Márgáśírſha, in a ſubſequent year, the matter muſt be otherwiſe regulated, by a diſtribution *of the rent* as before, or by *yielding* the rent of the ſubſequent year.

If a milch cow or the like be pledged for uſe and profit, the intereſt ſhould be liquidated, in conformity with the agreement, from the computed daily profit; and, if poſſible, the principal ſhould be liquidated. This induction has the authority of law. With the conſent of the debtor and creditor, an adjuſtment is formed on a middle valuation ſettled by arbitrators. Such is the current practice.

"The double ſum," in the text of Yá'jnyawálcya (XLVI), ſuppoſes *a loan of* gold or the like; but, if clothes or the like were lent, a treble ſum and ſo forth muſt be underſtood, as ſtated in the ſection on limits of intereſt. However, when the agreement was in this or ſimilar forms, "I will reſtore the pledge, when the double ſum has been received," the creditor need not reſtore the pledge before the debt has been diſcharged. Thus Vishnu, having premiſed, that the creditor muſt reſtore the pledge, ſubjoins the text *above cited* (CX).

Many *ſpecial* agreements may be *made* in reſpect of pledges. Some of theſe ſhall be *now* mentioned. 1. "This land is mortgaged for a debt of "twenty *ſuvernas*; when forty *ſuvernas* have been realized from the uſe of "it, you muſt releaſe the mortgage." 2. "If I do not redeem the pledge "when the principal has accumulated to forty *ſuvernas*, this ſhall become "thy abſolute property." 3. "The pledge ſhall be enjoyed by you, until "the principal and intereſt have been realized." 4. "If I do not then re-"deem the pledge, when the principal and intereſt have been realized, it ſhall "become thy abſolute property." 5. "The pledge ſhall be enjoyed by you "for ten years." 6. "The pledge ſhall be releaſed on the receipt of the "principal ſum at the end of three years." 7. "If I do not redeem the "pledge at the expiration of ten years, it ſhall become thy abſolute pro-"perty." 8. "If I do not redeem the pledge by paying the principal "ſum at the expiration of three years, it ſhall become thy abſolute proper-"ty." 9. "The pledge ſhall be enjoyed by you for three years, I will

"afterwards

" afterwards redeem it by paying the principal ſum; if I do not redeem it " at the expiration of the fifth year, it ſhall become thy abſolute property." 10. " Enjoy the pledge for ten years, and you may ſubſequently enjoy it " *unleſs I then redeem it;* if I do not redeem it at the cloſe of the twelfth " year, it ſhall become thy abſolute property." 11. " This pledge may be " uſed by thee ſo long as intereſt accrues; afterwards, on receipt of the " principal, the pledge muſt be reſtored." 12. " If I do not then redeem " it, the pledge ſhall become thy abſolute property." 13. " If I do not re- " deem it within two ſubſequent years, it ſhall become thy abſolute proper- " ty." 14. " The pledge may be uſed until I pay the principal ſum." 15. " If I do not pay the principal and redeem the pledge, it ſhall become " thy abſolute property."

" MORTGAGING this village or the like, I borrow twenty *ſuvernas*; from " this village thou ſhalt receive intereſt on that ſum at the rate of an eigh- " tieth part *of the principal*; the remainder ſhall be received by me." Ten forms of this agreement, as above ſtated, make twenty-eight forms.* Again; mortgaging a village or the like, the debtor ſays, " half or a quar- " ter of the produce of this village ſhall be enjoyed by you; the reſt I will " take." Since there are alſo ten forms of this agreement, forty modes of agreement have been ſuggeſted. " Accepting this village or the like in pawn, " lend twenty *ſuvernas*." Forty other forms may be ſtated in this mode. " Accept this village in pawn; from its produce ſupplying the expenſes " incident to it, give me ten *ſuvernas*, and take the remainder yourſelf." In this mode there may be numerous forms of agreement: and various forms exiſt in fixing the term of the mortgage and ſo forth. To avoid pro- lixity they are here unnoticed, but they are numerous. The law concern- ing them may be underſtood by *the* repetition *of the rules delivered reſpecting others*. But a contract for hypothecating *the merit of* ablutions in the *Ganges*, and the like, ſhall be mentioned.

THE ſettled law in reſpect of theſe *may be thus ſtated*. Under the firſt a-

* I CANNOT well correct the obvious errour in the numbers. It is unimportant. However, among the fifteen contracts particularized, four, and perhaps the fifth alſo, cannot be accommodated to this caſe of ſpecifick intereſt. We may therefore read twenty-five inſtead of twenty-eight, and correct the ſubſequent numbers by reading fifteen inſtead of ten.

greement,

greement, the ſum of forty *ſuvernas* being completed, if the debtor, tendering the principal ſum, offer to redeem the pledge, it muſt be then releaſed. Such is the opinion intimated in the *Retnácara* by the condition ſtated (in the gloſs on the text CIII) " a pledge to be uſed for an indefinite period." It has been already diſcuſſed. But computing the ſum realized from the uſe of the pledge in the period during which it has been held, and fully liquidating the forty *ſuvernas*, he may redeem the pledge. According to the *Dípacalicá*, if he do not redeem the pledge when forty *ſuvernas* have been realized, it becomes the ſole property of the creditor.

CXII.

YÁJNYAWALCYA: — THE pledge is forfeited, if it be not redeemed when the debt is doubled; *ſince it is* pledged for a ſtipulated period, it is forfeited at that period: but a pledge to be uſed *for an unlimited time* is not forfeited.

THE debt being doubled, if the debtor do not *then* redeem the pledge, it is forfeited to the creditor. A ſimilar expoſition is delivered in the *Calpateru*. But HELÁYUDHA ſays, 'this text concerns a pledge for cuſtody only:' in which opinion the author of the *Mitácſhará* concurs. Their notion appears to be this; if a beneficial pledge be not redeemed, although twice the principal have been received from its uſe, the creditor ſuſtains no loſs: why then ſhould it be forfeited? But, ſince a pledge for cuſtody is not uſed, why ſhould the creditor long preſerve unprofitably the property of another? The pledge is therefore forfeited by a debtor, who has ſtipulated a period for redemption.

OTHERS think, that ſuch reaſoning, which is not authorized by the law, may not be truſted. At the ſtipulated period, whether before or after the principal is doubled, a pledge limited as to time is forfeited, and becomes the property of the creditor: and this concerns the ſeventh form of agreement. According to this opinion, what is the import of the phraſe, " but a pledge to be uſed is not forfeited?" It concerns a pledge delivered for uſe, in the fourteenth form *of agreement*, " the pledge may be uſed until I pay the principal ſum."

BUT, although it be curſorily intimated, that both *pledges* become the ſole property of the creditor, whenever the principal is doubled, provided the debt conſiſted in ſhells, whether pledged for uſe or cuſtody; ſtill, as reaſonable practice no where in the univerſe ſhows the creditor's property without the conſent of the pledgeor, when braſs or the like has been pledged with a ſpecial agreement, CHANDE'SWARA, therefore intimating, that it is not admiſſible in his opinion, by adding "it muſt be otherwiſe expounded," himſelf propounds the caſe; that is forfeited which has been pledged with a declaration in this form, "if the pledge be not redeemed when the principal is doubled, it ſhall become thy ſole property," Conſequently the ſecond form only is intended by the expreſſion of YA'JNYAWALCYA, "the pledge is forfeited."

THIS is founded only on the inconſiſtency of *a different* practice. Thus, under the firſt form of agreement, if the pledge be not redeemed after the double ſum has been realized, a moveable pledge may be uſed, notice being given to the debtor or his family (CXIX). The debtor's property is not then forfeited, for there is no proof *of ſuch forfeiture*; and nothing oppoſes this application of the phraſe, "a pledge to be uſed is not forfeited." But immoveable property ſhould be reſtored when the double ſum has been realized. Such is CHANDE'SWARA'S opinion: and that is proper; for the land or other thing, which is pledged, belongs to the debtor while it remains a pledge, as much as it did before; but he cannot diſpoſe of it at pleaſure, while it is a pledge: how then ſhould the debtor's property be deveſted when the principal is doubled, ſince there is no efficient contract in the nature of gift or ſale? It ſhould not be objected, that, under the authority of the text, the forfeiture of property *in a pledge* unredeemed is acknowledged in the the *Mitácſharà*. That is improper, ſince it is difficult to deduce a forfeiture not previouſly ſtipulated, from a text which may be otherwiſe expounded. It ſhould be affirmed, that forfeiture of property only takes place *in caſes intended* by the text of YA'JNYAWALCYA on title by long poſſeſſion.

CXIII.

YA'JNYAWALCYA:—HE, who ſees his land poſſeſſed by a ſtranger for twenty years, or his perſonal eſtate for ten years, without aſſerting his own right, loſes his property in them.

FOR YÁJNYAWALCYA in a ſubſequent text declares property not forfeited in certain caſes.

CXIV.

YÁJNYAWALCYA:—EXCEPT pledges, boundaries, ſealed depoſits, the wealth of idiots and infants, things amicably lent for uſe, and the property of a king, a woman, or a prieſt verſed in holy writ.*

THIS alſo is ſubſequently mentioned by CHANDÉSWARA. What is propounded by the ſage (CXII), ſtates the cauſe; "pledged for a ſtipulated period &c;" that, for which a ſpecifick term was ſettled, when his own property ſhould be deveſted and property ſhould be veſted in the creditor, is forfeited at *the expiration of* that term. In whatever caſe, and in whatever mode, the owner has agreed to the forfeiture of his own property and the *conſequent* property of another, ſo ſhall it of courſe be. The period, in which the principal is doubled, is a ſpecifick term: this alſo is a ſtipulated term. Not fearing repetition, *the ſage* has aſſigned a cauſe *of forfeiture*. Thus *may the law be* conciſely *expounded*.

"A PLEDGE to be uſed is not forfeited;" a pledge to be uſed for an unlimited time is not forfeited, even though *unredeemed* for a thouſand years. But if a period be ſtipulated, other texts are found, *which provide for that caſe*.

The *Retnácara*.

SINCE there can be no enjoyment of produce from a pledge for cuſtody only, a pledge for uſe is meant. "For an unlimited time;" a pledge, for which no time has been ſtipulated, when the owner's property ſhall be deveſted and property be veſted in the creditor. "But, if a term be ſtipulated;" if a pledge be delivered with a term fixed for annulling his own property and veſting property in another, other texts of ſages, quoted or unquoted, are found, *which provide for that caſe*. Conſequently, whatever text declares the creditor's property in the pledge, concerns this alone.

* THE laſt hemiſtich was not cited in this place.

Even

Even where the principal ſum has been doubled, and the forfeiture of property has been ſtipulated, VRĬHASPATI propounds a legal period *for the equity of redemption.*

CXV.

VRĬHASPATI:—AFTER the time for payment has paſt, and when intereſt ceaſes *on becoming equal to the principal,* the creditor ſhall be owner of the pledge: but the debtor has a right to redeem it before ten days have elapſed.

CXVI.

VYÁSA:—GOLD being doubled, and the ſtipulated period having expired, the creditor becomes owner of the pledge, after the lapſe of fourteen days.

2. BUT a pledge to be uſed, of which the term has elapſed, the debtor ſhall *only* recover, on *then* paying, from other funds, the exact amount of the principal.

" AFTER the time for payment has paſt;" when the term, which was ſettled in regard to the pledge, is completed. For example; ten years or the like in the 7th form of agreement; three years or the like in the 8th; five years or the like in the 9th; twelve years or the like in the 10th; two years after intereſt has been fully liquidated, in the 13th; and, even in the 14th form, any time ſubſequent to the payment of the principal ſum: in theſe and ſimilar inſtances the period expires. How can it happen, that a man ſhould have paid the principal, and not have redeemed the pledge? It may happen, when the principal ſum has been any how received, through the intervention of another, but the debtor, apprehenſive *of puniſhment* on account of ſome offence, has abſconded.

" WHEN intereſt ceaſes;" when the principal is doubled: and this concerns the ſecond form of agreement abovementioned. " After the time for payment has paſt;" in this caſe a term different from the period when intereſt ceaſes ſhould be underſtood, by the ſame rule with the expreſſion

" bring

" bring the kine and oxen."* The conſtruction of the phraſe is, the creditor ſhall be owner of the pledge.

" BEFORE ten days have elapſed;" does not this concern the caſe, where it is agreed, " if I do not redeem the pledge within ten days after the principal is doubled, it ſhall become thy abſolute property?" This ſhould not be affirmed; for it would be inconſiſtent with practice. When no ſuch agreement is made, the interval of ten days is nevertheleſs required: and that would be inapplicable, when the term was paſt. Such is the mode of interpretation conſiſtent with the gloſs of the *Retnácara*.

THE interval of ten days, ordained by VRIHASPATI, muſt be underſtood of a debtor, who reſides at home. But, if he do not, VYA'SA propounds the rule (CXVI). " Gold being doubled," has the ſame import with the expreſſion " when intereſt ceaſes." " The ſtipulated period being expired;" when a term has been fixed in regard to the pledge, and that term is paſt. It correſponds with the preceding text. The ſubſequent verſe (CXVI 2) is intended for another diſtinction. " The exact amount;" that is, without intereſt.

The *Retnácara*.

CONSEQUENTLY this concerns the fourth, eighth, and fifteenth forms of agreement.

HERE an obſervation ſhould be made. If the debtor happen to have gone to a diſtant country, or be dead, and his ſon, or other heir, be not yet capable of buſineſs; or if the debtor be a captive; even in theſe and ſimilar caſes, no law ordains, that the property ſhall not veſt in the creditor, when the term of the mortgage is expired. It can only become the property of the debtor or of his ſon, when the creditor, through tenderneſs, or at the interceſſion of others, reſtores it. But, when the agreement runs in this form, " if I remain in my own country, and do not redeem the pledge, it ſhall

* Where one term is generick and the other ſpecifick. T.

become thy abſolute property ;" then, ſhould the debtor reſide in a foreign country, he does not forfeit *the pawn*.

If the creditor reſide in a foreign country, the mode of proceeding has been mentioned (CIV and CVI). But, if the chattel happen not to be appraiſed on that day, witneſſes muſt be taken of the debtor's going to the creditor's houſe for the purpoſe of redeeming the pledge. To this proceeding there is no objection. If a diſhoneſt creditor ſuffer the remaining days of the period to elapſe, and his fraudulent practice be proved, and the debtor's going to the creditor for the purpoſe of redeeming the pledge be alſo ſubſtantiated, no loſs is ſuſtained by the debtor. Again; if the creditor and his family were then abſent in a foreign country, but the debtor go to him on his return from abroad, we argue that there is no offence if the debtor afterwards go abroad. More would be ſuperfluous.

Under the firſt, third, fifth, eighth, and eleventh forms of agreement, if the pledge be long unredeemed, may, or may not, the creditor hypothecate it to another, or ſell it? In all forms of agreement, is a ſale valid, which is made on the ſuppoſition of property in conſequence of long enjoying the pledge?

CXVII.

Menu:—If he take a beneficial pledge, he muſt have no other intereſt on the loan ; nor, after a great length of time, *or when the profits have amounted to the debt*, can he aſſign or ſell ſuch a pledge.

The firſt hemiſtich has been expounded (XCI) as forbidding other intereſt, when the uſe and profit of a pledge has been ſettled as the only intereſt. The laſt hemiſtich determines the two queſtions propoſed.

"After a great length of time;" when it has long remained. "Aſſignment;" in pledge to another. "Sale;" an act deveſting his own property. However long it have remained, a pledge received, and left in his poſſeſſion after he has himſelf aſked money *of the debtor*, muſt not be aſſigned *by the creditor* in pledge to another perſon for a larger ſum. The *Retnácara*.

' Assignment

'ASSIGNMENT in pledge to another;' consequently, so long as the debtor's property subsists, a creditor must not assign, as a pawn to another for money borrowed, a chattel pledged by his debtor. This text is expounded in a similar manner in the *Méd'hátit'hi*, and by GO'VINDA RA'JA. VA'CHESPATI MIS'RA and BHAVADE'VA also concur in this interpretation.

'AN act devesting his own property:' sale is a contract annulling the party's own property in his chattel after receiving a price; but, in this definition, an act devesting his own property *simply* is expressed by the word sale: it consequently suggests a gift or absolute barter. The ox, pledged to, and possessed by, me, shall be this day employed in burden by you; but to-morrow your ox shall be employed by me: such an exchange for one day is nevertheless unexceptionable. This *appears to be* meant in the *Retnácara*.

'AFTER he has himself asked *money of the debtor*;' when the creditor demands money of the debtor, but he, though required, pays not the money nor receives back his pledge; then, if the creditor, impelled by poverty, attempt to assign that same pawn to another person for money borrowed, the text prevents him. But HELA'YUDHA explains "assignment" gift. In his opinion, the creditor may receive a loan from another person, assigning the pawned chattel in pledge to him. CULLU'CABHATTA also intimates, that the assignment of a pawn to another is unexceptionable, by adding, "for usage allows hypothecation of mortgaged land or the like to another person."

ON this interpretation, if the creditor contract a debt, assigning mortgaged land or the like to another, then, should he haply be unable to discharge his own debt, and the *original* debtor come to redeem his pledge, how should the matter be adjusted? On this it is correctly said, if a pledge for custody be transferred as a pawn to another, and the debt be less than the former one, or equal to it, then, discharging his own debt with the money paid by the original debtor, and *thus* redeeming the pledge, he should restore it to the owner. But a pledge should not be transferred as a pawn for a greater debt: this is expressly stated in the *Retnácara* and other works; "a pledge must not be assigned for a larger sum." It should also be considered as meant in the *Méd'hátit'hi*, and by GO'VINDA RA'JA.

IF

If the pledge were for uſe, it ſhould be transferred without any contradiction to the *former* agreement. For example; it ſhould be aſſigned by the original creditor with a declaration in this form, "the pledge ſhall be uſed ſo long as I do not cauſe the original debtor to pay the principal ſum *now borrowed*;" not in this form, "it ſhould be enjoyed ten years or the like." Yet, if that be done by any careleſs perſon, let the pledge be lodged in the hands of the ultimate creditor with the conſent of the firſt lender, along with a certificate of its value at the time, ſettled by an appraiſement made and ſigned by five perſons. But, in fact, ſhould a creditor transfer a pledge, which he has received, on diſſimilar terms, he ſhall be puniſhed. In the the ſame mode ſhould the deciſion be alſo argued in other caſes. But the word "aſſignment" is properly expounded as ſignifying hypothecation; for, in certain caſes, hypothecation is forbidden, and gift may be comprehended in the definition of ſale. To include permanent barter, the word ſale muſt be taken in a ſecondary ſenſe.

