she will dishonour his name. The contrast between actual unchastity and the conduct which is described in the translations as headstrong or perverse is also drawn with marked distinctness in Mitákshará, ch. II, sec. 10, para. 14 and Mayúkha, ch. IV, sec. IX, pl. 12, where the authors are discussing the rights of daughters and wives of disqualified persons. In the latter text, it is said:—'If she be unchaste, a woman must be turned out of doors and without a maintenance. A perverse woman should also be turned out of doors, but a maintenance must be provided for her, according to Madana and others.' * * * Regarding the question from the standpoint of humanity, few people would probably care to justify the husband's relations who had succeeded to his property, in leaving his widow in a state of complete destitution, (provided she was then leading a respectable life), however much she might in the past have failed in her duty of maintaining inviolate the bed of her lord. But in the absence of any text distinctly imposing this obligation, or of any expression qualifying the right which is reserved by so many texts to those who take the husband's property of withdrawing maintenance from an unchaste widow, it cannot (except perhaps in the case of a son) be regarded as a legal liability to be enforced in a Civil Court."

In noticing above the case of Honamma, *v.* Timanna Bhat, I. L. R. 1 Bom. 559, I have said that Hárita's text quoted in the Mitákshará, ch. II, sec. 1, para. 37 applies

to the case of the widow of a separated parcener. I find that in Savitri Bai *v.* Lukshmi Bai, I. L. R. 2 Bom. p. 606 the same text has been explained by Westropp, C. J. himself as a denial of the right of a widow suspected of incontinency to take the whole estate, and therefore as implying that a widow not suspected of incontinency has a right to take the whole property of a husband separated from his family and dying without leaving issue male. "Vijnáneswara is there regarding such maintenance of a headstrong woman as one of the liabilities of the inheritance, the descent of which was his main topic."

The case Savitri Bai *v.* Luximí Bai, I. L. R. 2 Bom. 573, in which the question of the Hindu widow's maintenance was considered by a Full Bench of the High Court of Bombay, and an exhaustive judgment, reviewing most of the prior decisions and discussing the original texts at a great length was delivered by Westropp, C. J. is a leading authority. This was not exactly the case of a joint family, for the widow's husband had separated himself before he died, and the claim was made against the uncle of the deceased husband. The points decided were that no claim to maintenance could be sustained in favour of a widow as against the relatives of her deceased husband, whether separated or not, unless there was ancestral property in their hands. This Full Bench Decision overruled some of the prior rulings which had gone so far as to have laid down that mere destitution would entitle a widow to claim maintenance from her husband's relatives. One case was that the widow had obtained her deceased husband's share and had lived by money-lending for thirty years. (Bai Lakshmi *v.* Lakshmi Das Gopal Das, 1 Bom. H. C. Rep. 13.) Notwithstanding these facts, it had been held that the obligation of maintaining the widow would still attach to the husband's relatives,

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should she then be destitute of the means of living. In another case Chandrabhaga Bai *v.* Kashinath Vilpal, 2 Bom. H. C. Rep. 323, a widow whose husband had been separated in estate from his father, and who herself was stopping with her own father sued her father-in-law for a money allowance by way of maintenance. The High Court of Bombay held that if the widow's present circumstances were such as to give her a claim to maintenance, the father-in-law would be bound to support her; and in determining what sum ought to be paid her as maintenance, any peculiar property in her hands should not be taken into account. In the case of Timmappa *v.* Parmeshriama, 5 Bom. H. C. Rep. 130 A. C. J., the High Court laid down that every Hindu widow, whether her husband was divided from the family or not, was entitled, when in needy circumstances, to claim maintenance from her husband's relatives, the whole policy of the Hindu Law being not to allow even a distantly related widow to starve. In Rama Bai *v.* Trimbak Ganesh, 9 Bom. H. C. Rep. 283, the High Court of Bombay said that although according to the authorities the relations of a deserted wife are not under a personal liability to maintain her, yet the proceeds of her husband's property to the extent of one-third might be claimed by her as maintenance. In the case of Udaram Sitaram *v.* Sonka Bai, 10 Bom. H. C. Rep. 483, the widow of an undivided son alleged that she had been maltreated by her father-in-law, who had expelled her from the family house. On these facts the Court awarded to her a residence in that house and a separate maintenance of rupees 10 per mensem. Some of these older decisions were overruled and others were distinguished, in the Full Bench case of Savitri Bai *v.* Lakshmi Bai, I. L. R. 2 Bom. 573.

I now come to the question of how far the maintenance

of a Hindu widow is a charge on the joint property. When it is said that the widow's maintenance is a charge upon the estate, what is intended is that a claim on the part of a Hindu widow for maintenance is good, not only against the persons allied by relationship to the deceased husband, but also against any person into whose hands the husband's property may have come. Upon this point the original texts do not furnish us with any direct authority. We might possibly contend from some of these texts that so long as there are persons in the family having a just claim for subsistence out of the joint estate, any alienation of such estate would be absolutely null and void in the eye of law.[1] But this ancient rule has been disregarded by the modern administrators of justice for a long time. In doing so, they have been mainly influenced by the principles governing the Bengal School, the authorities of which were the first to propound the doctrine that ownership means the power of dealing with property absolutely at one's pleasure. From this doctrine follows the corollary, that if a person is the lawful owner of property, a sale of it made by him must be legally valid notwithstanding that other persons may have a right to receive maintenance out of it. In a joint family when a coparcener dies, the rule of survivorship vests in the surviving members the interest the deceased member had. The survivors are the owners of the whole after a death of this kind, as they and the deceased were together owners of it before his death. Although therefore the widow may be entitled to subsistence, there is nothing to invalidate an actual sale by the owners of the property. The transaction is legally good, though it may be morally reprehensible. Such is the view the tribunals of the present day have come to

Widow's maintenance a charge on joint property.

[1] See Mitákshará, chap. I, sec. 1, para. 27.

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take of this matter, under the guidance of Jimúta-váhana and his followers. The work of Jimúta-váhana is nominally an authority for only the Bengal School; but his principles have imperceptibly overspread the law of the other four schools as actually administered. It should be borne in mind that the first considerable part of India which came under British dominion was the province of Bengal. The British administrators of Hindu Law therefore had become to a great extent familiar with the Bengal law before they addressed themselves to the task of mastering the law of the other four schools. What might be expected to happen did really take place. Analogies from Bengal law were largely availed of in deciding cases in the rest of India. The aggregate case-law as developed by the Courts of British India, exhibits a superabundance of Bengal rules, some of which are either in direct conflict with the recognised original authorities of the other four schools, or are entirely ignored by them. Another reason which has recommended the Bengal principles to the British administrators of justice is, that this law approaches more nearly to the ideas and opinions underlying the legal principles of Western Europe. In India the law of Bengal alone has given to individual proprietary right that absolute character which is in conformity to European notions. The effect of this tendency in the modern courts is visible on the law of maintenance as being a charge on joint property. Many an earlier case recognises the notion that a widow's maintenance follows the estate in whosesoever hands it may have come. In Mussamut Khukroo Misrain *v.* Jhoomucklall Dass, 15 W. R. 263, which was a case from the district of Tirhoot, and so governed by the Vivádachintámani, the Judges say:—"But with the finding that her husband died a member of the joint family, all her claim dis-

appeared, and she has no interest whatever in the family estate. It has been contended that her claim for maintenance is a charge on the estate, and that therefore she has an interest in keeping that estate in the family; but as a matter of fact, change of ownership would not affect her lien, and if she failed in getting her maintenance from the members of her late husband's family, she could make the estate chargeable with it into whose hands soever it had fallen under the foreclosure." In Ramchunder Dikshit *v.* Savitri Bai, 4 Bom. H. C. Rep. A. C. J. 73, the High Court of Bombay held that the maintenance of a widow was by Hindu Law a charge upon the whole estate and therefore on every part thereof. In this case the widow had sued for maintenance only one of the brothers of her deceased husband who raised a plea that as there were other persons interested in the property from which the widow's maintenance was to be received, the suit could not proceed unless they were made parties. The High Court said that it was not a good defence against the suit, inasmuch as the defendant might sue his brothers for contribution. In Gunga Bai *v.* Administrator General of Bengal, 2 I. J. N. S. 124, Phear, J. said that the widow's right to maintenance had by the death of her husband become an actual charge on the estate which devolved upon the four sons of the said husband in joint coparcenery. Three of these sons became afterwards concerned in a rebellion against the British Government, and having absconded, their rights were forfeited under Reg. XI of 1796. The Privy Council in Mussamut Golab Koonwar *v.* The Collector of Benares, 4 Moore's Ind. Ap. 246, held that the forfeiture of the sons' right did not interfere with the widow's right to maintenance out of the whole ancestral property. It was with reference to the facts of this case