This text is founded on reaſon or immemorial uſage. If a creditor therefore, in breach of this law, transfer a pledge which he had taken, a moral offence is not imputed to him, but the chattel muſt neceſſarily be reſtored to the debtor when he offers to redeem it (CIV); if the laſt lender refuſe to releaſe the pledge, the original creditor may be put to much trouble, or ſuſtain a loſs: this ſhould be underſtood. But the laſt creditor is only enabled to exact another pledge from the original lender, or payment of the principal and intereſt, not to refuſe the releaſe of the pledge. Should the creditor, in breach of this law, abſolutely give it to any perſon, the gift is not valid; whence then ſhould any benefit, ariſing from the gift, be even ſuppoſed? For he has no property in the pledge, ſince it has not been relinquiſhed by the debtor; but its uſe alone has been conceded to him. "Who can benefit by giving away the property of another?" This text forbids a pretended gift. The ſale of a pledge will be conſidered in the chapter on ſale without ownerſhip.

Mortgaged land or the like ſhould be carefully preſerved by the creditor; it ſhould not *by any means* be neglected. A debtor mortgages land for the debt contracted; the creditor uſes it a few years, and afterwards another

poſſeſſes

poſſeſſes it without any oppoſition from him. In ſuch a caſe the debtor could not redeem the mortgaged land, which had been poſſeſſed for twenty years: for he is poor, but ſees the land poſſeſſed by a ſtranger, yet aſſerts not his title, erroneouſly thinking his oppoſition improper becauſe a ſtranger poſſeſſes it. Afterwards, when a law-ſuit is inſtituted, the poſſeſſor having acquired a title by undiſturbed poſſeſſion for twenty years, the land cannot be reſtored to the debtor offering to redeem the pledge, and the creditor muſt give other land as an equivalent. Therefore it ſhould not be neglected. This ſome remark.

BUT others aſk, why does not the debtor oppoſe *adverſe poſſeſſion?* Since the pledge is loſt by the fault of the debtor, an equivalent in land need not be given by the creditor. If the poſſeſſor, though verbally forbidden, do not refrain, what can the debtor ſay, when he applies to the king? He may ſay, "this violent man poſſeſſes my land mortgaged to another; if the occupant be not now reſtrained, he will, after long poſſeſſion, aſſert a title, becauſe he may have poſſeſſed it twenty years." The debtor's not applying to the king is therefore an evident fault; why ſhould the creditor give an equivalent for land loſt by the debtor's fault? But if the poſſeſſor, attending the court, affirm, that the pledgee gave him poſſeſſion, and that plea do not then appear to be falſe; in ſuch a caſe indeed the pledge is loſt by the fault of the creditor alone: it is therefore proper he ſhould give an equivalent.

Others again hold, that the text of YA'JNYAWALCYA (CXIV) being equally applicable to a pledge received by another as to a pledge received by the poſſeſſor himſelf, no title to that land is gained by *adverſe* poſſeſſion for twenty years. On this account neglect has not been included *in the text* by the author of the *Retnácara* and the reſt. The juſtneſs of theſe opinions ſhould be examined under the head of title by long poſſeſſion: more would be here ſuperfluous.

THE term (tranſlated "aſſignment") may ſignify the nature of the thing. For example, a bracelet, an earring or the like, made of gold, ſhould not, by expoſure to the fire, be reduced to gold bullion *which is its natural form*: and the alteration of a pledge is forbidden by the word "and" *which bears the ſenſe of "and the like."*

BUT hypothecation is not forbidden in all caſes. For inſtance; one has contracted a debt, delivering a pledge on theſe terms, "the pledge may be uſed, ſo long as I do not pay the principal ſum;" after a few years the creditor demands the debt from the debtor, but he is unable to diſcharge it; the creditor therefore aſſigns the pledge to another on ſimilar terms, and borrows an equal ſum. Such caſes occur in practice.

THIS text (CXVII) according to CHANDE'SWARA, VA'CHESPATI, BHAVADE'VA, and others, concerns a pledge for uſe or cuſtody with no ſpecial agreement. But the author of the *Calpateru* ſays, it concerns a pledge to be uſed. This is mentioned on conſideration of the chief intent of the text, but with no view of reſtricting it to pledges for uſe. CHANDE'SWARA ſo expounds the text. But the author of the *Mitácſhará* holds, that it ſolely concerns pledges for uſe; this is only ſuitable on his interpretation.

A CERTAIN author has thus expounded the text; ſince a period has been ſpecified, no aſſignment or ſale of a pledge ſhould be made by the debtor within the ſtipulated period. He thinks, that the creditor, having no property in the pledge, could not be ſuppoſed entitled to give or ſell it; a prohibition would be therefore impertinent. It ſhould not be objected, that this would contradict the text, "if a pledge be ſold, the ſale ſhall be valid," ſince the ſale of mortgaged property, being forbidden, could not be valid: the difficulty, *he thinks*, is removed by referring that text to a pledge unlimited as to time. But this does not coincide with the opinion of CHANDE'SWARA and the reſt. Becauſe, in the firſt hemiſtich (CXVII), an agent being ſought for the phraſe "muſt have no other intereſt," the creditor is of courſe ſuggeſted as the agent; here alſo, it being queſtioned who cannot ſell the pledge, the ſame perſon, already ſuggeſted, muſt be the agent *in the ſentence*: accordingly the gloſs of the *Calpateru*, *Párijáta* and *Mitácſhará* muſt be ſupplied with the words, "ſhall not be made by the creditor."

WHEN a debtor, having mortgaged land or the like to a creditor, ſells the ſame property, or abſolutely gives it away to another; then, ſince coexiſtent mortgage and ſale, or mortgage and gift, are incompatible, it will be ſtated, under the title of comparative force of contracts, that the lateſt

contract,

contract, whether ſale or gift, is valid. Hence the gloſs, which ſuppoſes gift or ſale by the debtor prohibited, is irrelevant. It ſhould not be objected, how can gift or ſale be valid, ſince, by ſtipulating a ſpecifick period, the owner has conceded his independence? Although he be not independent, his property ſubſiſts. Conſequently, the efficient validity of ſale or gift is uncontroverted, if it be ſaid, as the debtor's property in the pledge was abſolute, ſo ſhall be the buyer's or donee's: and authors have not ſtated as unfounded the text, "an unredeemed pledge ſhall neither be ſold nor given away." Such is the mode of interpretation agreeable to the gloſs of CHANDE'SWARA: VA'CHESPATI and BHAVADE'VA concur in the ſame expoſition.

THE text of YA'JNYAWALCYA (CXII) concerns the caſe of an agreement in the ſecond form, "if I do not redeem the pledge when the double ſum has been realized, it ſhall become thy abſolute property." The text of MENU, "nor, after a great length of time, can he aſſign or ſell ſuch a pledge" (CXVII), concerns the caſe of an agreement in the firſt form, where the clauſe, "it ſhall become thy abſolute property," has not been inſerted. No contradiction can be ſuppoſed between theſe two forms of agreement.

IN all agreements for a definite time, if the debtor wiſhes to redeem the pledge within the ſtipulated period by paying the principal and intereſt, VRĬHASPATI propounds the law for that caſe.

CXVIII.

VRĬHASPATI: *—WHEN a houſe or field, mortgaged for uſe, has not been held to the cloſe of its term, neither can the debtor obtain his property, nor the creditor obtain the debt.

2. AFTER the period is completed, the right of both to their reſpective property is ordained; but, even while it is unexpired, they may reſtore their property to each other by mutual conſent.

"FOR uſe;" the ſeventh caſe has a cauſal ſenſe. Conſequently the mean-

* THE firſt verſe has been already cited and numbered CV.

ing

ing is, a houſe or field, which has been mortgaged for uſe. " When that has not been held to the cloſe of its term;" when it has not reached the full term, neither can the creditor then recover the debt, nor the debtor obtain his mortgaged property. Conſequently from this reſult, that, while the period is incomplete, the debtor ſhall not obtain his pledge, nor the creditor recover the debt, it follows, that the wiſh of recovering the pledge is ineffectual. After the period is completed, the right of both the creditor and debtor to the money lent and to the pledge reſpectively, that is, the free uſe of their own, is *in full force*. Conſequently the creditor has a right to the money lent, and may uſe it as his own, at the full term; and the debtor has the ſame right to the property mortgaged. Yet, even while the period is unexpired, if the creditor voluntarily accept payment of the debt and reſtore the pledge, or if the debtor freely diſcharge the debt to recover the pledge, the debtor's right to the pledge, and the creditor's right to the money lent, are immediately efficient. The ſage declares it, " but even while it is unexpired &c." they may act by mutual conſent; may accept the debt, and receive back the pledge; with the conſent of the creditor the debtor may take his pledge, and with the conſent of the debtor the lender may take his money. Conſequently, while the period is unexpired, the debtor's wiſh to recover his pledge is fruitleſs without the conſent of the creditor; and the creditor's wiſh to obtain the money, without the conſent of the debtor: but with the conſent of both parties, it is effectual. Such is the interpretation according to the gloſs delivered in the *Retnácara*.

In ſome parts of the *Retnácara*, the laſt hemiſtich is found *with this reading*, " but, even while it is unexpired, they muſt perform what was agreed by both parties." That is not found in the *Chintámeni*, nor is it quoted by Bhavadéva, nor inſerted in the *Mitácſhara*. If *this reading be* well founded, the ſenſe is this; were it declared by the debtor or creditor, at the time of contracting the debt, " even before the period expire, if the principal and intereſt can be paid, the pledge muſt be reſtored;" in ſuch a caſe the pledge may be reſtored and the debt be diſcharged, even while the period is unexpired. If this reading of the laſt hemiſtich be unfounded, the ſame ſenſe may be deduced from the phraſe, " by mutual conſent." For the mutual agreement of the parties when the loan was advanced, as well as conſent when payment is tendered, may be ſignified by the words " mutual conſent."

If the agreement run in this form, "take this land as a pledge, and lend me twenty *ſuvernas*;" when ſhould the pledge be redeemed? On this point it is ſaid, ſuch being the words uttered by the borrower, the lender muſt aſk, "how long ſhall I uſe the pledge?" In anſwer to which the borrower ſpecifies a term. When the debtor has been long in the habit of receiving and repaying loans *of the ſame creditor*, then, nothing being expreſsly declared, there is no tacit agreement in regard to the term; conſequently this agreement falls within the forms above mentioned. Or, ſhould it any how exceed that enumeration of forms, the pledge muſt be reſtored when the double ſum has been received; for it is of courſe legally fit, that a pledge be reſtored after the double ſum has been received.

Under the general law, that a pledge ſhall be uſed until the debt be repaid (CXI), is not the uſe of the pledge proper until the principal ſum be diſcharged? No; from the coincidence of the text of Cátyáyana v. XXXVII 3, (where the uſe of a pledge for a loan made with an agreement, that the whole uſe and profit of the pledge ſhall be the only intereſt, is denominated intereſt from the uſe of the pledge, and which is alſo called intereſt by enjoyment) this text (CXI) muſt be referred to the ſame caſe. It ſhould not be objected, that there is no argument for the reſtoration of a pledge, in ſuch a caſe, after the double ſum has been realized. The text of Yájnyawalcya (XLVI) is authority for ſuch an induction. Nor ſhould it be objected, that this contradicts the text of Vishnu (CX). That text is limited to immoveable property. Nor ſhould it be aſſerted, that the word "immoveable" is merely illuſtrative of a general ſenſe. There is no proof *to ſupport ſuch an aſſertion*; nor any grounds for reſtricting the text of Yájnyawalcya. A pledge unlimited as to time muſt therefore be releaſed when the double ſum has been realized, provided it conſiſt of moveable property; but immoveable property, under the authority of the law, may be uſed ſo long as the principal remain undiſcharged. Even though it be not then redeemed, the debtor does not forfeit his property in the pledge; for the text (CXII) concerns the caſe of an agreement containing a clauſe to this effect, "it ſhall become thy abſolute property." But, if the debt be contracted on a pledge given for confidence only, without *ſuch* a ſpecial agreement, the debt ſhould be recovered by the ſame mode of recovery as ordained for debts unſecured by a pledge.

A PLEDGE, delivered by the pledgeor to give confidence to the lender, muſt be carefully preſerved by the creditor, and be reſtored on receipt of the whole ſum due.

The *Retnācara.*

CONSEQUENTLY, in the caſe of a pledge to be uſed, ſince the creditor may derive benefit from the uſe of it, he has no ſolicitude in regard to the payment of the money. But, in the caſe of a pledge to be kept only, the creditor derives no benefit from the pledge; on the contrary, he has the trouble of keeping another's property; he may therefore be anxious to recover his money: but, ſince there is no other mode, he muſt adopt one of the five modes of recovery, that which is conſonant to moral duty, ſuit in court, legal deceit, lawful confinement, or violent compulſion: and, in ſuch a caſe, the time for recovering the debt is that, which was ſtipulated by the borrower for the payment of the debt; or, if none were ſtipulated, the period when the debt is doubled; for that is preſcribed by law as the time for redeeming a pledge. This is conſiſtent with reaſon: and this mode of proceeding, ſay ſome lawyers, ſuppoſes a caſe where the uſe of the pledge has been forbidden; or it ſuppoſes the caſe of a pledge conſiſting of maſſes of iron and the like.

BUT, if the debtor be abſent, having abſconded or the like, from whom ſhall the creditor recover his money? A text of law, cited in the *Retnâcara*, provides for this caſe.

CXIX.

Smṛiti: — AFTER giving notice to the debtor's family, a pledge for cuſtody may be uſed when the principal is doubled; and ſo may a pledge for a limited period, when that period is expired.

WHEN the principal is doubled, a pledge for cuſtody may be uſed after giving notice to the debtor's family in this form; "Having borrowed money "from me, but not having yet redeemed the pledge, the debtor has abſented "himſelf, and the principal has been now doubled by the intereſt; thou art "his heir; I therefore give thee notice as required by law, that henceforth

"the

" the pledge will be uſed by me." The ſage's meaning is this ; if the debtor's heir himſelf pay the debt to the creditor, and take the pledge, or if he ſay, " wait a few days, I ſhall ſend information to the debtor," the pledge muſt not be then uſed. But, if the heir do not redeem the pledge, nor give information *to the debtor*, then, taking the atteſtation of ſeveral perſons, the creditor may uſe the pledge.

" A PLEDGE for a limited period ;" a pledge, for which a ſpecifick period has been fixed, may be uſed after that period has expired, notice being firſt given to the debtor's family. Such is the ſenſe of the text.

THE uſe of a pledge delivered for uſe may be renewed: if it be agreed, " the " pledge ſhall be enjoyed for two years ; afterwards, paying the debt, I will " redeem this pledge delivered for uſe ; the uſe of the pledge ſhall ceaſe at the " cloſe of that period ;" in ſuch a caſe, if the debtor, happening to go to another country, be abſent, and the debt be not paid, nor the pledge redeemed then the uſe of the pledge is authorized after notice given to the debtor's family. What is ſaid by the author of the *Retnácara*, (' this authorizes the uſe of a pledge delivered for uſe without, however, conveying the abſolute property, if no period were ſtipulated'), intends generally any moveable pledge for uſe under ſuch circumſtances. But immoveable property, being pledged for uſe, muſt only be relinquiſhed, if it were agreed, " I will reſtore it when the principal is doubled or the like ;" for, ſince it cannot move to another place, there can be no apprehenſion of its being ſeized by another perſon. But moveable property muſt be preſerved with the utmoſt care until it be reſtored to the debtor.

IN the preſent caſe, after notice given to the debtor's family, the uſe of the pledge is to be taken as wages *for the care of it*. This is intended by the text. Here " the debtor's family" is merely an inſtance of a general injunction : therefore, if the debtor himſelf be preſent, but procraſtinate the redemption of the pledge, it is reaſonable, that the creditor ſhould uſe it after giving him notice : and this may be equally affirmed of pledges for cuſtody and pledges for uſe ; it ſhould be *ſo* argued, if the agreement be in the ſixth or other ſimilar form above ſtated, and ſometimes alſo in other caſes.

It appears from the term "may be uſed," and from the gloſs, "this authorizes the uſe of a pledge without, however, conveying the abſolute property," that the creditor ſhall only uſe the pledge: he has no property therein. Conſequently, although the creditor uſe the pledge, it muſt be reſtored to the debtor returning after the lapſe of ſeveral years. Such is the ſenſe of the law.

In ſuch a caſe, ſhall the principal ſum be received by the creditor with the whole intereſt? To this queſtion the anſwer is, it appears from the conditions in the text of Vrĭhaspati (XCII) "before intereſt ceaſe on the loan or before the ſtipulated period expire," that there is no forfeiture of intereſt in conſequence of uſing a pledge for cuſtody after the period has elapſed or the like. But, in the caſe of clothes and ſimilar things, ſince they would be totally ſpoiled by uſe, it is reaſonable, that the principal and intereſt ſhould be forfeited *in conſequence of uſing them.*

But, if the debtor die or abſcond, and notice cannot be given to his family, what is to be done? A text quoted in the *Retnácara* provides for that caſe.

CXX.

Smrĭti: — If the debtor be miſſing or dead, let the creditor produce the writing *in a court of juſtice*, and obtain a certificate from the court, ſpecifying the period which it bore.

Let the creditor produce the writing in the king's court, and there obtain a document ſpecifying the term which it bore; let him there obtain a certificate. A creditor, uſing a pledge after ſuch *precaution*, commits no offence.

The *Retnácara.*

The meaning is this; when a debtor is miſſing or has abſconded, the pledge may be uſed after notice given to the debtor's family, as ordained by the preceding text: but, if notice cannot be given to his family, then, producing the writing in the king's court, let the creditor obtain a certificate.

If

If the debtor be dead, the pledge may be uſed after notice given to the debtor's family, as is ſignified in the preceding text; yet, if notice cannot be given to the debtor's family, but heirs of the debtor exiſt in ſome *other* country, let the creditor produce the writing in the king's court and obtain a certificate. Such is the ſenſe of the text.

THE certificate is delivered by the king conditionally; it ſhould expreſs, "until the debtor or his heir attend, the pledge ſhall remain with thee, and ſhall be uſed by thee." "A certificate from the court;" a writing certifying the continuance of the pledged property with the creditor. That the pledge ſhall be uſed, appears from the expreſſion in the *Retnácara*, "a creditor uſing a pledge after ſuch *precaution* commits no offence." But if neither the debtor, nor his heir, be *living*, the mode of proceeding in that caſe will be ſubſequently mentioned from a text of CA'TYA'YANA.

CXXI.

VRĬHASPATI, cited by MISRA and BHAVADE'VA under the title of recovery of debts: — WHEN the debt is doubled by the intereſt, and the debtor is either dead or has abſconded, the creditor may attach his *pledge or the debtor's* chattel and ſell it before witneſſes:

2. Or having appraiſed it in an aſſembly of good men, he may keep it ten days; after which, having received the amount of his debt, he muſt relinquiſh the balance, *if there be any:*

3. Having aſcertained his own demand by the help of men ſkilled in arithmetick, and taken the atteſtation of witneſſes, he commits no offence by thus recovering it.

THESE texts are alſo cited in the *Retnácara*, but the reading is *tad bandhujnyátividitam* inſtead of *taddhanam jnyátrĭviditam*; and it is expounded, "notice having been given for the aſſurance of the debtor's relations." *

* SEE a further comment on theſe texts after v. CCXCI.