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that Phear, J. said that the widow's claim was an existing burden on the share which her sons took in the estates at the time their shares were confiscated, and of course the Government took subject to her claim for maintenance. In Hiralal *v.* Muss. Kousillah, 2 Agra H. C. 42, the widow asserted her right to maintenance and objected to the conveyance of the property. The court held that this constituted a charge of which the purchaser had notice, and that the maintenance remained claimable out of the property notwithstanding its alienation by the heirs. In Baijun Doobey *v.* Brijbhooken Lal Awasti, L. R. 2 I. A. 279, the Judicial Committee held that the maintenance of the widow was a charge upon the inheritance which had descended from her husband to her daughter-in-law; that the liability to maintain the widow passed to the son when he got the estate of his father, and that when the estate passed from the son to the son's widow, the liability to maintain the father's widow still attached to the inheritance, the son's widow being bound to maintain the father's widow out of the inheritance. In Sreemutty Bhagabutty Dossee *v.* Kanailal Mitter, 8 B. L. R. 225, Phear, J. said :—"As against an heir who has taken the property, the widow has a right to have her maintenance treated as a charge on the property. She may doubtless follow the property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir. I do not think that in Bengal she has a lien on the property in respect of her maintenance against all the world, irrespective of such notice. No such lien as far as I know has ever been established in these courts." In Babu Goluk Chunder Bose *v.* Ranee Ahilla Dai, 25 W. R. 100, Mitter, J. said :—"It has been settled by more than one decision of this court that where a purchaser purchases property from the heir with notice that

a Hindu widow is entitled to be maintained out of it, the property in the hands of the puschaser continues to be charged with that maintenance. * * * It is not a correct proposition of Hindu law to say that in all cases a Hindu widow is not entitled to follow properties from which she is entitled to obtain her maintenance in the hands of the purchaser, unless she at first attempts to recover her maintenance from the heir-at-law. It may be that in certain cases where the defence is that sufficient property is still in the hands of the heir-at-law from which the maintenance can be recovered, the person entitled to maintenance might not be allowed to recover it from the purchaser of a small portion of the family property without first attempting to recover it from the properties in the possession of the heir-at-law." In Subramania Mudaliar *v.* Kaliani Ammal, 7 Mad. H. C. R. 226, the court said:—"During the marriage and the life of the husband, the claim to maintenance against his estate was a mere possibility. If he had wrongfully put her away or refused to support her, the possibility would have become a present interest; the right is a charge on the husband's estate in some circumstances while he still lives,—in all cases when he lives no longer. The husband's estate in the hands of the survivor is therefore that to which the charge attaches, and the husband's death is the period at which the statute begins to run against the claim."

From a consideration of these different cases it would appear that originally the widow's claim to maintenance out of the joint property in which her deceased husband had an interest was supposed to override all other rights, including even those of a purchaser from the survivors to whom the husband's interest had lapsed. But latterly it has been held that a purchaser would not be affected if he had no notice of the widow's claim, and that even if

Purchaser without notice relieved from widow's maintenance right.

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he had notice the rights created by purchase from the hands of the survivors of the widow's deceased husband would remain intact if the alienation was caused by the necessity of paying such debts of the family as would be a just and valid burden upon the joint property. The necessity of notice has been strongly insisted upon in Adhirani Narain Kumari *v.* Shonamali Patmohadai, I. L. R. 1 Cal. 365. In this case the widow sued the purchaser of the joint property for her maintenance, after having obtained a decree against a member of the joint family, namely, the younger brother of her deceased husband. The property had been sold in execution of a decree against this person. It was found that the purchaser had no notice of any claim for maintenance on the part of the widow. The judgment was delivered by L. Jackson, J., who after reviewing many previous cases on the point held that the property in the hands of the purchaser was not liable for the maintenance claimed; that there was a distinction between the member of a family in whose hand the property had come either by right of inheritance or by survivorship, and a *bonâ fide* purchaser without notice; that it was exceedingly probable in this case that the debts which led to the sale of this property were partly ancestral; that the widow's right to maintenance was subject to the duty of paying these debts and was enforceable against only the residue after paying such debts; that her right to maintenance had been modified by her having previously obtained a personal decree against her deceased husband's younger brother, and that having omitted to give notice to the purchaser of her claim, the widow could have enforced her right only against the surplus proceeds of the property when sold.

The Full Bench case of Shamlal *v.* Banna, I. L. R. 4 All. 299, decided by the Allahabad High Court, lays

down that the maintenance of a Hindu widow is not such a charge on the joint estate in which her deceased husband had an interest, as can be enforced against a *bonâ fide* purchaser without notice, until the said maintenance has become fixed and charged by decree of court or contract on particular property. "The right to maintenance is of an indefinite character: the heir who succeeds to the estate may be said to take it with a trust for the widow's support which will give her a right against him to have the allowance ascertained and fixed and made chargeable on particular property; but till this has been done, a charge cannot be said to exist in the sense of a title issuing out of the land itself, and binding every person who comes into the estate; and a *bonâ fide* purchaser for value without notice of the claim will therefore be protected. The principle of protecting a *bonâ fide* purchaser without notice cannot be objected to as being something peculiar to English Law, as it rests on grounds of public convenience which are of universal application."

To a Hindu mind not penetrated with European notions, and still retaining the spirit of ancient Hindu law as propounded by the Rishis and their earlier commentators, this exposition of the law relating to a widow's maintenance would appear harsh and unsympathetic. The life of a Hindu female is one of seclusion; outside the zenana, her knowledge is as limited as that of a tender child; culture, training, or education, she has absolutely none. If her rights are invaded by the male members of the family, she is utterly helpless; or she falls under the influence of persons whose motive for lending her a help are the furthest from those of philanthropy or disinterested goodwill. Females belonging to the respectable classes are incapable of earning their own livelihood; if the family property is transferred by the male

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relations, what can these females do to keep their rights of maintenance secure? If the law holds that the purchaser of such property is not bound to give them maintenance, the law in fact forfeits an inherent right vested in them. To insist that the female member claiming maintenance must prove that her existence and claim were known to the purchaser is to impose upon her the performance of an impossibility. This is the light in which the modern exposition of the law of maintenance would be viewed by an orthodox Hindu. On the other hand, it is not easy to shut our eyes to the changes which Hindu society has undergone since the time when the Rishi texts were written. Transfers of immoveable property have now obtained a frequency that the people of those days could not even dream of; the idea of property being tied up in the hand of a single individual or a single family would create an amount of inconvenience quite disproportioned to the advantage that might be gained if the law set its face against property changing hands. The ordinary arrangements of society would be unsettled if the law were so. Again, to declare invalid all transfer of joint property so long as maintenance of any person is to issue out of it, would be inconsistent with the undoubted proprietory right of the male members. To the outside world, they represent the joint property; all necessary expenses are incurred by them; third parties give them credit in proportion to the amount of property visibly in their possession; the female members are unknown to the public at large. Third parties become accustomed to advance loans to the male members, and to regard them as the sole proprietors, —as the holders of an absolute and unfettered right over the property. If these third parties, so accustomed, should buy it from them, their conduct cannot be blamed

Modern case law as to widow's maintenance not consonant to Rishi texts.

as unreasonable. On the contrary, it would be unreasonable to hold them liable for unknown claims first brought to their notice after they have parted with their money. Unreasonable in this sense that the balance of convenience would be in favour of upholding the purchasers' rights, regard being had to the present condition of Hindu society. The later decisions disclose principles upholding transfers of joint family property where the purchaser is not affected with fraud. Fraud may be imputed to him, if he knowingly and willingly buys property from which a widow derives her maintenance. Lukshman Ramchandra Joshi *v.* Satyabhama Bai, I. L. R. 2 Bom. 494, is an authority for what has been said above. That was a suit for maintenance brought by a Hindu widow against her husband's brother (against whom she had previously obtained a decree), who was the sole surviving member of her husband's family, and against certain *bonâ fide* purchasers for value of certain immoveable ancestral property. It was contended that the widow's maintenance was not such a charge on the estate as to give her any kind of proprietary interest in it; that her right, although its value was dependent on the amount of her deceased husband's share in the property, was merely a personal one against her husband's brother; and that notice of what was not really a charge, in the sense of an interest in the property, could not convert the merely personal obligation into a real right by way of incumbrance on the property, accompanying it into whosesoever hands it may pass. West, J. held that the sole surviving proprietary member was competent to sell the estate vested in him; that the right of the widow would not be affected thereby if by a decree of court it had become a charge adhering to the estate; that previous to its being made a precise and

Fraudulent purchaser bound to pay widow's maintenance.

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actual charge on the property, the proprietary member might deal with it at his discretion; that if the alienation were made with a view to defraud the widow, and if the purchaser were privy to the fraudulent transaction, the property in such purchaser's hand would still be liable for the widow's maintenance, and that mere knowledge on the purchaser's part of the existence of such a widow and of her claim would not be sufficient notice affecting the purchaser, who in good faith thought that the alienation would not work any wrong upon the widow. Where the sale of the family property is brought about by what is called a legal necessity, which among other matters includes the payment of a family debt, the claim to maintenance cannot take precedence of such debt, nor will it be a charge on the husband's property as against a purchaser. (Natchiarammal *v.* Gopal Krishna, I. L. R. 2 Mad. 126.)