CXXII.

CÁTYÁYANA:—WHEN the pawner is miſſing, let the creditor produce his pledge before the king; it may be then ſold, with his permiſſion: this is a ſettled rule:

2. Receiving the principal with intereſt, he muſt depoſit the ſurplus with the king.

THESE texts of VRĬHASPATI (CXXI) are contradicted by the text above quoted (CXX); for that text ſuggeſts, that, if the debtor be not preſent, the pledge ſhould be uſed after obtaining the king's ſanction; but the text of VRĬHASPATI ſuggeſts, that the pledge may be ſold, if the debtor be not preſent: conſequently there is an evident contradiction in authorizing the uſe and the ſale of the ſame thing in the ſame caſe. An alternative is therefore allowed in this caſe by the ſyſtem of civil law; for an alternative is true in logick, when the matter is totally optional. Conſequently, when the debt is doubled, and the debtor is not preſent, being dead or having abſconded, the creditor may uſe the pledge after giving notice to the debtor's family; if notice cannot be given to the debtor's family, the creditor may exhibit the writing before the king, and uſe the pledge with his permiſſion: this is one option. Or waiting, or not waiting ten days, he may ſell the pledge: this is a ſecond option.

THE text of VRĬHASPATI may be thus expounded: "When the debt is doubled by the intereſt;" this is a general illuſtration, the ſame muſt be underſtood when the period has expired. It is a mere inſtance: the caſe deſcribed relates only to ſilver coins and the like; but if grain or other commodities were lent, it ſhould be ſaid, when the principal is quintupled or the like. "And the debtor is dead," or has gone to another country, "or has abſconded;" that is, cannot be found, becauſe he conceals himſelf. But if the debtor live in another country, and ſome perſon, who is his heir, ſay "let the ſale be poſtponed for ten days, I will fetch the debtor, or bring money from him and redeem the pledge;" in that caſe the creditor ſhould keep the pledge ten days, but he ſhould previouſly appraiſe it. The words "ten days" are merely illuſtrative; in proportion to the number of days, in which the debtor can arrive, ſo long ſhould he keep it, as awarded by arbitrators. IF

If the value of the pledge exceed the amount of principal and intereſt, what ſhould be done? The ſage declares, he ſhould take the amount of his debt and no more. What ſhall be done with the ſurplus? The ſage declares, "he muſt relinquiſh the balance;" he muſt deliver it to the heir or to the king. The text is ſo expounded by BHAVADE'VA.

"*Jnyátrĭviditam* (according to one reading of the text), known to witneſſes;" having taken the atteſtation of witneſſes. Conſequently the taking *of a pledge in payment of a debt* ſhould be atteſted as well as the ſale of it. "He commits no offence;" VA'CHESPATI expounds the word in the neuter ſenſe: a creditor, recovering his debt even by compulſion or the like, ſhall not be puniſhed by the king.

CXXIII.

YA'JNYAWALCYA:—OR, even in the abſence of the debtor, the creditor may ſell the pledge before witneſſes.

IF the debtor or pawner be not *preſent*, then, ſelling the pledge, and taking the amount of the debt, the creditor ſhould deliver the ſurplus to the heir or to the king.

The *Dípacalicâ*.

THE meaning is this; if the debtor live in another country, or happen not to be preſent, the creditor ſhould deliver the balance of the price to the debtor's ſon, brother, or the like, before witneſſes; that the debtor may receive it when he returns. This appears from the gloſs of BHAVADĒVA and of the *Dípacalicâ*. As a debtor, if the creditor be abſent, depoſits the amount of the debt with his ſon or other heir, ſo the creditor, if the debtor be abſent, depoſits the balance of the price obtained for the pledge with his ſon or other heir. This alſo is founded on the gloſs of BHAVADE'VA and of the author of the *Dípacalicâ*. If there be no heirs, or if they be abſent, or if they refuſe to receive it, he ſhould deliver it to the king (CXXII).

"WHEN the pawner is miſſing (CXXII);" when he cannot be found, being

being dead, having abſconded, or having gone to a diſtant province; the debt being doubled by the intereſt, let the creditor apply to the king, and alſo produce the writing: this muſt be underſtood. "With his permiſſion;" with the king's conſent to the ſale, the pledge may be then ſold: the text muſt be ſo ſupplied. After which, taking no more than the principal and intereſt of the debt, from the price for which the pledge is ſold, let him deliver the balance to the king. This diſtinction occurs; if the debtor be actually living in another country, it is merely intruſted to the heir or to the king; but, if he be dead, the creditor ſhould give it to the heir, or, on failure of heirs, to the king. This is reaſonable; a debtor, having delivered a pledge to a creditor, has property in the pledged chattel ſo long as he lives; afterwards, his property being deveſted by death, property veſts in his heir; it is therefore proper to give his chattel to him. On failure of heirs, property veſts in the king; but under the rule of VISHNU (Book V, v. CCCCXVII) the failure of heirs ſignifies the failure of fellow ſtudents. Accordingly CHANDE'SWARA, in expounding the text of CA'TYA'YANA (CXXII), delivers this gloſs, "when the pawner is not living, nor any perſon entitled to inherit from him." But the *eſcheated* pledge of a *Bráhmana* muſt be given to learned men or to prieſts, under the text of DE'VALA (Book V, v. CCCCXLV). All this will be diſcuſſed under the title of inheritance.

CXXIV.

YA'JNYAWALCYA:—A DEBTOR ſhall be compelled to pay, with intereſt, a debt contracted on the pledge of religious merit; and he ſhall be compelled to repay two fold a debt contracted on a chattel *of ſmall value* delivered with a ſolemn aſſeveration.

"RELIGIOUS merit;" the uſe of ſacrificial fire, ablutions in the Ganges, and the like: what is received on ſuch a pledge, muſt be repaid with intereſt. What has been lent on a pawn of ſmall value, delivered with a ſolemn aſſeveration, in this form, "it ſhall certainly be redeemed by me," muſt be repaid two fold, if the debt remain long due; the pledge ſhall not be ſold by the pledgee.

IT is noticed in the *Dípacalicá*, that the text is read in the *Viſwarúpa*,

"*charitra*"

"*charitra*" inſtead of "*cháritra.*" The commentator's opinion is this; *charitra* ſignifies act or practice; *cháritra* has the ſame ſignification; the meaning therefore is, what is borrowed on the pledge of ablutions in the Ganges or the like.

ABLUTIONS in the Ganges, and other religious acts, are pledged, when the debtor, on contracting the debt, ſays, "until I repay thy loan I will not bathe in the Ganges." The term, "uſe of ſacrificial fire," relates to the voluntary uſe of it *on ſpecial occaſions*, not the continual uſe of it *by thoſe, who maintain a perpetual fire.* Here ablutions in the Ganges and the like conſtitute a beneficial pledge to be kept only, not a pledge to be uſed; ſince the debt therefore is not diſcharged by the uſe of it, how ſhall it be diſcharged? The ſage therefore ordains, that he (the king) ſhall compel the debtor to pay the debt with intereſt. The meaning conſequently is, that payment ſhall be enforced by the king.

CHANDĒSWARA delivers a ſimilar gloſs, but he reads the text *(as in the Dípacalicá) charitra bandhaca crĭtam*, and expounds it; "for, if ablutions in the Ganges be not performed, the king ſhall compel the debtor to pay the debt with intereſt."

"WHEN ablutions are not performed;" they are hypothecated, and therefore not performed. We explain *charitra*, ablutions in the Ganges and the like; *cháritra*, the benefit ariſing from ſuch *ablutions*. When that is pledged "*the debtor ſhall be compelled &c.;*" for inſtance, when a debt is contracted with an agreement in this form, "if I do not repay thy loan, the benefit of my ablutions in the Ganges ſhall accrue to thee." But this can only be a pledge for cuſtody, for it would be loſt *to the debtor* were it enjoyed *by the creditor;* the debt muſt therefore be diſcharged as in the caſe of pledges for cuſtody: the pledge is not forfeited. The author of the *Mitácſharà* delivers a ſimilar expoſition.

"A PAWN of ſmall value;" a pledge, of which the value does not exceed twice the amount of the debt. This half of the text (CXXIV) reſtrains a creditor, who might attempt to ſell the pledge on this reflection; "twice the

amount of the debt is receivable by me, what objection therefore can the debtor have to the ſale of this pledge." The meaning is, ſince no agreement was made, when the debt was contracted, to authorize a ſale, how ſhould the pledge be ſold. This muſt be underſtood when the pledge is not redeemed after the principal is doubled. However, there is no offence in a ſale made, after application to the king, with the king's permiſſion.

We hold, that, when no pledge is delivered by the debtor, but he ſolemnly promiſes, at the time of receiving the loan, " I will aſſuredly repay thee thy loan," then conſcientiouſneſs is in reality his ſurety. In that caſe, on proof of the debt, he ſhall be compelled by the king to pay twice the amount. To enlarge on this ſubject would be ſuperfluous.

On this text the author of the *Mitácſhará* thus comments; " a pledge by *the* act *of the parties* is *charitra bandhaca*. Conſequently, when a pledge of greater or leſs value is taken with the free conſent of the debtor or creditor, the double ſum only ſhall in that caſe be received by the creditor; that is, the pledge ſhall not be forfeited. At the period when the principal is doubled, the double ſum only ſhall be paid; there ſhall be no forfeiture of the pledge. In the caſe of earneſt alſo, there is no forfeiture of a pledge." This is only ſuitable on his interpretation. He expounds the terms of the text otherwiſe (" earneſt delivered," inſtead of " ſolemn aſſeveration"); this other ſubject is incidentally introduced under the title of pledges. He adds, when the merchant, who buys a commodity, giving earneſt to the merchant who ſells it, concludes a bargain for the purchaſe of goods amounting to a thouſand *mudras*, if the buyer break the agreement, *the earneſt* ſhall be forfeited; if the ſeller break the agreement, it ſhall be repaid two fold.

SECTION

SECTION III.

ON THE VALIDITY OF HYPOTHECATION AND MORTGAGE.

CXXV.

VYÁSA:—PLEDGES are declared to be of two ſorts, immoveable and moveable; both are valid when there is actual enjoyment, and not otherwiſe.

AND this concerns a pledge delivered for uſe.

CXXVI.

VRÍHASPATI:—OF him, who does not enjoy a pledge, nor poſſeſs it, nor claim it *on evidence*, the written contract *for that pledge* is nugatory, *like a bond* when the debtor and witneſſes have deceaſed.

HERE *terms of compariſon*, as and ſo, muſt be aſſumed. "When the debtor and witneſſes have deceaſed;" when neither the debtor nor the witneſſes exiſt. Hence, as a writing executed by the debtor and atteſted by witneſſes is nugatory unleſs the debtor or witneſſes be living, ſo of him, who enjoys not a pledge, nor makes it his own, nor ſhows to others that the pledge was actually received, the writing, though complete, is no evidence ſo far as concerns the pledge.

The *Retnâcara*.

EVEN after the death of the witneſſes and debtor, if the creditor actually enjoy the pledge, that pledge is valid; how can it be aſſerted, that the writing is nugatory? To this it is anſwered, ſome perſon comes and makes a demand upon another in theſe words, "thy father is my debtor, inſpect "this bond; all thoſe, who witneſſed it, are dead, and thy father alſo is "dead;" as in this caſe, ſo, if there be no other proof of a pledge, a mere writing is nugatory becauſe it is unavailing. That is mentioned by way of example. Or *it may be thus explained*; if a chattel belonging to

ſome

ſome perſon have been enjoyed for a few days *only* by another, or be conteſted, and the poſſeſſor, ſued by the owner before the king, allege, "his father received a loan from me, and the bond is forthcoming;" then, if the witneſſes be dead, the writing is nugatory, even though there be actual occupancy. Such being the caſe, there is no difficulty *in explaining the text* without aſſuming *the terms of compariſon* as and ſo; for the ſenſe would be, he, who does not actually *poſſeſs nor* enjoy the pledge, may not claim it; and a writing is nugatory when the witneſſes and debtor are deceaſed: and in this caſe undiſputed poſſeſſion, and a term *fixed* for the reſtoration of the pledge, muſt be underſtood. It may therefore be affirmed, that, when poſſeſſion has been interrupted, but witneſſes are living, the pledge is valid; yet, in the caſe of uninterupted poſſeſſion, the pledge is valid even though the witneſſes be dead.

'NOR ſhows to others &c.' to others beſides thoſe named in the writing, that is, for the purpoſe of evidence. Conſequently the affirmation of it to another ſhould only be made in the preſence of the defendant. Or "claim" may ſignify ſue before the king. The writing, though complete, is no evidence, even though correctly drawn in the form already deſcribed, with all its conditions, "firſt inſerting the lender's name and ſo forth." Hence a writing in this or other ſimilar forms, "I borrow one hundred *ſuvernas* from DÉVADATTA," is certainly unavailing.

"IT is no evidence ſo far as concerns the pledge;" it follows that the writing may be good evidence ſo far as concerns the debt. Conſequently the ſenſe is this; if there be a writing, payment of the debt proved by that writing ſhall be enforced; but without *actual* occupancy, a pledge, though proved by that writing, ſhall not be obtained. Why does he not actually enjoy or occupy it? Has it been reſtored on receipt of another pledge, or has it been releaſed on a ſolemn promiſe *of payment* or the like? Or the ſenſe may be this; if the loan have been actually received from the creditor by the debtor, for what fault ſhould the creditor loſe it? But a pledge long unenjoyed cannot be ſeized. As a man's own effects, being neglected by him and long poſſeſſed by a ſtranger, become the abſolute property of the poſſeſſor, ſurely if a pledge, which is the property of another, be not poſſeſſed by the

the pledgee, it is the abſolute property of the owner who does poſſeſs it.

WHAT then is ſuggeſted by the word "claim?" for thoſe, to whom the claim is ſhown, become witneſſes only; but, if the thing be unpoſſeſſed through neglect, of what uſe are witneſſes? The anſwer is, he ſhould fully ſhow in an aſſembly of people the reaſon why he has not poſſeſſion. For inſtance, "executing a mortgage deed to me, he has received a loan, why does he not deliver the pledge?" Such a diſpute is ſuppoſed. But, if a conteſt do ſubſiſt, as poſſeſſion is not *then* valid *without proof of right*, neither is an unenjoyed pledge valid. This is one caſe. "This ornament is pledged to me; but his daughter's nuptials will be celebrated two months hence; his wife may wear it for that period, afterwards it muſt be delivered to me." This is another caſe. On theſe and ſimilar occaſions, if the recorded witneſſes be alive, they can depoſe theſe circumſtances. There is not conſequently any contradiction between the firſt and laſt caſe.

HERE the expreſſion "does not enjoy" concerns a pledge for uſe; "nor poſſeſs" concerns a pledge for cuſtody; "nor claim" concerns both.

The *Retnácara.*

BUT this text does not concern a pledge for cuſtody conſiſting of ablutions in the Ganges or other obſervances producing religious purity; for it is not applicable *to ſuch pledges.*

AND this is nearly *but not ſtrictly true;* for a pledge whether for uſe or cuſtody may be confirmed, although it be not aſcertained whether it have been actually poſſeſſed or not.

The *Retnácara.*

THIS meaning is intimated; although he have not himſelf ſhown his claim to other men, yet if they know *and depoſe* the whole circumſtances, even in that caſe alſo the pledge is confirmed.

A TEXT of law, cited in the *Retnâcara*, expreſsly declares the nullity of a pledge in a caſe of neglect.

CXXVII.

Smrĭti: — A HOUSE, *a reſervoir of* water, a market place, grain, women, beaſts of burden *and the like*, are deſtroyed or ſpoiled by neglect.

"A MARKET place;" a place where commodities are ſold.

The *Retnâcara*.

"WATER," preſerved for his own uſe. "A reſervoir of water;" a well or the like. "Beaſts of burden" are expreſſed in the plural number to ſignify "and the like." Conſequently a garden, a field and the like are comprehended by the text; in ſhort, all *kinds of* pledges are deſtroyed by neglect. If the pledgee neglect it, a houſe is deſtroyed or ſpoiled for want of thatching; a well or the like, for want of extracting earth by which it is choked; a market, for want of concourſe of buyers and ſellers through fear of ill diſpoſed perſons; grain, by robbery or the like; cattle, women and beaſts of burden, for want of food or care: ſo in other inſtances according to the circumſtances of each caſe. "They are deſtroyed," and utterly loſt; or they remain, but are ſpoiled and become unfit for uſe. By this mention of things deſtroyed or ſpoiled, neglect is ſhown blamable; and it is a fault on the part of the creditor. Conſequently, if the pawner preſerve them, they would be poſſeſſed by the debtor: but, if he do not preſerve them, they are loſt; and why ſhould another pledge be delivered to the creditor? The debt therefore remains unſecured by a pledge.

CHANDĒSWARA remaks; "*when* mortgaged houſes, and the reſt, are deſtroyed or ſpoiled by the fault of the pledgee, the mortgage is annulled. It is therefore implied, that another pawn ſhall not be given by the pawner in conſequence of the pawnee's fault." It is conſequently evident, that the ſame opinion has been entertained by CHANDĒSWARA.

"BY the *actual* poſſeſſion of a pledge the validity *of the contract* is *maintained*"

tained" (XCVI). The ſenſe is, by actual poſſeſſion only of a pledge is the validity of the contract *maintained*; for the text coincides with thoſe of VYA'SA and VRĬHASPATI. Conſequently, if it be neglected, there is no poſſeſſion of the pledge, as already explained. Hence, if a creditor, having loſt one pledge, demand another; or if he attempt to ſeize a pledge ſaved by the debtor, who interfered when loſs impended through *the creditor's* neglect; in ſuch caſes the creditor ſhall not obtain the pledge. So much is declared. Yet, if the creditor did not neglect the pledge, but it be ſpoiled by the act of GOD, another pledge ſhould be delivered. This the ſage declares; "if it be ſpoiled, though carefully kept &c." (XCVI). Spoiled is there illuſtrative of detriment.

CXXVIII.

CA'TYA'YANA:—SHOULD a man hypothecate the ſame thing to two creditors, what muſt be decided? The firſt hypothecation ſhall be eſtabliſhed; and the debtor ſhall be puniſhed as for theft.

"DECIDED;" ruled.

The *Retnácara*.

CONSEQUENTLY the laſt hypothecation is not valid: and this ſuppoſes, that both mortgagees have obtained poſſeſſion; if either or both have not obtained poſſeſſion, the hypothecation to him, who obtains not poſſeſſion, is invalid as abovementioned. Both may have obtained poſſeſſion of the ſame thing: for inſtance, one has had poſſeſſion for a few days; afterwards the other, diſſeizing him by force or fraud, poſſeſſes the thing a few days. Again; the thing is poſſeſſed by one through force or the like, but the other diſſeizes him; in this caſe, the attempt to take poſſeſſion on the part of him, who diſſeizes the other, is well argued to be *a ſufficient act of* occupancy: where neglect is declared a cauſe of invalidating the mortgage, there, if the claimant long attempting, but not obtaining, poſſeſſion, has been content, it is *conſidered as* neglect.