Widow's right to residence.

Connected with the widow's right to maintenance is her right to residence in the family dwelling house. The leading case on this subject is Mongola Dabee *v.* Dinonath Bose, 4 B. L. R. O. C. J. 73. In this case the judgment was delivered by Sir Barnes Peacock, the question being whether the purchaser of the family dwelling house from the adopted son of the widow's husband was entitled to dispossess her, she having lived in the house so long as her husband lived, and having continued to live in it after his death. Sir Barnes held that neither the adopted son nor the purchaser from him was entitled to turn the widow out of the house in which she was left by her husband at the time of his death; at any rate she could not be turned out unless some other suitable dwelling were provided for her. His words are:—"It seems quite contrary to every principle of Hindu Law, by which the property taken by an heir

is for the spiritual benefit of the deceased, to suppose it would not have contained some provision to protect a Hindu widow from being turned out of the dwelling in which her husband had left her at the time of his death without notice or even after a week's notice." This decision is based upon two texts. The first is a text of Kátyáyana cited in 2 Colebrooke's Dig. p. 133, and is as follows:—"Except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away, whatever it be, whether fixed or moveable; otherwise it may not be given." The other text is verses 56 and 57, sec. 1, ch. 11 of the Dáyabhága. Verse 56 is, "But the wife must enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it. Thus Kátyáyana says, 'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.'" The beginning of verse 57 is, "Abiding with her venerable protector, that is, with her father-in-law or others of her husband's family." I apprehend that these words have been construed by Sir Barnes as creating a right in the widow to dwell in her father-in-law's house. They clearly imply a duty on the part of the widow to adopt her residence in that house; the performance of this duty necessarily involves her right to reside therein, otherwise she would be unable to perform the duty. The considerations, however, which weighed most with the Chief Justice are disclosed in the following words of his judgment:—"I have very great doubt whether a son, either natural born or adopted, is entitled to turn his father's widow and the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence, and

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in which he left those females of his family at the time of his death. No one who is at all acquainted with the usages and customs of the Hindus can doubt, that it would be highly injurious to the reputation of the females of a family to be turned out of the residence, at least until some other proper place has been provided for them." With regard to the question whether the text of Kátyáyana might not be considered as a moral injunction, the judgment says:—"If a man's right is not restricted, *factum valet* applies; his act is valid if he has title, although he may be guilty of an immoral act in doing what he has a legal right to do; but if his right is restricted, the rule, *factum valet*, does not enable him to go beyond the restriction. The most difficult question is, whether this passage of Kátyayana, which says a dwelling house may not be given, is a mere moral precept or a restriction on a man's right to convey. It seems to me at present that it is a restriction and not a mere moral precept, and that the son and heir of the father has not such a right in the dwelling of the family that he can at once, of his own pleasure, turn out all females of his family, or sell it and give the purchaser leave to turn them out." This decision shows that even in Bengal the right over ancestral property is not unrestricted. In a former part of these Lectures I have attempted to show how such a conclusion could be arrived at by considering the drift of different parts of the Dáyabhága, especially where the author restricts the father's power as regards partition of inherited property. In Mongola Dabee *v.* Dinonath Bose, the Chief Justice comes to the same conclusion and says;—"That shows that, with regard to ancesteal property the father's inability to make an unequal partition of ancestral property among his sons depends on restricted ownership, and that he

Not affected by the doctrine of *factum valet*.

has not an unlimited discretion over his property. In those cases where a man has no title to convey, or where his right is restricted, the rule of *factum valet* does not apply." Were these observations carried out to their legitimate consequences, the Bengal property law might be assimilated to the property law as sanctioned by the Mitákshará. But the local usage and numberless decisions have established the Bengal father's absolute power over inherited property too firmly to be shaken by remarks like the above, they being regarded as *obiter dicta*. The only restriction which the above case establishes over one's power in respect of ancestral property in Bengal is, that the ancestor's widow and probably some other female members will not be driven out of the family dwelling house by persons claiming under alienations to which they are not parties. Mongola Dabee's case has been followed in cases decided by the other High Courts. Thus in Gouri *v.* Chandermoni, I. L. R. 1 All. 262, the auction purchaser of the rights and interests of one member in a certain dwelling house endeavoured to obtain possession of the house, but was resisted by the childless widow of another member, who was residing in the house, and claimed the right to reside in a moiety thereof as her husband's widow. The High Court said:—"It does appear to have been admitted that the property was held by Lachman Persad and Baney Madhub in equal shares, but assuming it was the joint property of the two brothers, the widow of Baney Madhub is entitled to live in it, it being the house in which she resided with her husband. She cannot be ousted by a purchaser of her nephew's rights. The house is a small one, and it is not shown that one moiety is more than sufficient as a residence for the Mussamut." In Talemand Sing *v.* Rukmina, I. L. R. 3 All. 353, one member of a joint

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family had been sued by a third party on a bond for money, upon which a decree had been obtained, and the family dwelling house had been sold in execution of the decree and purchased at the court sale by the decree-holder, when he tried to oust the widow of another member from the house. The High Court said that the widow of a member of a joint Hindu family could claim a right of residence in the family dwelling house, and could assert it against the auction purchaser. In Dalsukhram Mahasukhram *v.* Lallubhai Moteechand, I. L. R. 7 Bom. 282, two houses had been sold by the son of a joint family, one of which was occupied as residence by his mother. The purchaser sued both the vendor and his mother to recover possession of the houses. Upon these facts the district judge held that by Hindu Law and custom of the country a widow was entitled to residence in the house of her husband during her lifetime notwithstanding the sale of it by her son. The High Court said that as no proper reasons were disclosed for the alienation by the son, and as the widow was in possession, and the purchaser had purchased with full knowledge of such possession, the sale by the son did not affect the widow's right to residence. On the authority of the passage from Kátyáyana already quoted, found in Colebrooke's Dig., b. 2, ch. IV, sec. 2, text 19, the High Court held that the requisites for the maintenance of the family were on the same footing as the family dwelling; and although the rule regarding maintenance that the ancestral property in the hands of a purchaser continues to be charged with it might be subject to certain conditions, yet it was undoubtedly a correct proposition of law, that a son could not evict his widowed mother or authorise a purchaser to do so without providing some other suitable dwelling for her. It has been held, however, in an

Allahabad case that this right of residence would not prevent the auction sale of the family dwelling house merely because the judgment debtor's widow might be residing in it. In this case the suit was for certain moneys charged on, amongst other properties, the ancestral family dwelling house which was occupied by two widows, one the mother, the other the wife of the mortgagor. Their plea was that they had no other place to reside in except that house, that they possessed a right of residence therein, and that the mortgage was invalid. The decree of the first two courts refusing the sale of the house was upset by the High Court observing that the question of the right of residence was not involved in the case, that the hypothecated house could be sold in execution of the mortgage decree, and that it was a matter for decision in a future case whether the widow could be ousted by the auction purchaser. (Bhikham Das *v.* Pura, I. L. R. 2 All. 141.)

Widow may live elsewhere than in her husband's house.

Allied to the subject of a widow's right to reside in the family dwelling house is the question whether a widow affects her rights by refusing to live in the family of her husband. Such refusal may be dictated by either innocent or vicious motives. At one time there seems to have been a notion abroad that a widow was bound in duty after the death of her husband to live under the protection of her husband's family, and that should she, without any just cause, quit such protection, and go elsewhere, she would be guilty of a dereliction of duty, although there might be no vicious motive in her doing so. Nor would such a notion be devoid of all show of authority in its favour. Thus Kátyáyana quoted in the Dáyabhága, ch. 11, sec. 1, verse 56, says that the sonless widow should preserve inviolate the bed of her husband, that she should stop with the 'venerable

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preceptor' or 'guru,' as the word in the original is. Verse 57 explains what is meant by stopping with the guru. She must dwell near her 'father-in-law and such others,' and must stop in her husband's house. This is the same text from which Sir Barnes Peacock has inferred that the husband's house is the proper dwelling-place for the widow, and that she cannot be driven out from it by her husband's heirs or third persons claiming through them. The word 'guru' in Sanscrit means 'one who is entitled to respect and veneration.' The father and the elder brother are often respectfully called 'gurus.' When therefore Kátyáyana says that the widow is to stop with the 'guru,' the reasonable construction is, that she is directed to live in the same house in which such persons live, as were entitled to respect and veneration from her husband; it may be his father, or elder brother, or uncle, or senior cousin, or mother, somebody in fact belonging to the husband's family, to whom the husband used to pay deference when he was alive. After marriage, a woman's identity is to a great extent merged in that of her husband; she is according to Hindu notions, half his body; his house is her house; and his 'gurus' would be her 'gurus.' The text of Kátyáyana, therefore, supplemented by Jímútaváhana's explanation, fairly indicates the prevalence of a pretty general notion among Hindus, that for a widow to be independent in her actions and to dwell elsewhere than in her deceased husband's house, would be improper conduct. Again Nárada quoted in verse 64, sec. I, ch. XI, Dáyabhaga, says that after the death of the husband, it is his family that has a claim to the obedience of the souless widow. They have a right to be consulted when she makes any disposition of her property; they are the guardians of her wealth; they should supply her with all

necessary things. When the family of her husband has become extinct to a man, when the family domicile even is gone to wreck, when there is not a soul of the same blood with her husband, it is then that she is allowed to place herself under the guardianship of her father's family. Modern usage also seems to be in conformity with the notion that it is proper for a widow to live with her husband's family. The Hindus are superstitiously particular as to the honour of their females. The inevitable consequence of a single lapse of virtue on the part of a woman is absolute excommunication. Among the more respectable castes, actual unchastity is not unfrequent; but that the public excommunication of fallen women belonging to these castes is not so often seen is due to the fact that there is abundant concealment. There can be no condonation of an act of unchastity. Years of virtuous conduct cannot efface the stigma attaching to a woman to whom even a single guilty act has been brought home. Not only she herself, but even both her families, on the husband's and on the father's side, are involved in the infamy, according to the popular idea. No matter that all connection between the guilty woman and her family may have ceased; no matter that she may have gone elsewhere, dead to the community she belonged to. The memory of the guilt pursues her husband's and her father's family; and a certain social degradation is fastened upon all connected with her in the relationship of blood or affinity. It is for this reason, that the family of the widow's husband, when tolerably well-to-do, generally insist upon her residing with them. Except among the Kulin Brahmins, with whom the idea prevails that a man's proper home is his maternal grandfather's house, the residence of the widow with her husband's family is the rule; her residence in her

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father's house is exceptional. This usage of the Hindus furnishes an explanation of the circumstance that in some of the earlier cases, where a widow sued either for succession to her husband's property or for maintenance out of the same, we meet with a plea in defence set up, that the widow did not reside in her husband's family. One of these very early cases was that of Gopinath Bysack *v.* Hurrosoondery Dossee.[1] Here the question seems to have been whether the widow did not forfeit her right to her husband's property by reason of refusal to live in the residence of her deceased husband, and with his family. This case was decided in 1826. In those days all questions of Hindu Law were referred to a Pundit attached to the court, who held an appointment from Government, and whose duty it was to enlighten the judges on Hindu law. The answer of the Pundit in the present case was; that unless the widow left her husband's residence for unchaste and improper purposes, her refusal to dwell with the family of her husband did not interfere with her right to inherit her husband's property. The case came ultimately before the Privy Council. Their lordships approved the Pundit's opinion, and observed with reference to the circumstances of that particular case that the widow was only fourteen years old at the time of her husband's death; that the husband's brothers were then young men, and the widow thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death; that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; and that the brothers had no right to insist upon her not with-

[1] *Vide* the case noticed at length at p. 22, of 20th vol. of the Weekly Reporter.

drawing from them in order to put herself under the protection of her mother. The observations with regard to the widow being of fourteen years of age, and the husband's brothers being young men, were not meant to be the reasons upon which the decision of the Judicial Committee was founded. (*Vide* p. 22, 20 W. R. Raja Prithi Sing *v.* Ranee Rajkowar.) Those observations were made for the purpose of showing that the widow was not removing from her husband's house for unchaste or improper purposes. In the case of Shibu Soondery Dossee, cited in Shamacharan Surkar's Vyavastha Darpana, the widow after the death of her husband had left her father-in-law's house without any cause, and had sued the defendants who were the surviving brothers and representatives of the other brothers of her husband; the suit was for separate maintenance. The court said that the fact of her having left her father-in-law's house did not disentitle her from a separate maintenance. In Jadumonee Dossee *v.* Khetter Mohun Seal, published at p. 384, of the Vyavashtha Darpana, the judgment was delivered by Sir Lawrence Peel, whose words are :—"The question is whether a Hindu childless widow, who some time after the death of her husband, uncompelled by cruelty or ill-usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respects a proper one and her conduct unimpeached, forfeits her right of maintenance out of the property which was that of her deceased husband in his lifetime and which had devolved on his heirs. * * * The Privy Council has, on the subject of the right of the Hindu widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe." Then

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Sir Lawrence Peel cites the passage which I have already cited from the judgment of the Privy Council in Kashinath Bysack's case, and continues:—"In the Privy Council the question was whether the Hindu heiress forfeited her estate by selecting without impropriety her father's roof for her residence. But it is to be observed that the opinion of the Pundits was generally expressed as to forfeiture of rights, and the court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow not an heiress, as to one who inherited." The meaning of this last part of Sir Lawrence Peel's judgment is that even in Bengal the widow may not sometimes inherit her husband's estate, as for instance, when she is a disqualified person, being affected by an incurable disease. But she is then entitled to maintenance out of her husband's property, and her right to select her own residence remains when she is entitled simply to maintenance. In Surnomoyee Dossee *v.* Gopal Lal Doss, Marshall 497, the widow sued for maintenance, and it was held that she was entitled to it notwithstanding that she had left the residence of her deceased husband:—The court said:—"In this case a widow sues for maintenance. The defendant, who is her stepson, objects that she resides in the house of her father, and alleges that she is therefore not entitled to maintenance. The widow alleges that she left the family house because she was tortured or rendered uncomfortable, but did not prove that allegation. We find, however, that it is laid down in the Vyavastha Darpana of Shama Charan Sarkar, the learned interpreter of the late Supreme Court, Vol. I, p. 319,

sec. 160, that 'should a woman, without unchaste purposes, quit the family house and live with her parent or own relations, yet still she is entitled to maintenance;' and in sec. 161, 'The widow, however, is not entitled to maintenance by residing elsewhere without a cause, if she was directed by her husband to be maintained in the family home.' We think, therefore, that the widow is entitled to retain the decree for maintenance which she has obtained." All these cases were considered by the Privy Council in Raja Prithi Sing *v.* Rani Rajkowar, (20 W. R. 21 S. C. 2 Suth. P. C. 846, S. C. 12 B. L. R. 238), where the widow sued the adopted son of her husband for maintenance, and was met by a plea of unchastity having been committed by her. This fact could not be proved by the defendant. The widow had left her husband's house, and the question considered by the Privy Council was whether a Hindu widow lost her right to maintenance by reason of her leaving her husband's house, provided she did not leave it for the purposes of unchastity or for any other improper purpose. The decision of the Privy Council was that a Hindu widow was not bound to reside with the relatives of her husband; that the relations of her husband had no right to compel her to live with them; that she did not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes; that the law did not require her, for the purpose of maintaining her reputation, necessarily to live with her husband's relatives, and that she did not injure her reputation by living with her own father or own mother or with her relations on her father's side. Their Lordships also in this case point out a distinction between the position of a widow and that of a wife. "A wife

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cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different. All that is required of her is, that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance unless she is guilty of unchastity or other disreputable practices after she leaves that residence." The distinction between a wife and a widow is founded upon the law relating to husband and wife. A husband has a right to his wife's society, and she is bound to perform her conjugal duties towards him. The performance of these duties precludes the idea of her living at a distance from him. Unless therefore there are positive reasons for her quitting the protection of her husband, she is bound to live in the same house with him and to receive her maintenance there. In none of the earlier cases noticed by the Privy Council in Prithi Sing's case, the two texts, (see *ante*, pp. 331, 332) one of Kátyáyana and the other of Nárada, which I have already quoted, seem to have been placed before their Lordships. But even if brought to their notice, these texts would have hardly influenced the decision. No court of justice now would attribute an imperative character to the direction contained in such texts; nor would it be reasonable, in the present altered condition of Hindu society, to suppose that whenever a widow leaves her husband's house, she must be actuated by some improper motive. No other reason can be assigned for the direction given by Kátyayana and Nárada to a Hindu widow to reside with the family of her husband, except this that such residence is the best safeguard of her virtue and reputation; modern tribunals have looked more to the reason of the law than the letter of its text, and have accordingly decided that improper behaviour is the only cause for which maintenance can be withheld from a widow.