"THE debtor ſhall be puniſhed as for theft;" for pledging the ſame thing

thing to two perſons, the pledgeor ſhall be puniſhed as for theft. VISHNU expreſsly declares it.

CXXIX.

VISHNU:—HE, who has mortgaged even a bull's hide of land to one creditor, and, without having redeemed it, mortgages it to another, ſhall be corporally puniſhed *by whipping or impriſonment;* if the quantity be leſs, he ſhall pay a fine of ſixteen *ſuvernas.*

" EVEN a bull's hide of land;" land to the quantity of a bull's hide. The definition of a bull's hide will be cited further on. If he *twice* mortgage a leſs quantity than that, he ſhall be fined in ſixteen *ſuvernas.* On a curſory view there ſeems diſparity in the puniſhments by corporal chaſtiſement, and by a fine of ſixteen *ſuvernas.* This it would be proper to examine under the title of fines; *it muſt be here unnoticed,* for what would avail a miſplaced diſcuſſion vainly ſwelling the book?

THE laſt hypothecation is invalid, according to MISRA, BHAVADĔVA and others; herein the *Retnácara, Párijáta, Smrĭti ſára* and other works concur. Puniſhment only is ſhown by the text of VISHNU, the invalidity of the laſt hypothecation is inferred as a conſequence. If the laſt hypothecation were valid, the firſt would be certainly void; for one contract muſt avoid: conſequently the words " without having redeemed it" are pertinent. The firſt mortgage therefore, not being redeemed, is valid; and hence it follows, that the laſt mortgage is void. But ſome think the validity of the laſt hypothecation implied in the puniſhment of the debtor. This and other *deviations* are liable to objection.

THE text concerns land alone.

BHAVADĔVA.

MISRA and BHAVADĔVA read " land exceeding *the quantity of* a bull's hide only." MISRA remarks, that the ſale of it without ownerſhip is prevented. VISHNU explains the quantity of a bull's hide.

CXXX.

CXXX.

VISHNU:—THAT land, whether little or much, on the produce of which one man can ſubſiſt for a year, is called the quantity of a bull's hide.

"LITTLE or much;" if the land be excellent and very productive, one man may ſubſiſt for a year on the produce of a ſmall quantity of land, and the value of that land is great: but if its produce be ſmall, a greater quantity of land is *requiſite for* ſuch *maintenance of one man*. Conſequently the value of ſuch leſs quantity of *fertile* land, and greater quantity of land *not fertile*, is the ſame. They are equal in value, and the puniſhment ſhould be determined by the value of the land.

CXXXI.

Smrĭti, cited in the *Retnácara*:—IF two men, to whom the ſame property has been pledged, enter into a conteſt, to him, who has poſſeſſed the land, it ſhall belong, if no force were uſed.

THE conſtruction is, "who has poſſeſſed the land without uſing force." The text muſt be ſupplied, "that land ſhall belong to him."

The *Retnácara*.

IF the ſame property have been mortgaged to two perſons, and the pledge have been given to one before the other, but one has poſſeſſion and the other has not poſſeſſion, the pledge belongs to him only who has poſſeſſion, not to him who has not poſſeſſion even though he be the firſt mortgagee; for a pledge is invalid without poſſeſſion as has been already ſtated. Ultimately this text bears the ſame import; but there is no vain repetition, ſince both texts were not delivered by the ſame legiſlator, VRĭSHASPATI.

HELĀYUDHA, VACHESPATI, BHAVADĒVA and others read "he, who has poſſeſſed it, ſhall prevail" *(yaſya bhuctirjayaſtaſya)*. That reading is alſo admitted by CHANDĒSWARA, but he has quoted the other reading *(yaſya bhuctirbhuvaſtaſya)*.

If the ſame property be mortgaged to two perſons, and be poſſeſſed by both of them, what ſhould be the deciſion in that caſe?

CXXXII.

VRĬHASPATI: — If one field have been mortgaged to two creditors *ſo* nearly at the ſame time, that no *priority can be proved*, it ſhall belong to that mortgagee by whom it was firſt poſſeſſed *without force*.

"Nearly at the ſame time," ſo that it cannot be known, which was firſt, and which laſt.

By both theſe texts it is declared, that of two mortgages, in which no priority of time can be aſcertained, that mortgage is valid, under which poſſeſſion has been *firſt* obtained without force.

The *Retnácara*.

The meaning is this; if the witneſſes be living and depoſe, "through accident the creditor does not enjoy the thing mortgaged to him; there is no neglect on the part of any perſon, but we do not remember when it was mortgaged to the creditors reſpectively;" and if the writings have been accidentally loſt; this text governs the deciſion of ſuch a doubtful caſe. Again; a tree has been pledged with its fruit at the ſame time *to two creditors* by ſome man *in perſon* or through his ſon, and debts have been contracted with two perſons; one of thoſe creditors has enjoyed the produce of the tree, but the other has delayed occupancy to diſplay his own generoſity; and the parties are not aware of each other's loan and occupancy; in ſuch a caſe alſo, the mortgage is valid in favour of him, who firſt obtained poſſeſſion. In this caſe there is no queſtion on the priority of hypothecation; but if the witneſſes prove, that it was firſt pledged to one creditor, though laſt poſſeſſed by him, and there has been no neglect on the part of any one, that pledge belongs to him, to whom it was firſt hypothecated. This, however, is not the purport of the preſent text.

Should a thing be firſt mortgaged to one creditor but neglected by him,

and

and be afterwards mortgaged to another creditor and poſſeſſed by him, and the firſt creditor claim poſſeſſion at a ſubſequent time, in that caſe the pledge belongs to him by whom it was firſt poſſeſſed, though he be the laſt creditor. This and other points may be reaſoned.

If the priority both of mortgage and poſſeſſion be doubtful, a text, cited in the *Retnácara* and *Vivada Chintámeni*, directs the deciſion of that caſe.

CXXXIII.

Smṛiti:—By two creditors claiming the pledge *on the grounds of poſſeſſion* for an equal time, it ſhall be ſhared equally; and the ſame rule is declared in the caſes of a gift and a ſale.

The pledge ſhall be equally taken, that is, in equal ſhares, by both mortgagees; and their ſhares ſhall be proportioned to the amount of their reſpective loans. For example; the firſt debt amounts to a hundred *ſuvernas*, the other debt to fifty *ſuvernas*, and the mortgage conſiſts of one village; in that caſe, ſince a partition muſt be made between the two creditors, therefore dividing the land *or rent* of the village in equal portions with the debts due to thoſe creditors, ſhares ſhould be given to each in proportion to their reſpective debts: and this ſuppoſes debts of the ſame nature; but, if they be of various natures, the amount muſt be computed from the value which the things bore at the time when the debts were contracted.

In the *Vivada Chintámeni* the text is read, "if both have poſſeſſed it quietly for an equal time, it ſhall remain in their joint poſſeſſion." Bhavadéva concurs in this reading.

And this is nearly *but not ſtrictly poſitive*. When ſeen proof, *or evidence*, in favour of both parties is equal, a deciſion may be grounded on unſeen proof *or mental conviction*.

Misra.

If the ſeen proof, that is wordly or popular proof, ſuch as poſſeſſion or the like, by which, in a caſe of diſpute, the matter might be determined in favour

favour of one party, be equal, a deciſion may be grounded on unſeen argument, or *due* conſideration *of the credibility of the evidence*. When therefore the priority of mortgage and poſſeſſion is doubtful, a deciſion ſhould be formed on conſideration *of circumſtances*. If the rights of both be on any account undiſtinguiſhable, equal ſhares ſhall be aſſigned: and this is almoſt expreſsly declared. Such is MISRA's meaning. BHAVADE'VA concurs in that opinion: and it is reaſonable; for ſuits ſhould be decided by the king with due conſideration of the courſe of things. But that is a remote affair which cannot be aſcertained by the king; ſages have therefore delivered a rule of deciſion. Yet, if any one can aſcertain the matter through inveſtigation guided by profound juſtice, why ſhould recourſe be had to equal participation or the like?

"IN the caſe of a gift;" if one thing be given to two perſons, the ſame rule of deciſion, according to actual poſſeſſion, is declared in that caſe alſo by a text which will be quoted ("*even* in immoveable property a title is gained by *long* poſſeſſion, and loſt by *ſilent* neglect).* The ſame deciſion ſhould alſo be given in the caſe of a ſale; for there is no difference in the diveſture of property by gift or ſale. But, when the ſame thing has been ſold to two perſons, and, priority of time being proved, one of them is entitled to the thing, and the other not entitled to it, he, who does not obtain the commodity ſold, ſhall recover the price from the ſeller: if both are entitled to receive ſhares of the commodity ſold, half the price paid by him and half the commodity ſhall be the ſhare of one, and the other half of the commodity with half the price ſhall be the ſhare of the other. This ſhould be conſidered as the rule of deciſion.

IF both equally have, or have not, poſſeſſed the thing, and there have been no neglect on either part, and the priority of mortgage be doubtful, a text of law, cited in the *Retnācara*, propounds a deciſion on the diſparity of written and verbal evidence.

CXXXIV.

Smriti:†—IF a pledge, a ſale, or a gift of the ſame thing be

* Attributed to VRĬHASPATI. See Book V, v. CCCLXXXIV.

† Attributed to VRĬHASPATI.

alleged

alleged to be made before witneſſes *to one man*, and by a written inſtrument to *another*, the writing ſhall prevail *over the oral teſtimony*, becauſe one contract only is maintained.

If one contract be atteſted by witneſſes and the other be authenticated by an atteſted writing, the atteſted writing ſhall prevail; that is, it ſhall eſtabliſh the mortgage. "Becauſe one contract only is maintained;" becauſe the contract with one man only is maintained by the writing produced.

The *Retnâcara*.

Consequently the joint evidence of a writing and witneſſes is excluſive, and verbal evidence ſingly muſt be excluded, becauſe one contract only is maintained in conſequence of the writing produced. A pledge has been given before witneſſes to one man, and with a written inſtrument to another, but both have poſſeſſed the thing; after a few days a conteſt ariſing thereon, the pledge authenticated by a writing is alone valid. The text (CXXXIV) is conſidered in the *Retnâcara* as conveying that ſenſe. Again; the owner has delivered a pledge to one man with an inſtrument in his own handwriting, unatteſted but not extorted by force, and to another before witneſſes; even there alſo the writing ſhall prevail. The reaſon of it is, that the depoſitions of witneſſes may poſſibly be falſe.

But Hela'yudha ſays, if there be no occupancy, but a writing exiſt duly atteſted and ſo forth, the writing ſhall prevail becauſe it is the beſt evidence of a tranſaction; it ſhall eſtabliſh the mortgage. It is hereby intimated, that, if there be written and verbal evidence, a mortgage is not of courſe invalid for want of occupancy. That opinion is not admitted in the *Retnâcara*, for it is incompatible with the text of Vrĭhaspati (CXXVI). Yet, in fact, this text is an anſwer to him, who ſhould affirm, on a haſty conſideration of the text of Vrĭhaspati, that a pledge is invalid for want of poſſeſſion, in a caſe where the thing has not been poſſeſſed, but where no neglect is imputable to the pledgee. For inſtance, where a pledge or other contract has been made by an atteſted written inſtrument, the writing ſhall

 prevail;

prevail; that is, it ſhall eſtabliſh the mortgage. Such is HELA'YUDHA'S meaning: and that ſhould be conſidered as admitted in the *Retnácara*, as has been already ſtated more than once.

A PLEDGE is only loſt under the text, "a houſe and the reſt are deſtroyed by neglect &c. (CXXVII). Forfeiture of property by ſilent neglect occurs in caſes of gift and the like. So in the preſent caſe alſo, the pledgee is prevented from obtaining poſſeſſion in conſequence only of his ſilent neglect. Elſe, we think, a gift made for the benefit of the donee under the text concerning gifts, "in his mind intending the donee, let him caſt water on the ground;" would be void, if the donee, through ignorance, did not immediately take poſſeſſion.

THIS muſt be underſtood of two contracts of the ſame nature. But for contracts of various natures oppoſed *to each other*, the rule of deciſion will be delivered under the title of relative force of contracts.

IF neither party have deciſive poſſeſſion, and no neglect be imputable to either party, but both have writings, and thoſe writings be atteſted, the following texts of law, cited in the *Retnácara*, propound a ſpecial deciſion.

CXXXV.

Smriti: *—BUT, if a man firſt mortgage land without noticing all *circumſtances*, and afterwards mortgage it with expreſs deſcription by name *and the like*, that writing, which contains an expreſs diſtinction, ſhall prevail.

2. IF a field or a houſe be deſcribed in a written inſtrument by its limits, and if villages and the like be *ſo* deſcribed, the contract is valid.

3. WHEN a diſtinction is expreſſed in a writing to one man, and no diſtinction to another, the expreſs diſtinction, ſays CA'TYA'YANA, ſhall preponderate.

* Attributed to CA'TYA'YANA.

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In the firſt text it is ordained, that, if a writing be delivered to the firſt creditor in this form, "I mortgage ſo much land to thee, and receive a loan of a hundred *ſuvernas*;" and if it be mortgaged to the laſt creditor by a writing in the form directed by YA'JNYAWALCYA as abovementioned. inſerting the name of the lender and of the borrower and ſo forth; then the mortgage is valid in favour of the laſt creditor.

THE ſenſe of the ſecond text is this, if a written inſtrument, ſpecifying the limits, be delivered to one man in this form, "this field meaſured by four hundred cubits, and extending eaſt and weſt from ſuch a pond to ſuch a mango tree, and north and ſouth from the land of ſuch a perſon to ſuch a river, is mortgaged to you;" and if it be mortgaged to another by a writing in this form, "this field is mortgaged to you;" the field conveyed by the inſtrument, which ſpecifies the limits, acquires validity, that is, it becomes a valid pledge: and ſo of a houſe, a village, or the like. Or "villages and the like" may be thus expounded: the creditor's village; the village, in which the creditor reſides, occupying a dwelling houſe, land and the like; that, in which the debtor reſides; and that, in which the field is ſituated: if thoſe villages be deſcribed. Under the words "and the like" are comprehended the names of fathers and ſo forth, as directed by YA'JNYAWALCYA, and all other particulars of place and the like as required by local uſage.

BY the third text this meaning is denoted: to one man the mortgager delivers a written inſtrument in this form, "the land ſituated in ſuch a village, "extending from ſuch a boundary to ſuch a boundary, and belonging to "me YAJNYADATTA, is mortgaged to thee DE'VADATTA;" to another he mortgages land in another form, "this is addreſſed to CHAITRA; the "field belonging to me YAJNYADATTA, ſituated in ſuch a village, extend-"ing from ſuch a boundary to ſuch a boundary, and which was obtained by "favour of the king in conſequence of great ſervices rendered to him, is "mortgaged to thee;" a diſtinction being thus expreſſed, that is, the land being thus particularly deſcribed, the writing which contains an expreſs diſtinction, ſpecifying the land obtained by favour of the king, ſhall preponderate

ponderate; reſiſting the other mortgage, it ſhall maintain the mortgage it conveys. Or the third text may be conſidered as intended to enforce the ſenſe of the former texts.

FROM the expreſſion "preponderate" it follows, that the other is not preferable. Conſequently, when there is no contradiction, but one inſtrument only expreſſes the name, boundaries and other diſtinctions, the *other* inſtrument is ſufficient evidence, if the limits and other particulars can be aſcertained in any other mode. This is alſo admitted by CHANDÉSWARA, for he delivers this gloſs, "under theſe texts, if the mortgage be made to one man in a general form, and the ſame thing deſcribed by name be mortgaged to another; then, if the contracts be incompatible, that, which expreſſes a name and other diſtinctions, ſhall prevail." If ſuch were not his meaning, he would not have added "if the contracts be incompatible;" he would have only ſaid, the mortgage not deſcribed by name and other diſtinctions ſhall not prevail. This we hold reaſonable.

OCCUPANCY prevails over verbal and written evidence; but, if poſſeſſion be equal, the deciſion muſt be argued from the diſparity of the writings. If theſe alſo be equal, participation is reaſonable. No one has directed a deciſion on the diſparity of verbal evidence. In ſupport of theſe opinions it is proper to adduce the text above cited (CXXXIII).

ALL this is enjoined, *but not inflexibly.* Through ignorance or the like, the writing has been delivered to the firſt creditor in ſome *irregular* form, and he has not ſilently neglected the pledge; if all the circumſtances be fully aſcertained by the king or arbitrators, from the evidence of neighbours, and if a writing in due form agreeable to law and uſage were delivered to the laſt creditor, ſtill it is argued by ſuch men as we are, that the hypothecation to the firſt creditor is valid; for theſe texts of ſages are rules of civil law. Accordingly after citing the text (CXXXIII), MISRA adds, this is enjoined, *but admits exceptions.*

IF a mortgage deed, *irregularly* drawn by a perſon inexperienced in ſuch affairs, ſhould happen not to be otherwiſe proved authentick,

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the mortgage deed in favour of a crafty perſon might prevail; would not failure of juſtice be therefore imputable to the king for an untrue deciſion, *though* grounded on a legal rule? None could be imputed; ſuch a deciſion is the conſequence of particular circumſtances. When the day, lunar aſteriſm, and ſign, in which a man was born, are unknown to aſtrologers, as the purpoſe is accompliſhed by aſſuming the ſign from the firſt ſyllable of his familiar appellation; (for inſtance, CHA and LA *ſuggeſt* the conſtellation of the Ram; and ſo forth:)* ſo there is no failure of juſtice in *reſorting* to this *expedient in a doubtful caſe*. However, after much inveſtigation, throwing the load on the ſupreme ruler, a deciſion ſhould be made, with due conſideration of the *general* conduct of both parties. Accordingly *the author of* the *Retnácara*, citing the following text (CXXXVI) and expounding it, "if a man, mentally intending a particular thing, pledge his property not exhibited, nor preciſely deſcribed, and conſequently as imperceptible as the ſubtile element, it ſhall not be conſidered as a definite pledge;" adds, this is made evident by the ſubſequent text (CXXXVII): and if indefinite hypothecation be practiſed in certain inſtances, poſſeſſion may be granted by a ſpecial rule without *valid* hypothecation.

CXXXVI.

Uncertain:—IF a man pledge his property unexhibited, and undeſcribed as to its nature, and conſequently imperceptible like the ſubtile element, that ſhall not be conſidered as a definite pledge.

CXXXVII.

Uncertain:—WHATEVER then belonged to that *debtor*, the creditor may ſuppoſe deſcribed *by the contract*.