In Ahallabhai Dabia *v.* Lukshimoney Debia, 6 W. R. 37, the widow sued the heiress of the nephew of her husband for maintenance. The defendant did not impute unchastity or criminal conduct to her. Her plea was that the widow to receive maintenance ought to reside with the family or relatives of her late husband; two cases decided by the Sudder Dawany Adalut in 1850 and 1852 respectively, seem to have been cited, which the judgment of the High Court says support the position that a widow, after a voluntary separation, not based on any plea of ill-usage, has no right to a separate maintenance. The High Court, however, held, that "residence with the relations of the deceased husband is, after all, a moral and not a legal duty, and no forfeiture ought to be imposed on a widow who, for no immoral purposes, shows a preference for a residence elsewhere than with her husband's family, who are bound to give her support." Seton-Karr, J. also observed that the Hindu Law as applicable to widows ought to be administered by the courts of this country with a liberal spirit. Macpherson, J. said that the widow's leaving the house of her husband's relatives did not entail forfeiture of her right to maintenance. This principle, that a liberal interpretation should be given to the old texts, does not seem to have been conformed to in Umacharan Chowdry *v.* Nitambini Dabia, 10 W. R. 359, where a Hindu widow sued to obtain a monthly allowance as maintenance from the brothers of her deceased husband, the family property having descended to them. They stated in their answer that they were willing to maintain her if she resided with them as a member of the family. The High Court held that the widow could get subsistence on condition that she returned to and resided with her brothers-in-law as a

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member of the family. The judges say that their opinion was based on the ruling of the Full Bench upon the subject. I believe the Full Bench ruling referred to here is the case of Khettermoney Dossee *v.* Kashinath Doss, 10 W. R. F. B. 89, which has decided that a daughter-in-law cannot claim a money allowance from her father-in-law who was not in possession of any ancestral property. The case of Umacharan Chowdry, does not disclose, how in Bengal the widow came to be in the position of suing for maintenance, instead of inheriting the property. Supposing, however, that by some reason or other she was excluded from heirship, the decision of the High Court refusing a separate maintenance to her is not in accordance with the cases which went before, already noticed by me. In Srivirada Pratapa Raghunada Deo *v.* Sri Brojo Kishore Patta Deo, I. L. R. 1 Mad. 81, there are some observations made by the Judicial Committee which might support the idea that a widow was bound to reside in her husband's family. They are:—"The joint and undivided family is a normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that, in strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her." But we must remember

that this was said in a case in which the question was, who should be consulted by a widow desirous to adopt a son after the death of her husband. The above words of the Privy Council cannot be taken as overruling the clear expression of their views in their judgment in Raja Prithi Sing's case (20 W. R., 22).

In Rangovinayak Deo *v.* Yamuna Bai, I. L. R. 3 Bom. 47, the facts were similar to those of Umachurn Chowdry's case (10 W. R., 359). In this Bombay case, the widow had gone to reside with her parents after the death of her husband. For nine years she did not make any demand on her husband's family, but at the end of that period she sued her husband's brother and cousins for nine years' arrear of maintenance. The defence was, that the widow had voluntarily withdrawn from association with the joint family of which her husband had been a member, that she had not been harshly used, nor had been forced to incur any debts, but of her own free will had lived with her paternal family; and that she had no title to a money allowance. West, J. reviewed a number of cases most of which were from Bombay, and stated their effect in the following words:—"These cases make it plain that a separate maintenance may be awarded to the widow of a Hindu deceased as against the members of his family. Some of them seem to support the proposition that a separate maintenance may be claimed, although the husband's family may be willing to support the widow as a member of the household, and although there may be no particular reasons for withdrawing from it. The others would leave a discretion to the courts, which should be exercised so as not to throw on the deceased husband's family a needless or oppressive burden at the caprice of the widow or her family. None of them goes so far as to deprive the

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court of a discretion as to awarding or refusing arrears, while several of them support the exercise of such a discretion. * * * It is we think probable that a close examination of the replies of the Pundits in the earlier cases would show that they did not intend, in denying that withdrawal from the husband's family involves forfeiture of proprietorship, to widen a dependent widow's liberty beyond the range defined by the Madras and Bombay Shastris, or to impose a heavier burden on her husband's family. In a case like the present, where the widow has taken her residence permanently with her own family, and never even asked for anything on account of maintenance for many years, so as to create an impression that she abandoned any claim that she might have, where her own family seem to be in comfortable circumstances, and the defendant's people of rather straitened means, we think that it will be a right exercise of our discretion to reject the claim to a money annuity. * * * There seems to be no necessity in the present case, and the defendants are petty traders on whom the burden of a fixed payment might bear oppressively. If the plaintiff chooses to take up her residence with her husband's family, they must support her in such comfort as their means allow; but in the absence of any special circumstances necessitating her withdrawal and separate residence, we do not think she can claim cash payments from them to enable her to add to her luxuries while living apart."

In this case, the reasons which weighed most with West, J., were that the widow was living more comfortably with her father's family, while the members of her deceased husband's family were eking out a small inheritance by their own insignificant exertions for gaining a livelihood; and absence of demand on the widow's part

for nine years seems to have been regarded in the light of a waivor of her right. But the widow might have claimed a share of the property, whatever it was, had her husband died separate. She might then have sold it for her subsistence and deprived the family of even a reversionary right to it. For a sonless widow to live in the house of her deceased husband, in the same mess with her brothers-in-law and their wives, often becomes irksome and uncomfortable. Even in Bengal, where separation or its absence does not affect a widow's right, and where her position as a coparcener in respect of her deceased husband's share is secure, the family of her husband find means to render her condition unendurable. That she is a widow, that no addition can be made by her to the family income, as her husband if alive might have made is a circumstance which renders her an object of contempt and dislike. If she consents to be the general drudge, patient to endure in silence all ill-treatment she may be subjected to, obedient to the slightest indications of a wish on the other members' part, it is then that her life in her deceased husband's family may become tolerable. Where there is good treatment, and consideration is shown to her, she seldom evinces a desire to quit her deceased husband's family. The petty jealousies, the mean annoyances, the nameless small vexations, which are the features of Hindu zenana life in too many cases, may be a sufficient cause for a widow's withdrawal from her husband's family, but are not capable of proof in a court of justice. Positive cruelty in the mutual treatment of the female members may not be so frequent; but the wear and tear caused by daily bickerings of an insignificant character is certainly a matter deserving consideration; it would therefore be a humane procedure to allow a widow a separate allowance whenever she is desirous for it. Her right to be main-

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tained is beyond all doubt, and considerations of the hardship entailed upon the husband's family and their straitened means ought not to be imported to cut down this right. The judgment of Mr. Justice West in the above case therefore is open to criticism from this point of view. The truth seems to be, that in the decisions of our modern courts of justice, two opposite tendencies are discernible. In some decisions we perceive a tendency to revert to the spirit of the ancient Rishi texts in all their primitive rigidity. These texts often display an utter disregard of the ordinary instincts of human nature; a literal and unqualified application of many of them now would cause much unhappiness and injustice. On the other hand, we find in other decisions a sedulous attempt to temper the severity of the ancient texts by introducing broader principles of justice, humanity and impartiality borrowed from the advanced civilization of Europe. Where these principles do not go against any express declaration of the Rishis, or where they are not repugnant to any cherished notion of the Hindu community, no consummation is more devoutly to be wished for than the gradual incorporation of such liberal principles into the body of the current Hindu law. I am afraid that among our countrymen many suppose that the administration of Hindu law would be placed on a more satisfactory footing, were it left in the hand of our Pundits. The Pundits are more extensively acquainted with the original texts, no doubt. But the texts are of no help in new combinations of facts met with in actual cases. New principles must be had recourse to. It is remarkable that the original texts are rather poor in principles. What better storehouse is there to resort to, than the learning and experience and acumen of European judges whose education is infinitely superior to that of the

Pundits, and whose minds mirror the incomparably more progressive civilization of Western Europe? The effects of the administration of Hindu law by such superior intellects are seen in the gradual improvement of the position of widow. From the Vedic days of absolute exclusion to our own times when the widow has been placed on almost an equal footing with the male members, this gradual improvement can be traced step by step. Much was done towards it by Vijnáneswara and some of his immediate predecessors; but it was left for the European judges, to give the right of the widow that definite form which has rendered it secure. I am afraid that the judgment of Mr. Justice West betrays an unconscious tendency of a retrograde character. It relegates the widow's right to maintenance to its primitive insecure condition, and puts an unnecessary fetter upon her freedom of action. It is therefore satisfactory to find that the ruling in the case of Rangovinayaka was dissented from by three judges of the High Court of Bombay including Westrop, C. J. in Kasturbai *v.* Shivaji Ram Devkurna, I. L. R., 3 Bom. 372. In this case the Chief Justice says, that in all the five schools, it was a settled point that a Hindu widow does not forfeit her right to maintenance, out of the property chargeable therewith, by reason of non-residence with the family of her husband, except when such non-residence is for unchaste or immoral purposes. The authorities for Bengal with regard to this point are Kashinath Bysack *v.* Harasoondery Dossee, 2 Morley's Digest (Easl's notes) 198, noticed by Peacock, C. J. in 12 B. L. R. 241 and 242, and Shibusundery Dossee *v.* Kristo Kishore Neogy, 2 Taylor and Bell, 190. For Madras it is settled by Visalatchi Ammal *v.* Annasami Shastri, 5 Mad. H. C. Rep. 150; for the North-Western Pro-

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vinces by Raja Prithi Sing *v.* Ranee Rajkowar, 12 B. L. R. O. C. 238; and for Bombay by the decision of the Privy Council in Narayan Rao Ramchander Pant *v.* Rama Bai, I. L. R. 3 Bom. 415. In the case before Westrop, C. J., the widow sued her husband's father and brother for separate maintenance on the allegations that having quarrelled with their wives, she was turned out, and had since lived in separate lodgings. The defendants answered that they neither turned out nor ill-treated the plaintiff; that she left their house of her own accord; that they were willing to maintain her if she lived with them; and that neither she nor her deceased husband was entitled to any ancestral property. Westrop, C. J. said:— "It has not been alleged that the late husband of the plaintiff was separate in estate from his father and brother, or that he held any estate separately from them, or that she lived apart from them for unchaste or immoral purposes." It was directed therefore to try the question whether there was any family property in the hands of the defendants, and if so, what amount was proper to be allotted to the widow for her maintenance? In the Privy Council case referred to in the judgment of the Chief Justice, the widow sued the eldest son of her husband, to whom the father had left his self-acquired property by a will; this will recognised the claims of the younger brothers and the widows to maintenance. The Privy Council interpreted the will as imposing an obligation on the eldest son to make allowances for the support of the widows, the obligation being held analogous to the rights vested in Hindu widows in ordinary cases where there is no will. It was objected by the defendant there that the widow had disentitled herself to maintenance by living apart from the family of the eldest son. Their Lordships held that no condition was to be found in the will

imposing an obligation upon the widow to reside under the same roof and in joint family with the eldest son. The widow therefore, they held, was to be taken to have been left in this respect in the ordinary position of a Hindu widow, in which separation from the ancestral house did not disentitle her to maintenance suitable to her rank and condition.[1] In the Madras case of Visalatchi Ammal, also referred to in the decision of Westrop, C. J., the point decided was that a Hindu widow was entitled to charge on account of her maintenance a piece of land in the possession of her father-in-law, which originally formed a part of the ancestral property, and had been allotted on partition to the father-in-law; and that the widow's refusal to live in her father-in-law's house did not disentitle her to maintenance.

In Ramchunder Bishnu Bapat *v.* Saguna Bai[2] the widow had at first consented by a written agreement to receive rupees sixteen per annum as her maintenance from the brothers of her deceased husband. She subsequently sued for her maintenance being fixed at rupees four per mensem. Westrop, C. J. said :—"A Hindu widow is not bound to reside with her late husband's family, and if he were in union with that family at the time of his death, she is entitled to a separate maintenance where there is family property, and it is not so small as not reasonably to admit of allotment to her of separate maintenance. But though the family property may not be so small as to prevent any allotment of maintenance to her, yet it may be so small, or the family may be so numerous, as to admit only of a very moderate payment for a separate maintenance. Here the plaintiff was satisfied with the sum stipulated in the agreement for several years, and there is no proof that she was imposed upon. The family pro-

[1] I. L. R. 3 Bomb. 421. [2] I. L. R. 4 Bomb. 261

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perty is small and the family large; hence although the sum named in the agreement is itself small, yet we do not think that, under the circumstances of this case already noticed, the Court ought to increase that amount. The only variation which this court is disposed to make is to give to the widow the right to elect between taking the sum named in that agreement and living separately from her late husband's family, or of living with that family and being fed and clothed by them in the same manner as the members of that family." Upon the authority of this case, it would be a good defence in a suit for separate maintenance by a widow from the surviving members of the joint family to which her deceased husband belonged, that the family property is too small to admit of a separate payment being made to the widow for maintenance.

Separate maintenance from small joint property not allowed.

The next question is, what is the amount of maintenance claimable by a widow from the joint property in which her deceased husband was interested. Upon this point, the only general rule is, that in no case will it exceed the value of the share to which her deceased husband would have been entitled if a partition had been effected in his lifetime. In the Smritichandriká,[1] there is a passage indicating the state of society for which the author was providing the law. It will appear from this passage how unsuitable such provisions of law are to the present condition of the Hindu community. The author quotes Nárada to answer the question what ought to be given to the widow for her subsistence where the property out of which the maintenance is to proceed is small. Nárada says that the claims of a chaste widow are limited to twenty-four *arhakas* of paddy and forty *panas* in current money for every year. The author explains an *arhaka* to be one hundred and ninety-two *prasthas*, and one *pana*

Amount of maintenance.

[1] P. 62, Sanscrit.

Amount allowed in olden times.

as equal to one *kárshápana*. He says that this *kárshápana* is equivalent to an eightieth part of one *nishka* of current money in some parts of the country. The quantity of paddy implied by these different measures and the value of these descriptions of current money are not easily ascertainable now. Innumerable are the variations in the meaning attached in different parts of India to these different names for measure and currency. If we adopt what is understood by these terms in Bengal, the annual maintenance claimable by a Hindu widow according to Nárada would amount to 48 maunds of paddy and two rupees and a half in money.

The High Court observed in one case that it was not necessary to maintain a Hindu widow in the same state as her husband would maintain her, that it was difficult to lay down a general rule, that where the net receipt amounted to ten thousand rupees, an allowance of rupees eight hundred a year was an ample and liberal provision for the widow.[1] In another case, the High Court of Bengal held rupees twenty-five per month as a reasonable and sufficient sum to allow to the widow where the income was proved to be rupees 7,000 a year.[2] In this case Seton-Karr, J. says that in determining the amount of maintenance to be awarded to the widow, regard must be had not only to the annual value of the property out of which the allowance was to proceed, but also to the circumstances of the family as well as to the requirements of the widow. In Bhogabanchunder Bose *v.* Bindoo Basini Dossee, Sumbhoonath Pandit, J. said that the amount of maintenance could be fixed only with reference to the amount of the income, and not solely on the necessities of the widow; it was also to be kept in mind that where

[1] Kalipersad Sing *v.* Kupoor Kowari, 4 W. R. 65.

[2] Ahalla Bai Debia *v.* Lukshimonee Debia, 6 W. R. 37.

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the income was small, it might be more convenient for the party liable to supply the maintenance, to maintain the widow if she lived in his house, than if she were to live separate.[1] It was held in Sriram Bhattacharjee *v.* Puddomookhee Debia,[2] where the widow at first used to receive an allowance of three rupees per month, but subsequently left the house of her husband's family, removed to her own father's house, and since then being refused the payment of any further allowance, claimed rupees 4½ per mensem;—that there was nothing in the law to prevent an increase of the amount, as there was nothing to prevent a decrease, should sufficient cause be shown. It was also held that the widow's right did not cease on her leaving her husband's house. The principle enunciated, that it is legally competent to a court of justice to direct the payment of an increased allowance or a reduced allowance where maintenance has once been already fixed, has been also propounded by L. Jackson, J. in Rajendronath Roy *v.* S. M. Rani Puttosoondry Dossee.[3] The court said;—"The previous decree based upon a compromise awarding a specific sum by way of maintenance, and the particular mode of realising that sum has neither more or less effect than a decree would have, if it were founded on a judgment of Court, arrived at after hearing of evidence. Such decrees apportion maintenance always with reference to the circumstances of the parties, to the reasonable wants of the widow, and the extent of the property out of which the maintenance is to come. So long as the circumstances remain unaltered, the maintenance of course will be paid at the rate agreed upon, but if by circumstances not arising out of the default of the holder of the property the assets of it are greatly reduced, so that he can no longer be reasonably called

Amount once fixed may be altered.

[1] 6 W. R. 286. [2] 9 W. R. 152. [3] 5 C. L. R. 18.

upon to pay the amount of maintenance fixed, I think it is open to the court to reconsider the allowance and to adjust it to the altered circumstances." In this case the suit was by the widow against the adopted son of her husband upon the basis of a compromise whereby the adopted son had agreed to pay the sum of rupees 264 and three *bish* of paddy annually. At the time the suit was brought, the entire estates left by the widow's husband had been flooded by salt-water, and the income of the property had been so diminished that even the Government revenue could not be paid out of it. Upon these facts, the High Court held that rupees 15, the amount which she was then receiving, was sufficient. In Prithi Sing's case, (20 W. R., 22), the income of the property was two lacs a year, and there were four widows who had a right to receive an allowance out of it. Their Lordships held that the amount of maintenance must always be determined with reference to the income of the joint ancestral property; and that Rs. 200 per mensem for each of the four widows out of an income of two lacs a year was not an exorbitant or unreasonable provision.