SOME explain the term, unknown, *inſtead of* "*unexhibited*," juſtifying the interpretation from the ſenſe of the verb *vid*, know: that thing, which, be-

* IN drawing the horoſcope of an infant, the lunar aſteriſm, under which he was born, guides the ſelection of his name; for inſtance, if he was born under *Aſwini*, a name is ſelected beginning with CHA, CHÉ, CHÓ, or LA. But in drawing the horoſcope of a man, whoſe birthday is unaſcertained, the name ſuggeſts the conſtellation.

ing undeſcribed as to its nature, is not known or aſcertained. It is not certainly deſcribed by its limits, the village in which it is ſituated, and other diſtinctions; it is therefore ſimilar to the ſubtile element, equally inviſible and imperceptible; and conſequently ſhall not be conſidered as *ſufficiently* definite. *For example;* "a field meaſured by a hundred cubits is mortgaged to CHAITRA;" it is not thereby particularly known, where and of what deſcription that field is. How ſhould a man ſo mortgage land? The commentator explains it; "mentally intending *a particular field*;" indicating it by a general deſcription, but not actually ſhowing it. "Whatever then belonged to him" (CXXXVII); whatever belonged to the debtor at the time of making the hypothecation, might, through exceſs of confidence, or unguarded ignorance, be ſuppoſed by the creditor *pledged to him.* Whatever the creditor therefore occupied as the intended pledge, would be merely held under the authority of practice, to maintain the agreement inviolate. They thus expound the gloſs of the *Retnácara*, "If indefinite hypothecation &c."

CXXXVIII.

*Smriti,** cited in the *Retnácara:*—SHOULD the creditor, againſt or even without the aſſent of his debtor, poſſeſs himſelf of more *land or other* property than was expreſsly mortgaged, he ſhall pay the firſt amercement, and the debtor ſhall receive back his whole pledge.

WHEN a field meaſured by four hundred cubits has been mortgaged, ſhould the creditor annex to it another adjoining field and forcibly poſſeſs himſelf of it, that creditor ſhall pay the firſt amercement, namely the amercement firſt directed, which MENU thus propounds, "Now two hundred and fifty *panas* are declared to be the firſt *or loweſt* amercement." To explain the ſenſe of the text, this obſervation is made reſpecting fines. CHANDE'SWARA thus comments on the text; "if the creditor forcibly annex to the pledge more land or other property than was expreſſly mortgaged, and poſſeſs himſelf of it, he ſhall be fined, and the mortgager

* Attributed to CA'TYA'YANA.

ſhall

ſhall receive back the land or other property mortgaged, without paying the ſum due."

CONSEQUENTLY the debt, though lent by the party himſelf, is forfeited by reaſon of an offence conſiſting in encroachment on land exceeding the mortgage. But the debtor ſhall not receive the value of what has been previouſly obtained by enjoyment, ſince no text ordains it. Yet, if the debt be not diſcharged from the uſe of more land than was mortgaged, the mortgager ſhall *nevertheleſs* recover his pledge without diſcharging the debt; elſe the terms of the text, "the debtor ſhall receive back his whole pledge," would be unmeaning.

HERE it ſhould be remarked, that if a loan be obtained on this condition, propoſed by the borrower to the lender, "be this field pledged to you; the pledge ſhall be redeemed after four years, on the ſeventh day of the month of *Bhádra:* if I do not then redeem it, the pledge ſhall become thy abſolute property;" the mortgage is not uſually foreclоſed, even though the debtor fail in his agreement. If a covetous creditor, reflecting on this local uſage, ſay, "give a bill of ſale;" and a neceſſitous borrower, to obtain the loan, execute a bill of ſale, but inſert as a date the future month and year intended by him, and ſpecify in writing, that the price received ſhall bear intereſt to that time; and if the debtor occupy the land until the ſtipulated period expire; is a contract in this form a mortgage or not? It is anſwered, ſince a bill of ſale is executed, it is a ſale and not a mortgage. Does the ſale take place immediately, or on the future day ſpecified in the writing? Not immediately; for, if the ſale took place immediately, the debtor could not repay the price borrowed and recover his pledge on a ſubſequent day. Nor can that be deemed admiſſible; for it would be inconſiſtent with practice. Neither is the ſecond ſuppoſition true; for, ſince the vender does not intend an immediate ſale, his property is not deveſted. Nor ſhould it be affirmed, that the vender muſt intend a ſale on the day when the writing is executed; for the borrower cannot be ſuppoſed to conſent to a ſale inconſiſtent with his purpoſe. On this point it is ſaid, the ſale is concluded on that very day when the vender receives the price; but property is not immediately de-

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veſted. Yet the period, contemplated in the vender's actual intention at the time of the contract, deveſts the property of the original owner. Or the promiſe of a future ſale is clearly conveyed by the writing then executed; and the borrower, conſequently bound by his agreement, muſt conſent to the ſale; elſe he would be puniſhed, and held guilty of a moral offence. Therefore do good men execute ſuch bills of ſale.

On this a queſtion ariſes; if the contract were executed when four thouſand years of the *Cali*-age were expired, and dated in the four thouſand and fifth year; ſhould the borrower or witneſſes die in the interval, the writing being inſufficient evidence, the money lent might be irrecoverable; and how could a mortgage of the land be alleged? That ſhould not therefore be practiſed. Yet, in fact, ſince many excellent perſons do ſo proceed, arbitrators by ſome means admit the writing, becauſe ſuch current practice is remarked. But, if the writing be fully proved, it is a valid bill of ſale. Should the borrower or his ſon be unable to diſcharge the debt in the interval, the ſale muſt be acknowledged by the ſon, becauſe it was promiſed by his father. Elſe he would be guilty of a great offence in violating his father's engagement: and the king ſhould animadvert on it. But, if he can diſcharge the debt within the period, the ſale is not valid; for the borrower then aſſented to the deveſture of property concomitant with failure in payment of the debt.

If a borrower execute a mortgage deed for a limited time, and alſo a bill of ſale dated on a future day, there would be no difficulty in recovering the money lent. This is remarked on the preſcriptive uſage of good men; but it has not been expreſſly noticed by any author. On the contrary, if a pledge be given upon this condition, "ſhould the debt be undiſcharged on a certain day, this pledge ſhall become thy abſolute property," then, if the pledge be not redeemed, that pledge ſhall belong to the creditor, as has been more than once declared, and that alone is ſuggeſted by the texts of ſages.

It may be here remarked, that, when a loan is made on a pledge received, the pledgee ſhould deliver a written acknowledgement to the debtor; elſe

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the creditor, enjoying the pledge, might affirm after a conſiderable lapſe of time, "this has been poſſeſſed by me twenty years and is ſolely mine." As a written contract relative to tillage is both given and received by the cultivator and landlord, *ſo ſhould mutual agreements be delivered in this caſe alſo.* Accordingly "mutual" is ſpecified in the text of VRĬHASPATI (XII).*

ON the ſubject of pledges ſomething remains to be ſaid.† In fact a pledge delivered for uſe is a pledge to be uſed, and a pledge delivered for confidence only is a pledge for cuſtody. The text of MENU (v. XCI) concerns a pledge for uſe; his text (v. LXXXVIII) muſt relate to a pledge for cuſtody, ſince it expreſſes "without the conſent of the owners;" his text (v. LXXXVII) regards a pledge for cuſtody. Conſequently, ſince the uſe and profit of the pledge is the only intereſt in the caſe of a pledge to be uſed, intereſt at the rate of an eightieth part is prohibited. Should a pledge for cuſtody be uſed, the uſe of it not being forbidden by the owner, half the intereſt is forfeited; but if the uſe of it were forbidden, the whole intereſt ſhall be forfeited. The ſame meaning ſhould be alſo attributed to the text of YĀJNYAWALCYA (LXXXIV): if a pledge for cuſtody be uſed, the forfeiture of intereſt is equitable, ſince *the uſe of it* had not been allowed in place of intereſt; but, if a beneficial pledge be uſed, there ſhall be no intereſt, that is, no intereſt at the rate of an eightieth part and the like. Since the ſingle word "intereſt" may be connected with both phraſes

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* THE compiler takes occaſion to relate an ancient tale. A borrower, pledging a valuable veſſel through the medium of his own ſervant, and executing a written inſtrument, contracted a debt. Afterwards, the ſervant being dead, the creditor told the debtor, who offered to redeem the pledge, "the pledge has been already redeemed by thy ſervant." In this conteſt the debtor was caſt by many arbitrators. He afterwards truly repreſented the whole circumſtances to a certain king, and that king, underſtanding the caſe, called the creditor, and having liſtened to his narration, ſhowed him great courteſy. The king, having aſſumed the character of a friend, took the man's ring under pretence of viewing it; at that moment, a ſervant of the king, previouſly inſtructed, announced to him, that his mother called. Seemingly interrupted thereby, he retired to an inner apartment, taking the ring with him as it were by miſtake. Thence he ſent a ſervant with the ring to the creditor's ſteward. "Unleſs the veſſel be inſtantly produced, thy maſter's life is forfeited, this ring is my token;" hearing this, the ſteward delivered the veſſel to the meſſenger. Having received the veſſel in the inner apartment, the king put betle in it, and called the debtor. He, attending and ſeeing the veſſel, with downcaſt look ſaid, "I have offended, my ſervant muſt have been diſhoneſt; without my knowledge he has ſold this veſſel: elſe how could it be in thy poſſeſſion?" The king, having aſcertained the weight and value of the veſſel by means of artiſts, impoſed a fine on the creditor, delivered the pledge to the debtor, and directed payment of the debt to the creditor. If there had been a writing, adds the compiler, no ſuch diſpute could have exiſted.

† IN the original, theſe remarks are ſubjoined to the laſt chapter on the recovery of debts.

(LXXXIV), there is no objection to the admiſſion of both meanings. Such is the opinion of CULLŪCABHATTA.

THAT chattel, from the uſe of which no loſs ariſes, is a pledge which may be uſed; that is, one, the uſe of which cauſes no ill: for participles of this form ſignify what may be done without cauſing any ill; as in the example, "a prieſt and a king are never to be ſlighted." Any other pledge is a pledge to be kept, that is one, which muſt be kept or preſerved. Hence SŪLAPĀNI'S gloſs delivered in the *Dípacalicá* (where a pledge for cuſtody is explained a pledge to be kept, ſuch as clothes, ornaments or the like, and a beneficial pledge is exemplified by an ox or the like;) is fully juſtified: and the remark of CHANDĒSWARA, in his gloſs on the rule of VISHNU (LXXXII), which reſtricts the word "pledge" to a pledge for cuſtody only, is pertinent: elſe, ſince MENU (XCI) alſo declares, that there ſhall be no *other* intereſt when a beneficial pledge is uſed, the reſtriction of the term to a pledge for cuſtody, as inferred by CHANDĒSWARA, would be irrelevant Thus likewiſe the gloſs of MISRA on the text of CĀTYĀYANA (LXXXIX) is fully juſtified, where, after obſerving, that in every caſe where the pledge is uſed againſt the will of the owner, the whole intereſt is forfeited; and when a ſlave or the like, being pledged, is employed, half the intereſt; he adds, but if a pledge for cuſtody be uſed, the whole intereſt ſhall be forfeited. Elſe, ſince it is reaſonable, that all *other* intereſt ſhould be foregone, when a pledged ſlave or the like has been delivered for uſe, the forfeiture of half the intereſt would be irrelevant. But if ſuch a ſlave or the like be delivered for confidence only, the pledge is for cuſtody; and if uſed, the whole intereſt ſhall be forfeited: and hence that explicit ſtatement of the diſtinction ariſing from this text was proper.

THIS opinion of ſome lawyers appears correct: a debtor, borrowing five pieces of money, has pledged a copper caldron worth ten pieces; the creditor uſes it without, though not againſt, the aſſent of the owner, during five years from that date; and the veſſel is not thereby totally ſpoiled, but, being much worn, is reduced to half, or a leſs portion of its original value: in ſuch a caſe the forfeiture of half the intereſt *only* would be inconſiſtent with common ſenſe. The law has been thus explained at large.

BUT

BUT others expound the phraſe, " on its loſs or deſtruction," which occurs in the text of NA'REDA (LXXXI 3), 'ſhould the lender neglect the preſervation of the pledge:' conſequently, ſhould the care of the pledge be neglected by the creditor, and the pledge nevertheleſs be fortunately uninjured, ſtill the intereſt is forfeited. For example; a cow is pledged to a *Yavana* by a fooliſh debtor, and that ill diſpoſed creditor of the *Yavana* race neither uſes the cow, nor feeds her at his own houſe; but that cow grazes night and day in the foreſt, and, being deſtined to a long life, ſurvives; not being bitten by a ſnake or the like, or being bitten but cured by ſome traveller: in ſuch a caſe *the intereſt is forfeited.*

VIJNYA'NE'SWARA conſiders the text of MENU (v. XCI) as relating to a pledge delivered for uſe; and the text of YA'JNYAWALCYA (LXXXIV), and another text of MENU (v. LXXXVIII) as relating to a pledge not delivered for uſe. But, if a pledge delivered for uſe be damaged, intereſt ſhall be forfeited, under the precept of YA'JNYAWALCYA, " nor *any intereſt*, if a pledge for uſe be damaged" (LXXXIV). " A pledge ſpoiled ſhall be made good;" if a pledge not delivered for uſe be damaged in a ſmall degree or the like, it muſt be repaired, and thus reſtored in its former condition; ſhould it have been uſed, intereſt ſhall be forfeited. If a pledge delivered for uſe be damaged in a ſmall degree or the like, it muſt be repaired, and reſtored in its former condition; if it bore intereſt, that intereſt ſhall be forfeited. Should a pledge be utterly ſpoiled or deſtroyed, an equivalent muſt be given, or the price of the pledge muſt be paid, or the principal ſum ſhall be forfeited.

CHAPTER IV.

ON SURETIES.

CXXXIX.

CA'TYA'YANA: — NEITHER the maſter *of the lender*, nor his profeſſed enemy, nor an agent of his maſter, nor a priſoner, nor a criminal amerced, nor one whoſe character is ambiguous,

2. Nor a coheir or joint-tenant *with either party*, nor an intimate friend, nor a pupil, nor a ſervant of the king, nor a religious anchoret,

3. Nor a man *reputed* unable to pay the ſum to the creditor, or a fine of equal amount to the king, nor one whoſe father is living, nor one who is guided ſolely by his own froward will,

4. Nor a man, who is not well known, ſhould ever be accepted as a ſurety for any purpoſe.

A MAN confined by the king for ſome offence, becoming ſurety for another, might *afterwards* plead, "how can I enforce payment of the debt?" Or *it may be objected*, how could he attend to that matter when conteſted? A

priſoner therefore ſhould not be accepted as a ſurety. "A criminal amerced;" that is one, on whom puniſhment impends: elſe, ſince almoſt every perſon may caſually become liable to puniſhment, none could be accepted as ſureties: but this criminal is refuſed becauſe the fine impoveriſhes him, and he is therefore unable to make good the debt. Thus ſome interpret the text; but that is wrong, for the ſame ſenſe is alſo conveyed by the words, "a man unable to pay the ſum to the creditor." Some again hold, that a criminal amerced is refuſed as a ſurety, through apprehenſion of his ſinful miſconduct. But in fact, future impoveriſhment is ſuggeſted by the term explained "a criminal liable to amercement;" ſince he is not at preſent reduced to indigence, there is no vain repetition.

"ONE whoſe character is ambiguous;" ſo explained in the *Retnácara*: that is, a man of ambiguous character. That gloſs intends one, whom honeſt men ſuſpect to be ill diſpoſed. If his evil diſpoſition be aſcertained, ſurely *he cannot be accepted as a ſponſor*. Others expound the term, 'accuſed:' they ſuppoſe one, whom any perſon arraigns in a publick aſſembly, alleging that he is addicted to the uſe of intoxicating liquors.

"A COHEIR;" a joint-tenant with the creditor or debtor.

The *Retnácara*.

THE notion is this; if the creditor accept his own coparcener as a ſurety, does he not make himſelf ſurety? If he accept the debtor's coparcener as a ſurety, does he not make the debtor ſurety for himſelf? A text of YA'JNYAWALCYA to the ſame purport will be cited. "A friend" of the creditor *muſt not be accepted*, leſt friendſhip be violated.

"PUPILS," *literally* apprentices; diſciples. The *Retnácara*.

THE reaſon is, leſt affection be diverted. But the author of the *Mitácſharâ* reads *atyantavāſinah* inſtead of *antévāſinah*, and expounds it, 'perpetual ſtudents in theology.'

"A SERVANT of the king;" one employed by the king, his miniſter

and

and the reſt. On the reading, "nor the king, nor one employed in his affairs," king is illuſtrative of a general ſenſe: it would be ſuperfluous for the king or his miniſter to become a ſurety; becauſe the king, by *the* nature *of his truſt*, is *an univerſal* ſurety; and his deputed miniſter or other officer is certainly ſo likewiſe; and a ſervant of the king ſhould not be accepted as ſurety, leſt he avail himſelf of his ſuperiour power. "Religious anchorets" ſhould not be accepted as ſureties, becauſe they are venerable and are not capable of civil tranſactions. The want of independent property is the objection againſt one, whoſe father is living.

"ONE who is guided by his own will;" who is ſolely guided by his own froward will, and not by any conſideration of circumſtances: conſequently his incapacity for civil affairs is the objection againſt him.

"A MAN *reputed* unable to pay the ſum to the creditor;" if he be unable to pay the ſum to the creditor, for what purpoſe ſhould he be accepted as a ſurety? "Or a fine of equal amount to the king;" if the creditor accept as a ſurety a man able to pay the ſum to him, but unable *alſo* to pay a fine to the king; then, ſhould he become liable for a fine to the king in conſequence of ſome offence, and be therefore unable to pay both ſums, the creditor could not recover the whole ſum from him: for this reaſon he ſhould be refuſed. Thus ſome expound the text; but in fact this text is not reſtricted to loans, for it expreſſes generally "for any purpoſe." Conſequently, when a ſurety is required by the king, he ſhould not accept one who is unable to pay a fine: and that is merely illuſtrative; a man unable to produce the party, ſhould not be accepted as ſurety for appearance and ſo forth. If a creditor accept, as a ſurety, "one who is not well known," then, after a lapſe of a few days, when he has gone to another place, and the debtor has abſconded, from whom could the creditor recover the ſum? The creditor ſhould therefore accept, as a ſurety, none but a man who is well known.

HE, who becomes a ſubſtitute for another *(pratibhavati)*, is a ſurety *(pratibhú)* or bondſman. By parity of reaſoning ſimilar ſureties ſhould be required in other caſes. Conſequently, from the full ſenſe of the law, he

only

only ſhould be accepted as a ſurety *for any purpoſe*, from whoſe ſuretiſhip no breach of reſpect, natural affection, or tender regard, need be apprehended; and from whom, or from the debtor, the ſum may be ſubſequently recovered.

CXL.