According to Couch, C. J., if there has been a decree awarding maintenance to be paid by a particular person, if subsequent circumstances render it improper to continue the allowance originally made, the alteration in the amount cannot be directed by the court at the time of the execution of the decree. Therefore where the property was ancestral, and had come into the hands of the minor successor of the party against whom the decree for maintenance had been made, the minor defendant was held precluded from raising the question in the execution of the decree, that there were circumstances under which the sum decreed was not a proper sum to be allowed. The only course left open to the judgment-debtor in such

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a case would be to apply to the court which made the decree for maintenance, for a review.[1] In Nobogopal Roy *v.* S. M. Amritomoyee Dossee, the question was whether the civil court had power to make an order that the husband should pay to the wife maintenance at a particular rate, in cases where the wife was residing apart from him for lawful cause, and whether such order could be operative in respect of payments to be made in future. The case was decided by a single judge, Markby, J. who held that such an order was subject to any modification which future circumstances might render necessary; that under some circumstances the allowance might be altogether stopped although there might not be any special direction to that effect contained in the order; that if the wife were shown to have been guilty of such misconduct as would forfeit her maintenance, or if it were shown that under changed condition of things, the wife could be called upon to return to her husband's house, or that the rate of allowance should be changed, the court would have power in all such cases either to set aside or to modify the order as circumstances might require; and that the safer course would be to insert special directions in the decree to that effect, the law upon the whole of this subject being not altogether settled.[2] In Hurry Mohun Roy *v.* S. M. Nayantara, 25 W. R. 474, a stepmother sued her stepson for separate maintenance upon the allegation that she had been obliged by ill-treatment on the part of her stepson to leave his house, and to seek accommodation elsewhere. The income from the ancestral property was not less than rupees 7,000 yearly. The court of first instance made a decree for maintenance at the rate of rupees 30 a month, together with an extra rupees 10 per month if no pro-

[1] Ramkali Koer *v.* The Court of Wards, 18 W. R. 473. [2] 24 W. R. 428.

per accommodation were provided for the stepmother; adding a proviso to the decree that if the stepmother insisted on living at her father's or at her son-in-law's house against the will of the defendant, she was to forfeit the larger portion of her allowance and to receive only rupees 12 per mensem. The High Court altered it into an absolute decree for rupees 25 per mensem, observing that the ill-feeling between the parties was so strong, that they could not be expected to live in comfort and peace in the same house; that the circumstances of the case necessitated the award of a separate money allowance without reference to the possibility of the stepmother's getting accommodation anywhere on her stepson's premises; that rupees 30 per month together with rupees 10 for house-rent was not a reasonable amount out of an income of rupees 7,000 a year, such a sum being too large a proportion to take away for the maintenance of one member of the family only; and that an unreserved allowance of rupees 25 per month was such as the reasonable and probable needs of a person in the plaintiff's position in life would warrant, regard being had to all the circumstances of the case. It was also said by the Judges in this case:—"It is in the highest degree improbable, considering the terms on which the parties to this suit are, that the stepson could ever agree to his stepmother's living either with her father or son-in-law, specially when her determination to live with either of those relatives contrary to the stepson's wishes could have the effect of saving him half the allowance he would be otherwise obliged to pay. To uphold the proviso in the decree of the Court of first instance would be practically to cut down the allowance to rupees 12 per mensem, for a widow woman would naturally desire to live with her relatives, and not amongst strangers. As to the objection, that by

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her living with her relatives the expenses of cook, &c., would be saved, and that the stepson is entitled to the benefit of such saving, we do not think that the circumstance ought to be taken into account in this case. What we have to do, is to give the plaintiff a reasonable allowance for maintenance, her position and that of her stepson being considered, and we do not think rupees 25 a month is too large a one, even if some small items of expense be cut off by the plaintiff's living in her father's or son-in-law's house. As to the life of semi-starvation and wretchedness, in which it is argued that according to the Shastras a Hindu widow ought to live, that is a matter of religious or ceremonial observance rather than of law. A Hindu widow in these days at all events is entitled to decent food and clothing if the head of the family is in a position to supply them, and rupees 25 a month does not seem too large a sum for the purpose."

If the allowance be payable out of the assets of a firm, such firm constituting, according to the well-known principle of Hindu law, the ancestral joint family property, a suit lies by the proprietor of the firm for the reduction of an allowance previously fixed by a decree of the Court, upon the ground that the business of the firm has been gradually failing. In such a case, the business is considered as the estate charged with the payment of the maintenance; the diminution of its income is regarded as a sufficient cause for its reduction. If in time the estate yields no income at all, the maintenance will altogether cease; the rule being that in every case the amount of maintenance should bear a reasonable proportion to the amount of income.[1]

Sometimes, the female member entitled to maintenance may claim it in a double capacity. Thus where there are

[1] Ruka Bai *v.* Ganda Bai, I. L. R. 1 All. 594.

three brothers constituting a family joint in estate, and one dies, leaving a widow and a minor son, and then the minor son dies, the family still continuing joint, the widow of the deceased brother may claim maintenance both as a widow of one of the coparceners composing the joint family in its earlier stage, and as the mother of one of the coparceners of the family in its later stage. But I apprehend that this would not be a ground for the female member's receiving any increased allowance. Maintenance is allowed to a female member simply with a view to subsistence; and the amount necessary for the subsistence of a single individual not being subject to any variation on account of the party entitled to it being invested with a double right, the courts of justice I believe will allow that amount of maintenance which will be reasonable under the particular circumstances of each case. But if a woman being a member of a joint Hindu family, first loses her husband, and then her son, it cannot be reasonably advanced that as a mother she is entitled to a less amount of maintenance than what was at first thought necessary for her when she only lost her husband. The position of a Hindu mother of a child deceased since her husband's death is not inferior to that of a widow without a child or children, in respect to the amount of allowance claimable by her. In one case of this kind, Straight, J. observed, that there was no distinction between a widow and a mother. "It is impossible to avoid remarking that if matters of feeling can be admitted,—and we are not sure they should not in arriving at the amount of what is a reasonable allowance,—the case of a widowed mother deprived of her only son and of the contingent advantages that might have accrued to her had he survived, seems the more deserving of sympathy

Female member occasionally entitled to maintenance in a double capacity.

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and consideration. It is a fact not to be lost sight of in this case, that down to the death of the respondent's (the widow's) son, the appellants (the members of the joint family who were sued for maintenance) made due provision for her and her child according to their position and the family custom, but immediately after the latter's decease, they stopped the allowance not only for the one but as to both. Such a proceeding appears indefensible and altogether inconsistent with the position they now take up. They are actually in enjoyment of the profits of the share of the villages to which, had the respondent's husband lived, he would have been entitled, and it is relatively to the amount of these profits that the sum to be allowed here should be calculated. No precedent was quoted fixing any principle of computation to apply to a case like the present, and it may well be that there are none, for the question that now arises involves equitable considerations that must of necessity be affected by the peculiar circumstances of each individual case.'"[1] In this case, another proposition laid down is, that the amount of maintenance is to be fixed, not only with reference to the income of the whole joint family, but also with reference to the value of the particular share to which that member of the family was entitled, on account of relationship with whom the female member claims the maintenance. Thus, if she claims maintenance as the mother of a particular member, then the value of her son's share should be looked to as a factor in determining the quantum; if as a widow, then the value of her husband's share is the matter to be considered. In the above case, the value of such share was rupees 3,000 odd per annum, and rupees 60 per mensem was allowed as maintenance, the court of first instance remarking that

[1] Narharsing *v.* Dirghnath Koer, I. L. R. 2 All. 407.

an estate incurred other expenses than the usual ones, and that the rents entered in the rent-roll of an estate were for different reasons never actually realised.

It is not a valid objection to fixing a money value of the maintenance to be paid, that the income varies according to the seasons, that a given sum should not be fixed, but should be determined as occasion may arise. Convenience requires that a reasonable definite sum conformable to all the circumstances of the case, should be ascertained and made payable by an order of the court, with a view to prevent the recurrence of litigation between the parties.[1] In Sreemutty Nittokishoree Dossee *v.* Jogendro Nath Mullick,[2] the Judicial Committee declare that the elements to be considered in fixing the amount of maintenance are 1stly, the value of the estate; 2ndly, the proper proportion which ought to be given to the widow out of it; and that the maintenance should include not only the ordinary expenses of living, but also what she might reasonably spend for religious and other duties incident to her station in life. In that case the contending parties were an adopted son and a widow of the adoptive father. The widow from the beginning repudiated the fact of adoption and contested for the whole estate. The *factum* of adoption was proved to the satisfaction of the court, but the conduct of the widow in having all along denied that fact, was regarded by the High Court as a circumstance which ought to lower the amount of maintenance awarded to the widow. The High Court said, that the fact of adoption was perfectly well-known to the widow and all the members of the family. The adoptive father had left a will by which he had bequeathed a lac of rupees absolutely to the widow,

[1] I. L. R. 2 All. 777, Jhanna *v.* Ram Surup.
[2] 3 Suth. P. C. 505.

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besides a right to live in the family dwelling house and to be maintained out of his general estate, as she had been in his lifetime. Upon these facts the High Court observed :—"If it had been left to the court to determine the sum which should be awarded to the defendant in future for her maintenance, we should only have given her the most moderate provision which, having regard to her husband's property and position, the law would allow." The Privy Council, however, said :—"One cannot read that passage without perceiving that the court reduced as low as they could, upon the principle upon which they proceeded, the maintenance which they allowed, as a kind of punishment to her for having defended a suit which they thought she must have known was properly brought against her. That the court, being under this influence, should have allowed its judgment to be affected by it, their Lordships think, was a departure from the strict principles which ought alone to have guided it." Their Lordships threw out an intimation that as a lac of rupees had been left her by her husband, the proper maintenance would be an annuity of rupeees 6,000.

Limitation as to maintenance.