YA'JNYAWALCYA: — IT is declared, that brethren, huſband and wife, father and ſon, cannot become ſureties for each other before partition, nor reciprocally lend *their joint property* nor give evidence for each other *in matters relating to the common ſtock.*

BROTHERS and the reſt cannot, before partition, become bound to, or for, each other, and ſo forth. Before partition a man ſhould not make a loan, taking as a ſurety his own brother, or the brother of the debtor. Nor ſhould he make a loan to his own undivided brother: for all, that belongs to him, alſo belongs to his brother: how then can it be a debt? It will be declared, that his brother has no title to what is acquired by the man himſelf; may not therefore his own acquired wealth be lent to his brother? *The anſwer is*, why ſhould his brother borrow money from him, ſince his food and other wants may be ſupplied from the joint eſtate. If he need it for religious occaſions, why ſhould he not uſe the joint property? *If he wiſh to adventure it* for increaſe of wealth, why ſhould he not improve the joint eſtate? If he require it for the enjoyment of wreaths, ſanders wood, fine cloth, and the like, that may be ſupplied out of joint-property; for the law has not forbidden any uſe of common property.

BUT, if any one reſolve in his own mind, "I will perform a religious act on my own ſeparate funds, and I alone ſhall obtain the benefit of it;" or if his brother forbid ſuch expenditure of the paternal wealth; in ſuch caſes a man, intending to dig a pond, or to perform a ſolemn ſacrifice or the like, out of property acquired by himſelf, but *finding* ſome part of his own ſeveral property unavailable, may borrow from his brother money acquired by *that brother* himſelf. Why is a loan forbidden before partition? It ſhould not be objected, that a religious act, even though performed

formed by one brother on funds acquired by himſelf, is the act of both undivided brothers, under a text which will be quoted (Book V, v. CCCLXXXVIII); and therefore money received for that purpoſe from a brother, even though it were acquired by himſelf, is no debt, and ſhall not therefore be repaid. Another text* declares the participation of all brethren in that religious act only which is performed with the aſſent of all, on funds common to all; and the former text has virtually the ſame import. That a debt may be contracted with an undivided brother, cannot therefore be diſputed.

AGAIN; a man, reflecting, "if I obtain profit on joint property, another brother will alſo have a title to that profit," only lends at intereſt his own property acquired by himſelf; or he conducts commerce on that capital; in ſuch a caſe, a ſmall part of his ſeveral property being then unavailable, he borrows from his undivided brother money acquired by that brother himſelf; here alſo what ſhould prevent him? So, if another brother tell one who diſſipates the joint property for the enjoyment of wreaths, ſanders wood, fine cloth and the like, "gratify thy wiſh for enjoyment in proportion only to *thy ſhare of* the wealth," and if he, being thereby reſtrained, ſupplies his enjoyments out of wealth acquired by himſelf; but, ſome part of his ſeveral property being then unavailable, borrows from an undivided brother money acquired by that brother himſelf; here again what is there incongruous? Conſequently a debt contracted with an undivided brother for the three purpoſes of ſpiritual benefit, of wealth, and of gratification, is in reaſon valid.

YET YA'JNYAWALCYA forbids it. Can ſuch a rule be demonſtratively true, that, under the text of YA'JNYAWALCYA, a debt may not be contracted with an undivided brother, though in reaſon ſuch a debt be valid? There is no objection to explain "while undivided," while the property

* A text of MARI'CHI is incorrectly cited in this place. After conſulting the *Dwaita pariſ'iſhta* of CE'SAVA MISRA and *Suddhi vive'ca* of RUDRADHARA, I thus tranſlate the text with the preceding verſe; "The father being dead, his obſequies muſt be carefully performed by his ſon; but if there be many ſons of the father, reſiding in the ſame place, what is done by the eldeſt alone with the aſſent of all, and out of the common ſtock, ſhall be *conſidered as* the act of all."

lent is undivided: for the ſenſe *muſt be this;* paternal wealth and the like, and what has been gained by a common exertion, may not be borrowed from undivided brethren.

So, if a religious act or the like be undertaken on a man's own ſeveral property, and if a ſmall ſum be deficient, and a debt be therefore contracted with another perſon, an undivided brother may be his ſurety or his witneſs. But if he contract a debt for the maintenance of the united family, an undivided brother can neither be ſurety nor witneſs; for he alſo is liable to the payment of the debt: and if this text be adduced by authors to guide the deciſion when a doubt ariſes whether a partition have been made, ſtill that ſuppoſes either paternal wealth, or property acquired in common. This will be diſcuſſed in the *fifth* book on inheritance, under the head of aſcertainment of partition: and this text has the ſame import with that of CA'TYA'YANA (CXXXIX 2) "Nor a coheir or joint-tenant;" as has been already noticed.

THERE can be no partition between huſband and wife (Book V, v. LXXXIX). The text of YA'JNYAWALCYA (Book V, v. LXXXIII) intends only a proviſion for ſubſiſtence, not partition; were there partition, wives would become independent, and it would contradict the text of A'PASTAMBA (Book V, v. LXXXIX). Property therefore being common to huſband and wife (Book V, v. CCCCXV), ſuretiſhip and the reſt are forbidden ſo far as concerns the general eſtate of the huſband, but a contract of debt or ſuretiſhip may exiſt in reſpect of other wealth, ſuch as the ſeveral property of a woman. For example; the huſband may borrow from his wife her own ſeveral property. So, if the wife deſire to ſupport her own brother or other kinſman out of her ſeveral property, and no part of that property be then available, a debt muſt be contracted; when that debt is therefore contracted with another perſon, her huſband may become either ſurety or witneſs: for YA'JNYAWALCYA (CCVII) denies the abſolute neceſſity of a huſband paying ſuch a debt. By the huſband only, can no loan be made to his wife; for the text above cited (Book V, v. CCCCXV) declares the wife's property in the huſband's wealth only. Such is the interpretation according to ancient authors.

BUT

BUT VA'CHESPATI BHATTA'CHA'RYA does not acknowledge the property of the wife in her huſband's wealth. There is not, in his opinion, any objection to a gift made by her; however, he conſiders the huſband and wife as never undivided in *reſpect of* property. This may be admitted; but the author of the *Mitácſhará* admits partition between huſband and wife, and acknowledges the wife's property in her huſband's whole eſtate; for in his gloſs on the text of APASTAMBA above cited (Book V, v. LXXXIX) he ſays, "ſince MENU and the reſt do not deem it a theft, if ſhe uſe her huſband's property in the entertainment of gueſts, and eleemoſynary gifts, therefore the wife alſo has ownerſhip of her huſband's wealth: elſe it would be a theft." A partition may therefore be made at the option of the huſband, but not at the option of the wife; as will be mentioned (Book V, Chapter II). The wife's property in her huſband's eſtate is thus ſhown (Book V, v. LXXXIII); partition *in general* is not again denied: and the text, which does deny partition, is expounded as relating to acts, which concern the nuptial fire and the like. But RAGHUNANDANA ſays, "the legiſlator mentions partition between huſband and wife, intending the aſſignment of an equal ſhare with the ſons, by way of proviſion for the wife's maintenance: if that have not been done, teſtimony for each other and ſo forth is forbidden."

CXLI.

NAREDA:—AFTER partition, but not before it, brothers may become witneſſes or ſureties for each other, and may reciprocally give and receive *preſents, or make contracts with each other: but in regard to property ſeparately acquired, they may do ſo even before partition.**

THEY may give and receive loans, for the text coincides with that of YA'JNYAWALCYA (CXL). Since there is no ground for ſelection, both delivery and receipt are meant. Or, if a man erroneouſly make a preſent, receipt is forbidden; if he erroneouſly take a preſent, gift was forbidden. If the prohibition of receipt be infringed, the benefit of a gift for a religi-

* Book V, v. CCCLXXXVIII 3.

ous

ous purpoſe is loſt; if the prohibition of gift be infringed, the thing ſhall not be obtained at a ſubſequent time: hence both are intended.

AGAIN; delivery and receipt may ſignify the delivery of a thing relinquiſhed on a religious account, and the receipt of that thing. If that prohibition be infringed, what moral purity can he acquire by yielding joint property to one of the owners? Or how can the donee forfeit *his ſhare in* the merit of the gift, by receiving his own property which in reality produces moral benefit common to both owners? Such is the objection *to the interchange of preſents between parceners.*

UNDER this text (CXLI) the atteſtation of brothers and ſo forth is only proper in matters concerning that property, in reſpect of which they are ſeparate; and it is only improper in matters concerning that property, in reſpect of which they are coparceners.

IF one allege in the king's court, "this man is my debtor," and the other affirm, "I am not his debtor;" that ſuit being tried, if three ſtrangers depoſe to the debt, and ſeven parceners depoſe againſt the debt, the negative plea would prevail by the text of YÁJNYAWALCYA:* to prevent this *circumſtance*, their teſtimony is forbidden. Therefore ſetting aſide the negative plea, though ſupported by the evidence of many parceners, the debt proved by ſtrangers ſhould be adjudged. "A kinſman might ſpeak *falſely* through the impulſe of natural affection." This and other points ſhould be diſcuſſed under the title of adminiſtration of juſtice.

AND that (which is ſtated in the text CXLI) *is forbidden* without mutual conſent; but with mutual conſent even undivided brothers may become ſureties and ſo forth: after partition they may ſo act even without mutual conſent.

The Mitácſharà.

SURETIES are of four ſorts.

*THE text at large ſtands thus in the code of that legiſlator; "If the evidence be diſcordant, the teſtimony of the greater number ſhall prevail; if the witneſſes be equal in number, the teſtimony of the virtuous; if virtuous men depoſe two inconſiſtent facts, the teſtimony of thoſe, who are moſt eminent by their honeſty."

CXLII.

VRĬHASPATI:—FOUR ſorts of ſureties are mentioned by ſages in the ſyſtem of juriſprudence; for appearance, for honeſty, for paying a ſum lent, and for delivering the debtor's effects.

2. THE firſt ſays, "I will produce that man;" the ſecond ſays, "that man is truſt worthy;" the third ſays, "I will pay the debt;" the fourth ſays, "I will deliver his effects."

3. ON failure of their engagement, the two firſt, *but not their ſons*, muſt pay the ſum lent, at the time ſtipulated; the two laſt, on default *of the borrowers*, and even their ſons, if they die, *and leave aſſets*.

THE conſtruction is, four ſorts of ſureties are mentioned in the ſyſtem of juriſprudence. The firſt for appearance, that is, for producing the party; in ſhort, he is ſurety for appearance. So likewiſe in reſpect of ſureties for honeſty and for payment. "For delivery of the debtor's effects;" for delivery of his aſſets to the creditor.

The *Retnácara*.

THUS the creditor ſays, "he will not repay my loan, for he is diſhoneſt; who will obtain the money from him and pay it to me?" In reply, the ſurety for producing the debtor's aſſets ſays, "I will deliver his aſſets." *In* the ſubſequent verſe, *the terms*, "I will deliver his effects," are expounded "I will deliver aſſets of that debtor equal to the ſum lent," that is, effects ſufficient for the purpoſe of payment.

BUT modern authors expound it, ſurety for the delivery of the debtor's mortgaged property. For inſtance, the borrower contracts a debt on the mortgage of a field; and the creditor aſks, "who will deliver to me the produce of that field?" In ſuch a caſe, the ſurety for the delivery of the debtor's effects ſays, "I will deliver his property;" that is, the property of this debtor, namely the produce of the mortgaged field.

MISRA contends for another reading, *rĭné drăvyárpané* inſtead of *rĭni dravyárpané*. It is explained, for reſtoring a thing lent to be uſed. A thing lent for uſe is any thing which a man aſks and obtains from another, ſuch as ornaments and the like. For inſtance, one ſays, "give me ornaments for decoration on a day of feſtivity at my houſe;" the owner aſks, "if thou do not reſtore them, what ſhall be done?" In ſuch a caſe, the ſurety for delivery ſays, "I will reſtore theſe effects." Here, ſince thoſe ornaments are the ſole property of the original owner, there can be no payment, it is therefore ſaid for delivery or reſtoration. Conſequently ſureties for appearance and honeſty may concern a loan for uſe as well as for conſumption: in reſpect of a debt there is alſo a ſurety for payment; and in reſpect of loans for uſe, there is alſo a ſurety for reſtoring the chattel. In caſes of debt, therefore, ſureties are of three ſorts; and there are alſo three ſorts of ſurety for reſtoring a chattel: but generally ſureties are of four ſorts. This gloſs is conſiſtent with the ſenſe *of the text*.

ON this we remark, that *rĭné* is a reading approved by SULAPA´NI. The conſtruction is, "in reſpect of debts, four ſorts of ſureties are mentioned." When an artiſt is required by the king for ſervice during a long ſpace of time, there are only three ſorts of ſureties for him; a ſurety for appearance, a ſurety for honeſty, and a ſurety for work. In ſome inſtances ſureties are of five ſorts as will be mentioned. But in matters of debt there are only four ſorts of ſurety. The meaning of "ſurety for delivery of effects" muſt be explained according to the modern interpretation, or according to the preceding gloſs.

HERE an obſervation ſhould be made in regard to what has been already noticed in the diſcuſſion of loans ſecured by a pledge. Some perſon lends money to a ſervant, being told by his maſter, "I will not pay my ſervant's wages unknown to you." It has been ſaid, that in ſuch a caſe the ſervant's maſter becomes a ſurety: and according to the modern interpretation, and the laſt gloſs, he is only ſurety for delivery; but according to other opinions he is ſurety for honeſty. *As* a creditor, relying on ſome perſon's affirmation, "this man is truſtworthy," lends money to the borrower; ſo *in this inſtance*, he lends money to a borrower in confidence of

recovering

recovering the ſum from him, relying on the promiſe, "I will not pay his wages unknown to you." The ſervant's maſter ſhall therefore be compelled to pay the debt, if he falſify his word. But he ſhall only be compelled to pay the amount of the wages, and not the whole debt, if it exceed the wages; for the ſervant's maſter only became ſurety for a debt equal to the wages.

THE ſecond ſays, "that man is truſtworthy." (CXLII 2); this form is merely illuſtrative, as has been already noticed. "The two firſt muſt pay the ſum lent, on failure of their engagement" (CXLII 3); the two firſt, the ſurety for appearance and the ſurety for honeſty, muſt pay it on failure of their engagement, that is, ſhould the words uttered by them prove untrue. For example; if the ſurety, who ſaid, "I will produce that man," do not produce him, he muſt pay the debt. So the ſurety for honeſty, who ſaid "that man is truſtworthy; he is honeſt and will not be averſe from diſcharging the debt;" or, "he will not take refuge with thy profeſſed enemy;" muſt pay the debt, if it be proved that the debtor evades the payment of the debt, is diſhoneſt, or has taken refuge with a profeſſed enemy of the creditor. The ſame muſt be underſtood with reſpect to the maſter's ſervant in the caſe ſuppoſed.

THE ſurety for honeſty is belied, when the debtor does not pay the debt, and that ſurety muſt therefore make it good. It is the ſame in the caſe of a ſurety for payment. Does it not follow, that there is no difference between a ſurety for honeſty and a ſurety for payment? No; they differ in many points. If the ſurety ſaid, "that man is honeſt;" and afterwards if the debtor, being reduced to indigence by conflagration, by the depredations of robbers or the like, have no aſſets whatever for the payment of his debts, his honeſty is unimpeached; for *in ſuch circumſtances* there is no ſin in his not diſcharging the debt: the ſurety for honeſty ſhall not in this caſe be compelled to pay the debt. But if the ſurety ſay, "I will pay the debt," then indeed that ſurety for payment ſhall be compelled to pay it. Such is the difference. Again; if the ſurety for honeſty ſay, "that man is wealthy," in ſuch a caſe, ſhould it be proved that he was then indigent, the ſurety for honeſty or truſt ſhall pay the debt, even though the inability of the

debtor

debtor be the cauſe of its remaining undiſcharged *by him*. But, if wealthineſs be proved, and the debtor withhold payment through diſhoneſty or the like, a ſurety for payment would in that caſe be compelled to diſcharge the debt, not the ſurety for truſt. This alſo conſtitutes a difference. There is again a difference in the caſe of the debtor's deceaſe; and various diſtinctions may alſo be deduced from other circumſtances.

In fact, when the ſurety for honeſty ſays, "that man is truſtworthy;" if he punctually paid debts formerly contracted from others without diſpute, and never did a diſhoneſt act, but ſubſequently practiſe knavery in regard to the payment of this debt, the ſurety is not in that caſe amenable; for none can know future events. But, when the ſurety for honeſty ſays, "that man will practiſe no knavery; of this I am well aſſured; confiding in my words, lend him the money without heſitation;" then indeed, ſhould the debtor afterwards practiſe knavery, the fooliſh ſurety muſt pay the debt. If a ſurety affirm, that a diſhoneſt borrower is honeſt, then this ſurety for honeſty is belied and muſt pay the debt. Providing for this caſe, the text of VRĬHASPATI expreſſes, "the two firſt muſt pay the ſum lent."

"AT the time ſtipulated" (CXLII); at the term, as ſtipulated *by the debtor*. For example; when the debtor promiſed, "I will diſcharge the debt in ſuch a year and month, on ſuch a day," it muſt be paid on that very day in that month and year.

"THE two laſt (the ſurety for payment and the ſurety for delivery), on default;" *they ſhall be compelled to fulfil their engagements*, if they do not ſpontaneouſly pay the debt or deliver the effects.

The *Retnâcara*.

HERE "at the ſtipulated term," muſt be ſupplied after the words "pay the debt."

"IF they be dead;" literally, without them: on failure of the ſurety for payment and of the ſurety for delivery, in conſequence of their death, abſence, or religious ſecluſion from the world. Conſequently, ſhould a

ſurety

ſurety for appearance or honeſty die or go to a foreign country, his ſon is not bound; but if a ſurety for payment or delivery die or go to a foreign country, his ſon is held bound.

It ſhould be here noticed, that, ſo long as the ſurety for appearance or honeſty be forthcoming, the debt is ſecured by a ſurety and bears intereſt at the rate of an eightieth part increaſed by an eighth (XXVII). If they die, or go to a foreign country whence their return cannot be expected, the debts are thenceforward unſecured by pledge or ſurety, and bear intereſt at the rate of two in the hundred. But the grandſon of a ſurety for payment or for delivery is not bound *by his grandfather's engagements*, as will be mentioned.

CXLIII.

Nárada: — Three ſorts of ſureties, for three purpoſes, are mentioned by the wiſe; for appearance, for payment, and for honeſty:

2. If the debtors fail in their engagements, or if *his* confidence miſled *the creditor*, the ſurety muſt pay the debt; and ſo *muſt the ſurety for appearance*, if he do not produce *the debtor*.