Having thus considered the amount of maintenance claimable by a widow, I ought to say a few words upon the question,—whether a claim to maintenance is ever barred by limitation. The law of limitation enacted in 1859, provides for suits for maintenance, and says that where the right to receive it is a charge on the inheritance of any estate, a suit for it will be barred, if instituted after twelve years from the death of the person on whose estate it is alleged to be a charge. In the Privy Council case of Narayan Rao Ram Chunder Pant, (I. L. R. 3 Bom. 415), the Judicial Committee has held, upon the terms of the will propounded in the case, that no charge was created

upon any specific portion of the property, but that the adopted son, the general legatee under the will, was directed to allow maintenance to the widows. The terms of the will relating to maintenance were ;—"Nana the eldest son, shall provide for both the mothers; treating them with great respect." These terms were not sufficient, according to their Lordships' opinion, to create a right which was a specific charge upon the inheritance of any estate, within the meaning of the Limitation Act of 1859. So that upon the authority of this case, it would seem that a suit for the declaration of a right to receive maintenance personally against a member of a joint family would be barred by no lapse of time; for cl. 13, Sec. 1, Act XIV of 1859, is silent as to a case where the maintenance is not sought to be made a charge upon the inheritance of any property. There have been two new enactments relating to limitation since the passing of Act XIV of 1859. The first is Act IX of 1871, and the second Act XV of 1877. Under the earlier of the two Acts, the provision relating to maintenance is general and simple; it simply says that[1] a suit by a Hindu for maintenance will be barred if instituted after twelve years from the date when the maintenance sued for is claimed and refused. The corresponding provision in the later of the two Acts, namely, Act XV of 1877, which is now in force, has been split up into two separate Articles 128 and 129. The first provides for arrears of maintenance; the second relates to a suit for the declaration of a right to maintenance. The suit for arrears will be barred in twelve years from the date when the arrears are payable; the suit for declaration will be barred in twelve years from the date when the right is denied. As these provisions are general, and con-

[1] Article 128 of the Second Schedule.

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template maintenance of the various kinds that one person may claim from another, it is not easy to find from a consideration of these provisions, an answer to the question, when does a widow's maintenance become payable, or when is the denial of her right to be supposed to take place? It is now settled that so far as the law of maintenance concerns a joint Hindu family, a widow need not live in that family to preserve her right. Supposing she withdrew from the family dwelling-house immediately after her husband's death, and supposing that for a number of years, she has not asked for any allowance, nor has any been paid to her; have any arrears become payable, under these circumstances? Has there been any denial of her right? I apprehend that, unless there has been a positive assertion of right to maintenance on the widow's part, and a positive denial of it by the party sought to be made liable, limitation does not run against the widow. So again, with reference to the arrears, if no maintenance money has been expressly fixed to be paid by one party to the other, namely, by a member of the joint family to the widow, there are no arrears which can be said to be 'payable.' I am confirmed in this supposition by what I find in the judgment of the Privy Council in the case already referred to, namely, that of Nárayan Ramchandra Pant; in that judgment it is said that the terms of the Act of 1859 are not quite clear; that under the principles of Common Law, the right to maintenance is one accruing from time to time, according to the wants and exigencies of the widow; and that the Statute of Limitation might do much harm if it should force widows to claim their strict rights, and to commence litigation, which, but for the purpose of keeping alive their claims, would not be necessary or desirable.

The above words may seem to rule that a claim to maintenance would be subject to no law of limitation. And some of our earlier cases might be supposed to have been decided under an idea like that. In one case decided by the High Court of Bengal, Seton-Karr, J. said in a rather summary way that limitation could not apply to the suit so far as it was brought to fix the maintenance for the future. Macpherson, J. said that the case was not barred by limitation, because it was evident, that from the time of her husband's death, up to within twelve years from the institution of the suit, the widow had been maintained out of her husband's estate.[1] In this case the widow had sued both for large arrears and also for future maintenance at a particular rate. The case was under the Mitákshará law, and governed by the Limitation Act of 1859. The question of the widow's right to the large amount by way of arrears did not arise in the High Court; it had been disallowed in the court below, and there does not seem to have been an appeal upon that part of the claim by the widow, before the High Court. The appeal was by the party made liable for the maintenance, on various grounds, among others, that of limitation. The ruling by Macpherson, J., that the suit was not barred, because the widow had been supported down to within twelve years before the institution of the suit, cannot refer to cl. 13, sec. 1, Act XIV of 1859; for in that clause, 12 years from the death of the person on whose property the maintenance is a charge is mentioned as the period within which the suit is to be brought. It is not clear, therefore, what law of limitation is here referred to. The ruling seems to be that, if the

[1] Aholla Bai Debia v. Luckimoney Debia, 6 W. R. 37.

LECTURE VI. widow has received her support from the joint family property within 12 years previous to the suit for a declaration of her right to future maintenance at a specified sum, her suit will be in time. But the words of Seton-Karr, J. warrant the supposition that under the Limitation Act of 1859, future maintenance may be claimed by the widow at any time during her life. To a like purport is a decision of the High Court of Bombay, the substance of which is stated to be that in a suit for maintenance the cause of action ordinarily arises at the time when the maintenance having become necessary is refused by the party from whom it is claimed; and that clause 13, sec. 1, Act XIV of 1859 does not apply to all suits for the recovery of maintenance brought by a Hindu widow against her husband's family, but only to suits in which the plaintiff seeks to have her maintenance made a charge on a particular estate.[1] In another case, the son's widow had sued her father-in-law, in a family governed by the Mitákshará. She had made no claim for twenty-two years after her husband's death, but alleged that she had been forced to sue, disputes having recently arisen between herself and her mother-in-law; that previously she had no cause of complaint against her father-in-law. The case was decided by a single judge; who said that such a claim was not governed by limitation, a claim for maintenance being a recurring cause of action.[2] The High Court of Madrsa has held that if there be two undivided brothers, and one of them dies leaving a widow, then as the joint property in the hands of the surviving brother is charged with the maintenance of the widow, limitation against her claim for maintenance runs from the date of her husband's

[1] Timappa Bhat *v.* Parameshariamma, 5 Bom. H. C. Rep. A. C. 130.
[2] Muss. Heema Kooeree *v.* Ajudhya Pershad, 24 W. R. 474.

death.[1] From this decision, it would seem that in every case of a claim by a Hindu widow for maintenance against the surviving members of the joint family to which her husband belonged, the limitation must run from the date of her husband's death. We have seen that the surviving members are not liable for such maintenance unless there is some joint property in their hands, property that is, in which the deceased husband of the widow had an interest. The High Court of Madras in the above case, in discussing the right of the widow, in effect says that in every such case the widow's maintenance is a charge on the joint property. Therefore wherever a widow can legally claim maintenance, she must do so by way of a charge upon an inherited estate; consequently every such claim would come within the words of cl. 13, sec. 1, Act XIV of 1859; for there is no escaping from the necessary sequence of these propositions;—all claims for maintenance by a widow depend upon the existence of joint property; all such maintenance is a charge on such property; therefore all such maintenance is barred in 12 years from the husband's death. But the Privy Council in Narayan Ramchandra Pant's case (see p. 359) seem to be against such a rule. There is also another reason against the application of this cl. 13 to a maintenance right charged upon joint family property. The clause says that the maintenance must be a charge upon the *inheritance* of an estate. Now it is doubtful whether there is any 'inheritance' in the case when one undivided member dies, and his interest survives to those who remain. Sir Barnes Peacock has on one occasion said that the right of the surviving coparceners of a joint Hindu family governed by the Mitákshará law depends

[1] Subramania *v.* Kaliani Ammal, 7 Mad. H. C. Rep. 226.

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The effect of the change of law brought about by the

[1] Lalla Mohabeer Pershad *v.* Muss. Koondun Kooer, 8 W. R. 116; see p. 118, Col. 2, para. 4.

[2] 9 Moore's Ind. A. p. 539.

[3] Choony Kooer *v.* Joonka Kooer, 12 W. R. 524.

enactment of Act IX of 1871 came to be considered by the High Court of Bombay in Jivi *v.* Ranji, I. L. R. 3 Bom. 207. There the widow sued for arrears of maintenance for four years from 13th June 1873 to 13th June 1877, alleging her cause of action to have accrued on the last mentioned date, inasmuch as she on that date having claimed maintenance from her late husband's brother, the defendant, had been refused by the latter. The Lower Appellate Court had held that no maintenance could be claimed for a period previous to a demand and refusal. The ground for so holding was that the provision relating to maintenance in Act IX of 1871, was a deliberate and decided change from the law of 1859, the earlier law giving a period of 12 years from the husband's death, and the later law the same period from the date of a demand and refusal. This finding of law on the part of the Lower Appellate Court, was upset by the High Court, Melvill, J. observing that it was not a sound proposition to lay down that a Hindu widow had no right to recover arrears of maintenance, excepting such as accrued due after a demand and refusal; or that a demand and refusal created a prospective right to maintenance; or that there was no cause of action in respect of arrears claimed for a period prior to such demand being made. The result of this decision by Melvil, J. is that arrears of maintenance to the extent allowed by the law of limitation for the time being in force are legally claimable by a widow; that the new provision in the Limitation Act of 1871, enacting that the period of limitation is to run from the date when the maintenance sued for is claimed and refused, is not to be interpreted as creating the right to maintenance from that date; that a Limitation Act is not intended to define or create causes of action; that a widow has a legal right to