For three purpoſes in reſpect of things, namely for payment, appearance, and honeſty, three ſorts of ſureties are mentioned. What is to be done by them? The ſage declares it (CXLIII 2). "If the debtors fail in their engagements," if they do not diſcharge the debt, "the ſurety," namely the ſurety for payment, muſt pay the debt. "If *his* confidence miſled *the creditor*;" that, whereby a man confides, is confidence. If what is meant by that term, namely the confidence of the ſurety for honeſty, produce incongruity, or excite an erroneous notion, (for the word has an inflection which bears a cauſal ſenſe;) that is, if the aſſertion of the ſurety produce errour, or in other words if it prove falſe, *he muſt pay the debt*. If the reading be *vibódhité* inſtead of *viródhité*, *it muſt be thus explained*; if confidence, or the notion excited by the aſſertion of the ſurety for honeſty, be miſconceived,

ceived, or prove contrary to fact; that is, if it prove falſe; or, in ſhort, if the debtor be diſhoneſt; the ſurety, namely the ſurety for confidence, muſt pay the debt. Such is the meaning. "If he do not produce *the debtor in court;*" the text muſt be ſo ſupplied: if he do not compel the appearance of the debtor, the ſurety, namely the ſurety for appearance, muſt pay the debt.

BUT the ſurety for delivery is not here mentioned; in the text of NA'REDA, therefore, three ſureties only are noticed. The apparent inconſiſtency is thus reconciled according to MISRA; the text of NA'REDA concerns only ſureties for debts, but the text of VRĬHASPATI concerns both loans for conſumption and loans for uſe; there is not conſequently any contradiction. But according to others the ſurety for delivery falls under the *general* deſcription of ſurety for payment; for there is no *material* difference between a ſurety for the delivery of mortgaged property, or of the debtor's aſſets, and one who has undertaken the payment *of the debt:* entertaining this notion, NA'REDA has only mentioned three ſorts of ſureties. Diſtinguiſhing this form of agreement, "if the debtor do not pay the debt, it ſhall be paid by me," from this form, "obtaining aſſets from the debtor, I will deliver them," or diſtinguiſhing the engagements to pay the money lent, and to deliver the property mortgaged, VRĬHASPATI has diſcriminated the ſurety for payment and ſurety for delivery: there is not conſequently any inconſiſtency. In effect there is no difference of meaning. The text is cited by HELA'YUDHA and CHANDE'SWARA, and is therefore inſerted in this digeſt, though not quoted by LACSHMID'HARA and others.

CXLIV.

YA'JNYAWALCYA:—SURETISHIP is ordained for appearance, for honeſty and for payment; the two firſt *ſureties, and not their ſons,* muſt pay the debt, on failure of their engagements, but even the ſons of the laſt *may be compelled to pay it.*

THE two firſt, the ſurety for appearance and ſurety for honeſty, muſt pay it on failure of their engagements. Even the ſons of the ſurety for payment may be compelled to pay the debt. The *Dípacalicá.*

SINCE

SINCE the ſon of the ſurety for payment is alone declared liable for the debt, it appears that the ſon of a ſurety for appearance or for honeſty is not liable for the debt. Herein the author of the *Mitácſhará* concurs: but he has delivered this gloſs on the term "honeſty" or truſt; *the ſurety ſays*, "confiding in me, lend him the money; he will not deceive thee: for he is ſon of ſuch a one; his land is very fertile; and he has an excellent eſtate:" and all other circumſtances are *in this manner* almoſt fully particularized. That no real inconſiſtency with the text of VRĬHASPATI exiſts, has been already explained in the gloſs on the text of NA´REDA.

CXLV.

CA´TYA´YANA: — *Let the king* cauſe ſureties to be given for payment, for appearance, for confidence *or for honeſty*, for the matter in conteſt, and for ordeal; on failure of their engagements *they ſhall be liable* according to circumſtances.

"FOR payment;" for the diſcharge of the debt, and for the delivery of mortgaged property and the like. "For appearance;" for producing the debtor. "For confidence;" for truſt: the words are ſynonymous. "For the matter in conteſt" with the creditor. "For the performance of ordeal:" that ſurety ſhall be compelled to pay the debt "on failure of his engagement;" or, *in other words*, if the engagement be not performed. Such is the ſenſe, as apprehended by CHANDE´SWARA.

"FOR the matter in conteſt;" a ſuit being inſtituted by the creditor for the recovery of money from the debtor, he, whom the king takes as a ſurety leſt the debtor or creditor abſcond through apprehenſion of loſing the cauſe, is ſurety for the action, the fourth ſort of ſurety, as *alſo directed* by a text which will be quoted from YA´JNYAWALCYA.* This ſurety ſays, "if that man do not appear to *defend* the ſuit, he ſhall be produced by me;" or he ſays, "I will perform what may be required from that man."

AFTERWARDS, during the procedure, if ordeal muſt be performed by

* NOT again cited in this digeſt. I ſubjoin the tranſlation according to the gloſs of RAGHUNANDANA: "From both parties a ſurety muſt be taken, able to perform the decree *by paying the ſum adjudged and ſo forth.*"

the

the party himſelf, he, whom the king, under the text of YA´JNYAWALCYA, takes as a ſurety, ſuſpecting the creditor's or debtor's wiſh to abſcond becauſe he perceives the probable detection of his falſehood, is ſurety for ordeal, the fifth ſort of ſurety. He ſays, "when this debtor ſhould paſs "ordeal, I will then produce him;" or he ſays, "I will perform his office." This ſhould be underſtood incidentally in the caſe of a ſurety for the creditor.

THIS text ſhould be placed under the title of adminiſtration of juſtice. It carries an *apparent* inconſiſtency with the text of VRĬHASPATI, where four ſorts of ſureties are propounded. That may be reconciled: the text of VRĬHASPATI concerns debts alone, but the text of CA´TYA´YANA concerns law ſuits in general; there is no contradiction. Or the ſureties for the action and for ordeal fall under the deſcription of ſureties for appearance, diſtinguiſhed, *however*, by the difference of agreement. Accordingly MISRA ſays, the ſurety for attending the deciſion of the ſuit and for ordeal and the like, as mentioned by CA´TYA´YANA, is included in the ſurety for appearance and the reſt.

ACCORDING to the laſt interpretation *of the text of* VRĬHASPATI, conſiſtent with the gloſs of ŚŪLAPA´NI, "matters of debt" being there ſpecified, the apparent contradiction is obviouſly reconciled in this mode: in matters of debt there are four ſorts of ſureties, but for law ſuits *in general* there are five ſorts. Some however hold, that, when a ſuit is inſtituted, he, who is appointed by the plaintiff, or defendant, who is himſelf unable to act, to be his repreſentative for the purſuit or defence, is ſurety for the action. By the nature of the undertaking, if he be caſt, his principal is caſt; and, if he prevail *in the ſuit*, his principal prevails. The king ſhould exact from the principal a written engagement in this form, "his ſucceſs or defeat ſhall fall on me."

A WRITTEN acknowledgement ſhould be executed by ſureties in their own handwriting, or in that of another perſon. In the margin of the written contract of debt the ſurety may write, "I ſuch a one, ſon of "ſuch a one, will produce unto thee ſuch a one thy debtor, on a certain

"day,

" day, month and year, *(ſpecifying the time* when the debt ought to be " diſcharged,) provided he have not paid the debt before that time; ſhould " I fail herein, I will myſelf diſcharge the debt with intereſt." A ſurety for confidence ſhould execute a ſimilar obligation, but call himſelf " ſurety for confidence," and after inſerting the name of the borrower and other particulars, conclude by declaring " that man is honeſt; if this aſſertion prove falſe, the debt ſhall be paid by me." So in the caſe of a ſurety for payment, for delivery, for the action, or for ordeal, the undertaking abovementioned ſhould be duly recorded in writing. By the ſurety for the action, according to the laſt mentioned opinion, an undertaking may be reduced to writing in this form, " I will anſwer the plea ſo long as the ſuit remain *undecided*." This and other points may be reaſoned according to received practice.

THAT the debt, not being diſcharged by the debtor at the ſtipulated period, muſt be paid by the ſurety for payment, is evident from the expreſſion, " on failure of their engagements." A ſpecial rule is declared in reſpect of a ſurety for appearance.

CXLVI.

CÁTYÁYANA propounds it:—IF a ſurety for the appearance of a debtor produce him not at the time and in the place *agreed on*, he ſhall diſcharge the debt, unleſs he was prevented by the act of GOD or the king.

2. AFTER the time *of difficulty* has paſt, the ſurety, who ſtill does not produce him, ſhall pay the debt; and the ſame law is declared, even if the debtor ſhould die.

" AT the time and in the place;" the ſurety for appearance, having promiſed, " I will produce the debtor at ſuch a time, and in ſuch a place," if he do not produce him at that time and in that place, becomes liable for the condition of the writing, namely for the debt; that is, he muſt pay the debt to the creditor; ſuch is the ſenſe of the firſt part *of the text:* and this was conveyed by a former text; but a ſpecial rule is ſubjoined; " unleſs he was prevented by the act of GOD or the king." If the debtor

abſcond through fear of the king, in conſequence of another's fault, or if he go to another country, promiſing to return at the cloſe of a month, but be detained by illneſs a year *or more*, the ſurety for appearance is not blamable for not producing the debtor.

"AFTER the time has paſt;" after the king's violence has paſt away and ſo forth. After relief from *apprehenſion of* the king's violence, or after his return to his home on recovery from ſickneſs, if the ſurety ſtill do not produce him, through diſhoneſty, inability, or the like, *the king* ſhall compel the ſurety to pay the debt. The text ſhould be ſo ſupplied.

"AND the ſame law is declared, even if the debtor ſhould die;" that is, the ſurety muſt pay the debt. The *Retnácara.*

THIS opinion, literally taken, is inconſiſtent with reaſon; for favour is ſhown him, if he be prevented by the act of GOD or the king, but none is ſhown in the caſe of death, which is the moſt abſolute hindrance ariſing from the act of GOD. Its purport muſt therefore be aſſumed according to the expoſition of VACHESPATI MISRA; and that is meant in the *Retnácara.* His expoſition is as follows: when the time, at which the ſurety undertook to produce the debtor, has paſt without any hindrance from the act of GOD or the king; or, in the caſe of hindrance by the act of GOD or the king, after that *difficulty ceaſed*; if the ſurety ſtill procraſtinate, thinking, "I am ſurety for appearance and not bound for payment, I will produce the debtor two months hence, but at preſent I will attend to my own buſineſs;" in ſuch a caſe, if the debtor afterwards die, the ſurety muſt pay the debt. Such is the ſenſe of the phraſe: and this is alſo the import of the the text of VRĬHASPATI, "on failure of their engagements, the two firſt muſt pay the ſum lent" (CXLII 3). MENU alſo declares, that the ſurety for appearance muſt himſelf pay the debt, if he do not produce the debtor.

CXLVII.

MENU:—THE man, who becomes ſurety for the appearance of a debtor in this world, and produces him not, ſhall pay the debt out of his own property.

MUST

Must diſpoſe himſelf to pay the debt out of his own property.

CULLU'CABHATTA.

HERE it ſhould be obſerved, that, when the agreement is ſimply this, "I will produce or ſhow the debtor at ſuch a time," and no place be ſpecified; if he ſhow him on that very day, while buſied in holy worſhip or the like, or occupied with other affairs and ſo forth, it might be ſuppoſed on a curſory view, that the agreement is not violated; but we humbly think it reaſonable to affirm, that in ſuch a caſe the agreement is infringed; for the creditor requires the debtor to be produced at the time agreed on, that he may recover the ſum lent; he requires him to be ſo produced, as may tend to the recovery of the money: this the ſurety undertakes to fulfil, and the terms of his engagement muſt be ſo underſtood; but it is not fulfilled by indicating *the debtor* at ſuch a time, when he is not amenable: the ſurety muſt therefore ſhow the debtor at a time when he is at leiſure *and amenable*. Such is the modern mode of interpretation.

A RULE has been propounded for the caſe of a debtor abſconding through the fault of another; what is the rule if he abſcond to evade payment of the debt? On this point

CXLVIII.

VRIHASPATI declares: — LET the creditor allow time for the ſurety to ſearch for the debtor, who has abſconded; a fortnight, a month, or ſix weeks, according to the diſtance of the place, *where he may be ſuppoſed to lurk*:

2. Let no ſureties be exceſſively haraſſed; let them gradually be compelled to pay the debt; let them not be attacked if the debtor be at hand *and amenable*: ſuch is the law *in favour* of ſureties.

"FOR the debtor, who is miſſing or has abſconded;" according to the literal ſenſe of the verb *náś*, be inviſible or not to be found. "According to the diſtance of the place;" according to the remote or near ſituation of the

the place and so forth. "Gradually:" without the consent of the surety, the whole sum shall not be at once exacted at the stipulated term. "If the debtor be at hand;" if he be present, or if he be willing to pay the debt, sureties must not be required to produce the debtor or pay the debt.

In respect of a surety for honesty, a text of law, cited in the *Retnácara*, propounds a rule.

CXLIX.

Smriti:— From a malicious debtor, who is on any account disposed, through enmity, to take the protection of a stranger *professedly hostile to his creditor*, or to do any thing inauspicious *to him*, or to adopt the conduct of wicked men,

2. Let a surety for honesty be taken *as a precaution* against such behaviour; if his conduct belie the promise, his surety must pay the debt.

"From a malicious debtor, who is disposed &c;" whose mind is bent on taking the protection of a stranger, that is, of a professed enemy to the creditor; on doing any thing inauspicious to the creditor; or on adopting the conduct of wicked men, such as thieves and the like. Why should a debtor take the protection of his creditor's antagonist? In reply to this he adds "through enmity:" lending his own money the creditor confers a favour; when he demands his money, the malice of a wicked man is roused. This is obvious.

The *Retnácara*.

"*As a precaution* against such behaviour;" lest he should take refuge with a professed enemy *of the creditor* and so forth: let some person be taken as surety for honesty or confidence; that is, for the certainty, that he will not seek the protection of a professed enemy and so forth. Such is the sense of the first phrase. He is in reality surety for honesty. He says, "that man is honest, he will be ready to pay the debt, and will not take refuge with *thy* professed enemy."

"If

"If his conduct belie the promise;" if it be different from what was promised: taking the protection of the creditor's enemy, if he discharge not the debt, the king shall compel the surety to pay the debt at the close of the stipulated term. Such is the sense of the last phrase: and this is also the import of VRĪHASPATI's expression, "on failure of their engagements, the two first must pay the sum lent."

ON this *text* (CXLVIII) CHANDĒSWARA remarks, that, "wherever confidence is wanting, the king should require a surety for confidence *or honesty* to be given." Accordingly, if the creditor refuse the loan, apprehending the insolvency of the borrower, and some person affirm, "he is not insolvent;" and if the creditor, confiding in that assurance, lend the money; that person also is a surety for confidence, as has been already noticed. This and other points may be reasoned. Hence BHAVADĒVA has said, if it be affirmed by some person, "that man is not thy debtor, but some *other* honest man," should it be afterwards proved by other evidence, that he was the debtor, that cheat is *deemed* a surety. According to this opinion of BHAVADĒVA, it must be understood, that, if a cheat, sent by the debtor, make such affirmation, he is only *deemed* a surety for confidence; but, if he make that affirmation when questioned by the king or the umpire, he is a perjured witness, and shall undergo the punishment of false testimony.

IN law suits there are three sorts of sureties; the representative of the party, who pleads his suit; the surety for his appearance; and the surety for the sum which may be due from him. This and other points may be understood from popular *practice*. It has been almost expressly declared already, and should be further discussed under the title of administration of justice.

WHAT should be done in the case of a surety for ordeal, CĀTYĀYANA declares.

CL.

CĀTYĀYANA:— AT the time and place when the ceremony should be performed, if he fail in ever so small a degree,

the ſurety ſhall be compelled to pay the ſum as a juſt debt: ſuch is the law reſpecting proved debts.

"WHEN the ceremony ſhould be performed;" when ordeal ſhould be performed.

The *Retnácara.*

THE meaning is, that this concerns ordeal. If the ſurety for ordeal, having declared, "when ordeal ſhall take place, I will produce that man," ſhould paſs that day, however inconſiderable the delay may be; if he delay it one watch, or even half a watch beyond the day appointed; the ſurety, who entered into that engagement muſt pay the ſum "as a juſt debt" proved to be due. So much has been delivered by way of commentary on the *preceding* text of CA'TYA'YANA (CXLV). MENU has delivered a text of the ſame import with the expreſſion of VRĬHASPATI, "and even their ſons, if they be dead" (CLI 2).

"A SURETY for payment" (CLI 2); a ſurety, who has formally declared, "I will pay *the debt.*" Since the text (CXLII) expreſſes, "even their ſons if they be dead," "heirs" *may here ſignify ſons* (CLI 2).

The *Retnácara.*

EVEN the ſurety for delivery, mentioned by VRĬHASPATI, is conſidered by MENU as the ſame with the ſurety for payment. By ſpecifying the ſurety for payment, he exempts the ſon of a ſurety for appearance or for honeſty: and that has been expreſsly declared by MENU in the text, which precedes the paſſage quoted.

CLI.

MENU:—BUT money, due by a ſurety, or idly promiſed *to muſicians and actreſſes*, or loſt at play, or due for ſpirituous liquors, or what remains unpaid of a fine or toll, the ſon *of the ſurety or debtor* ſhall not *in general* be obliged to pay.

2. SUCH is the rule in caſe of a ſurety for appearance *or*

good

good behaviour; but if a ſurety for payment ſhould die, the judge may compel even his heirs to diſcharge the debt.

"MONEY due by a ſurety;" what was payable by a ſurety.

CULLŪCABHATTA.

IDLE promiſes and the reſt will be diſcuſſed in the chapter on payment of debts.

"THE ſon ſhall not be obliged to pay money due by a ſurety;" this, which had been previouſly mentioned, muſt be underſtood of money due by his father, who was ſurety for appearance.

CULLŪCABHATTA.

THE word "appearance" muſt allude to the debtor as a near term. The honeſt and diſhoneſt proceeding of a debtor had alſo been propounded: hence the ſurety for honeſty is alſo comprehended under the text. This YA'JNYAWALCYA makes evident.

CLII.

YA'JNYAWALCYA:—SHOULD a ſurety for the appearance or the honeſty of another die, his ſons need not pay the debt; but the ſons of a ſurety for payment or delivery muſt pay *the ſum lent, or deliver the thing undertaken.*

"SURETY for the honeſty of another;" ſurety for *the good behaviour of the debtor*, giving confidence *to the lender.* "Die" is illuſtrative of ſeclusion from the world, remote abſence and the like. "The ſons of a ſurety for payment:" the literal interpretation is this; the ſons of thoſe, who are bound for payment, that is, who are ſureties for the diſcharge of a debt or the delivery of mortgaged property, muſt pay the ſum lent.

"THOSE who are bound for payment;" the ſons of a ſurety for payment.

The *Retnácara.*

A SURETY for delivery is comprehended under the terms of the text. That in ſome inſtances the ſon of a ſurety for appearance muſt alſo diſcharge the debt, CA'TYA'YANA declares.

CLIII.

CA'TYA'YANA: — SHOULD a man become ſurety for the appearance of a debtor, from whom he had received a pledge *as his own ſecurity*, the creditor, *if that ſurety die*, may compel his ſon to pay the debt on proving the whole caſe.

IF he became ſurety for the appearance of the debtor, after receiving a pledge *for his indemnity*, and the whole caſe be proved by the claimant or creditor; then, if that ſurety be dead, his ſon may be compelled to pay the debt. "Any how" and "the perſon bound" muſt be underſtood, for the purpoſe of making the agent in the ſentence the ſame, agreeably to rules of grammar; "*ſhould a man become ſurety after receiving a pledge, and be any how proved to have received that pledge &c.*" "Proved" is in the regular paſſive form.

THUS, a borrower aſks a loan of a moneylender, and he requires a ſurety; but the ſurety, for his own aſſurance, demands a pledge: in ſuch a caſe, he became ſurety for the appearance of a debtor, from whom he had received a pledge. If that ſurety die, and the debtor alſo die or be unable to diſcharge the debt, the ſon of the ſurety may be compelled to pay it. That debt, however, was not ſecured by a pledge *delivered to the creditor*; the intereſt therefore ſhall be computed at the rate of an eightieth part increaſed by an eighth. "Appearance" is here illuſtrative of a more general ſenſe. Hence, if a ſurety for honeſty alſo take a pledge *as his indemnity* and die *unexonerated*, his ſon may alſo be compelled to pay the debt; for MENU, uſing the expreſſion "a ſurety other than for payment," intends the ſurety for honeſty as well as the ſurety for appearance, who are both different from the ſurety for payment. May not the expreſſion uſed in the text of MENU (CLIV), "a ſurety other than for payment," be reſtricted to the ſurety for appearance, ſince that coincides with the text of CA'TYA'YANA? If the ſurety for honeſty have likewiſe received a pledge,

why

why ſhould not his ſon pay the debt, ſince the reaſon of the law applies equally to both? Accordingly this gloſs is delivered in the *Mitácſharâ* on the text of CA'TYA'YANA (CLIII): "ſurety for appearance" is illuſtrative of ſurety for honeſty. However, the text is there read, "even without aſſets left by his father," inſtead of "on proving the whole caſe."

CLIV.

MENU:—ON what account then is it, that, after the death of a ſurety other than for payment, the creditor may *in one caſe* demand the debt *of the heir*, all the affairs of the deceaſed being known and proved?

THIS is a queſtion propoſed. "Surety other than for payment;" different from the ſurety for payment, namely a ſurety for appearance *and ſo forth*. "All the affairs of the deceaſed being known and proved;" the circumſtances, ſuch as the receipt of a pledge, *being proved;* that having been taken, and the receipt of the pledge by the ſurety being known and proved, and ſo forth. "The creditor, literally the giver;" the perſon, who delivered a loan. After the death of that ſurety, on what account, and from whom, can he demand payment of the debt, ſince the ſurety *himſelf* is dead? This is a queſtion propoſed. The anſwer follows.

CLV.

MENU:—IF the ſurety had received money from the debtor, and had enough to pay the debt, the ſon *of him*, who ſo received it, ſhall diſcharge the debt out of his *inherited* property: this is a ſacred ordinance.

IF the debtor had given money, if money had been given by the debtor (to the ſurety of courſe, from the purport of the text;) then the ſurety has enough to pay the debt; he has a lien on money applicable to the payment of the debt (money of courſe received from the debtor). His ſon therefore ſhall diſcharge the debt "out of his property." The money ſo received is referred ſecondarily to his ſon. "This is a ſacred ordinance;" it is directed in the ſyſtem of juriſprudence, that he ſhall diſcharge the debt.

Such is the interpretation delivered in the *Retnácara*. But CULLŬCA-BHATTA explains the term as an epithet of ſurety; it ſignifies one, to whom property has been given as a pledge: and thereby having in his hands a lien on a ſum ſufficient to pay the debt, *his ſon ſhall diſcharge it*.

HELA'YUDHA otherwiſe expounds the phraſe, "all the affairs of the deceaſed being known and proved:" 'the circumſtance of his not having received any pledge being known and proved.' Thus, if he became ſurety without having received a pledge, and the whole caſe be known and proved, on what account could the creditor demand the debt *from his ſon* after his death? Of courſe on no account. Hence, after the death of one, who became ſurety for the appearance of another without receiving a pledge, the judge ſhall not compel his ſon to diſcharge the debt. But the ſubſequent text (CLV) is explained as above. In effect there is no difference. However, the law concerning money due by a ſurety for appearance, already propounded (CLI), would be *vainly* repeated in the ſubſequent text (CLIV).

"IF the ſurety had received money; if property had been delivered to him not amounting to gift. Conſequently, if effects had been delivered to the ſurety by way of depoſit, without declaring a poſitive gift and ſo forth; if the ſurety be ſuch, *we ſay*, his ſon ſhall diſcharge the debt out of his property, namely the property which is in his poſſeſſion, held as a depoſit. He muſt diſcharge it although he hold no property given *to him*. This takes place, when the ſurety for appearance has not produced the debtor, and that debtor afterwards dies, or though living is inſolvent. This caſe is intended. Or with a view to the caſe of a ſurety for payment, this text (CLIV) enforces the ſenſe of the preceding text. "All the affairs of the deceaſed being known and proved;" the whole circumſtance of his not having received a pledge being known and proved. On what account then might the creditor demand the debt, after the death of a ſurety for appearance, who had received no pledge? It follows of courſe, that on no account can he demand it. By the condition ſpecified, that the receipt of no pledge be proved, it is intimated, that, if he became ſurety for the appearance of a debtor, from whom he received a pledge, then, ſhould he die, the creditor may recover the debt from his ſon.

If there be ſeveral ſureties, by whom muſt the debt be paid? And what ſhall be the deciſion of ſuch a caſe? For inſtance; if there be many ſureties for payment, or many ſureties for appearance, or honeſty, who have received a pledge; in ſuch a caſe may payment be required from any one of them? or muſt they all pay their proportionate ſhares of the debt? or each ſeverally pay the whole ſum?

CLVI.

YA'JNYAWALCYA: — WHEN there are two or more ſureties jointly bound, they ſhall pay their proportionate ſhares of the debt; but, when they are bound ſeverally the payment ſhall be made *by any one of them*, as the creditor pleaſes.

AT the time of contracting the debt, if it were ſettled by the expreſs declaration of the creditor or of the debtor, or by the engagement of the ſureties themſelves, that the creditor ſhall receive the debt from the hands of any one of ſeveral ſureties bound for the ſame debt, this text propounds a rule of deciſion for that caſe. Two or more perſons may become ſureties in conſequence of the creditor's requiſition: for inſtance, he may require ſeveral ſureties, reflecting, "if a ſingle ſurety die as well as the debtor, from whom could the debt be recovered?" Or the debtor may ingenuouſly give ſeveral ſureties. Other caſes may be eaſily ſuppoſed.

THE ſenſe of the text is this; when there are many ſureties, they muſt make up the ſum according to their proportionate ſhares, and pay it to the creditor. The whole meaning is, that the general law directs payment of the debt by proportionate ſhares in the caſe of many ſureties for the ſame debt. He propounds a ſpecial rule: "but when they are bound ſeverally &c." If they be bound in the ſame manner as a ſingle ſurety; if any man ſingly become ſurety for a debt, as that whole debt muſt be diſcharged by him, ſo, if they become ſeverally bound for the payment of the whole debt, *it may be exacted from any one of them.* When theſe ſureties become ſo bound, the payment ſhall be made *by any one of them*, as the creditor pleaſes. Conſequently, ſhould the creditor chuſe to require payment of the

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whole debt from DE'VADATTA alone, it muſt be diſcharged by DEVADATTA alone: if he chuſe to require payment of the whole debt from any one of them, it muſt be paid by any one of them. But, if he chuſe to require it from all proportionally; it muſt be diſcharged by all the ſureties. In this and other ſimilar modes ſhould be underſtood the creditor's option.

IF the creditor be deſirous of exacting payment of the whole debt from each of the ſureties, what would be the conſequence? Since that is contrary to juſtice, his wiſh of exacting an undue ſum would be fruitleſs: for who can obtain many hundred *ſuvernas* for a loan of one hundred *ſuvernas?* To detail the reaſon of the law would unneceſſarily ſwell the book; it is therefore unnoticed.

SHOULD the creditor chuſe to exact payment of the whole debt from any one ſurety, it is ſettled that he muſt diſcharge it. Having paid it, may that ſurety recover from all the other ſureties their proportionate ſhares of the debt? On this queſtion a certain author has ſaid, he ſhall not recover *their proportionate ſhares from the other ſureties*, ſince no law *has expreſsly declared it*: for the general rule directs, that "they ſhall pay their proportionate ſhares;" and it is intimated by a ſpecial rule, that "payment ſhall be made as the creditor pleaſes." Conſequently, when there are two or more ſureties bound like a ſingle ſurety for the payment of the whole debt without mutual connexion *or joint reſponſibility*, then the payment ſhall be made as the creditor pleaſes: he may exact payment of the whole debt from any one of them, or from all the ſureties, under the authority of that ſpecial rule. In a different caſe, when two or more ſureties are jointly bound, they muſt pay their proportionate ſhares of the debt: how could one ſurety, having diſcharged the whole debt, recover from the reſt their proportionate ſhares, when all were ſeverally bound like a ſingle ſurety? The law forbids it.

THAT is wrong; for the general and particular rules would be irrelevant, ſince there would be no contradiction of ſenſe, *or exception*. In all caſes where two or more perſons have become ſureties, all the ſureties ſhall pay their proportionate ſhares of the debt; but, if they be ſeverally bound like a ſingle ſurety, another diſtinction is ſtated, namely that payment ſhall be

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made as the creditor pleaſes: as in the injunction, "give curds to the prieſts, *and diluted curds to the* CAUNDINYAS," meaning to thoſe, who have officiated at the ſolemn rites.* In fact, the expreſſion, "as the creditor pleaſes," ſhould be conſidered only as a circumſtance of the action. That action is ſuggeſted by the neareſt term, "they ſhall pay:" and the agents in the ſentence are the ſureties juſt mentioned. It appears therefore, that immediate payment muſt be made by the exertion of any one of them, or by all the ſureties, at the option of the creditor: and that exertion conſiſts in making up the ſum by any poſſible means, and ſo forth. It follows, that all muſt *ultimately* pay their proportionate ſhares of the debt. There is not conſequently any difficulty. Again; if any one ſurety refuſe to pay his ſhare *of the debt*, the king ſhall compel him to pay it. But if any one of many ſureties ſay, "I will alone diſcharge the debt," no law directs, that it ſhall be ſolely paid by him; reaſon alone ſuggeſts it.

WHEN the debtor gives a ſecond ſurety for payment, or for appearance, to the ſurety for payment; in that caſe alſo, like a creditor obtaining the ſum from the ſurety who is reſponſible to him, the original ſurety ſhould pay the debt to the creditor; but the ſubordinate ſurety cannot be attacked by the original creditor. So in other caſes a rule of deciſion may be deduced by *the reader* himſelf.

IF the ſureties become ſeverally bound, each for his own undertaking, they may each be ſeverally compelled to pay the whole ſum, *for which he became bound*, to the creditor. In this gloſs of the *Vivada Retnácara*, "each ſeverally" ſignifies one by one; intending the caſe of more than one *ſeparate engagement*.

"AS the creditor pleaſes;" for inſtance, when the engagement is made, the creditor ſays "at my option the ſum may be exacted from any one ſurety; I am not reſtrained to make a joint demand; any one ſurety muſt pay the whole ſum." Such is the ſenſe.

The *Vivada Chintámeni*.

* I inſert the whole example, which is incomplete in the citation. The ſpecial injunction is an exception to the general precept. But a rule, unconnected with, and independent of, another, is not a particular or exceptive rule.

THIS point has been ſufficiently explained by the text of VRĬSHASPATI (CXLII 3). If the ſurety for payment die, it is eſtabliſhed that the debt may be recovered from his ſon; ſhall it be recovered with or without intereſt?

CLVII.

VYÁSA:—THE ſon of a ſon ſhall *in general* pay the debt of his grandfather, but the ſon *only* ſhall pay the debt of his father incurred by his becoming a ſurety, *and both of them* without intereſt; but it is clearly ſettled, that their ſons, *the great grandſon and grandſon reſpectively*, are not *morally* bound to pay.

THE ſenſe is, the grandſon muſt pay the debt which was contracted by his paternal grandfather without giving a pledge. This muſt be conſidered as appertaining to the title of payment of debts. "The debt of his father incurred by his becoming a ſurety;" if his father became ſurety for the payment of a debt due from any perſon; or, taking a pledge, became ſurety for his appearance or honeſty; then, ſhould the father die, his ſon muſt pay that debt without intereſt; he muſt only pay the exact ſum borrowed, and no intereſt upon it. Conſequently the entire debt of the grandfather muſt be paid by the grandſon without intereſt; and the debt of the father, incurred by his becoming a ſurety, muſt be paid by the ſon without intereſt.

The *Retnácara.*

HERE the entire debt of the grandfather ſignifies the debt contracted by the grandfather with a ſtipulation of intereſt. "Their ſons are not *morally* bound to pay;" a ſon of the grandſon, and a ſon of the ſon. The great grandſon need not pay any debt of his great grandfather, nor the grandſon the debt of his grandfather incurred by becoming a ſurety.

CLVIII.

CÁTYÁYANA:—MONEY due by a ſurety need not on any account be paid by his grandſons, but in every inſtance ſuch a debt incurred by his father muſt be made good by a ſon without intereſt.

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THE debt of a grandfather, incurred by his becoming a ſurety, need not be paid by grandſons; ſuch a debt ſhall only be paid by a ſon: ſtill, however, without intereſt. To denote this, the particle is employed. The connective ſenſe is, that the ſon is alſo exempted from the payment of intereſt. From the expreſſion "in every inſtance," a certain author has deduced, that the debt of his father, incurred by his becoming a ſurety, or on his own account, ſhall be paid by the ſon without intereſt, as a debt incurred by his grandfather *is paid* by a grandſon *without intereſt*. That is wrong; for it is inconſiſtent with a text which will be cited from VRIHASPATI (CLXVII 2), and with the gloſs of CHANDE'SWARA, "the debt muſt be paid by ſons with intereſt, as if it were their own." Hence the expreſſion "in every inſtance" muſt be underſtood to ſignify "in every inſtance of a ſurety for payment and ſo forth."

CLIX.

Smṛiti, cited in the *Mitácſharà*:—SHOULD the debtor be inſolvent, and the ſurety have aſſets, the principal only muſt be paid *by his ſon*; he is not liable for the payment of intereſt.

THIS text alſo ordains the payment of a debt without intereſt by the ſon of a ſurety for payment. What proof is there, that the debt ſhall be diſcharged without intereſt by the ſon of a ſurety for the appearance or honeſty of a debtor, from whom he had received a pledge? It ſhould not be affirmed, that the text of CA'TYA'YANA above cited, expreſſing "in every inſtance," *is authority for exempting him from the payment of intereſt*; for that may be otherwiſe expounded. Nor ſhould it be affirmed, that the text of law cited in the *Mitácſharà* may authorize that inference, if "aſſets" be explained "a pledge." The author of the *Mitácſharà* does not warrant ſuch an interpretation.

ON this point it is ſaid, there is no authority for aſſerting, that the debt ſhall be paid with intereſt. The text of CA'TYA'YANA directs generally, that a debt incurred by a ſurety ſhall be diſcharged without intereſt. Conſequently that is ſettled in every inſtance of a debt incurred by a ſurety: but

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in the preſent inſtance the conſequence might be inconſiſtent with reaſon. It cannot be true, that the ſon of him, who, having received effects worth ten pieces of money, became ſurety for a debt of five pieces, ſhall pay the debt without intereſt. If a chattel of ſmall value have been received as a pledge, then only ſhall the debt be diſcharged without intereſt; but when valuable effects have been received, why ſhould payment be accepted without intereſt, while the aſſets are ſufficient for the *whole* debt? The debt muſt therefore be diſcharged with intereſt; and the ſurety muſt reſtore the ſurplus, if there be any, to the debtor or his family.

THIS deciſion regards a pledge which may not be uſed; it is not fit, that the ſurety ſhould uſe the pledge. But, if it be uſed, payment muſt be made in proportion to the uſe and profit *of the pledge*. If it be aſked, the pledge received being of very inconſiderable value, the whole debt, even without intereſt, might not be fully diſcharged? The anſwer is, even that is admiſſible: accordingly it is expreſſed in the text of MENU, "if the ſurety had enough to pay the debt;" and in the gloſs of the *Mitácſharà*, "if he had received a ſufficient pledge." Should the ſon of the ſurety alſo die, the ſucceſſor of the debtor, who has received his heritage, ſhould withdraw the pledge from the grandſons of the ſurety, and himſelf diſcharge the debt. Such is the meaning.

IF there be two or more ſureties for the ſame debt, and one of them die leaving a ſon, ſhould it be the creditor's choice to recover the debt from the ſon, he muſt receive it without intereſt, and not with intereſt. But, ſhould it be the creditor's choice to recover the debt from another ſurety, the ſon of the deceaſed ſurety muſt pay his proportionate ſhare; but he need not pay intereſt, for he is the ſon of a ſurety. The creditor, however, may recover the debt with the whole amount of intereſt, ſince the ſurety *called upon* muſt immediately pay *the whole ſum*. Whence then can the intereſt be recovered on the ſhare of the debt which is payable by the ſon of a deceaſed ſurety? To this it is anſwered, if there be many ſureties ſeverally bound like a ſingle ſurety, ſhould any one of them die leaving no ſon or other *heir liable for the debt*, from whom could his ſhare of the debt be recovered? Conſequently, as in that caſe the ſurviving ſureties muſt contribute their proportionate ſhares

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of the deficiency, and discharge the debt, *although* "payment be made as the creditor pleases;" so in this case also, even though the son be living, he is as it were nonexistent in respect of interest: consequently the surviving sureties, together with the son of the deceased surety, must contribute their proportionate shares of the principal sum, but the amount of interest must be made good by them unaided by that son.

But some lawyers remark, when the creditor makes his election of recovering the *whole* sum from one surety, he shall receive it from one alone; how can the surety, who discharges the debt, recover proportionate shares from the rest? But, if the creditor have chosen to receive the sum from all the sureties in due proportion, then the son of a deceased surety must pay his share of the debt without interest. Again; when five persons have become jointly bound as sureties for a debt, then, should one die, his share of the debt must be received from his son without interest: but, if he leave no son or other *amenable heir*, his proportionate share is lost; since it was virtually understood when the agreement was made, that the five persons were each bound for a fifth part of the debt. Yet, if it were agreed, "should any one of us die, the debt must be discharged by such of us as survive," then the whole debt must be paid by the surviving sureties contributing their proportionate shares. This is mentioned merely as an example; that in other cases also the adjustment must be made according to the tenour of the agreement, may be easily inferred by the reader himself.

Shall the surety, *thus becoming* a creditor, recover what has been paid by him to the *original* creditor in consequence of the debt remaining undischarged by the debtor though living, but insolvent, dishonest or the like?

CLX.

Vrĭhaspati ordains:—Should a surety, being harassed, pay the debt, for which he was bound, he shall receive twice the sum from the debtor after the lapse of a month and a half.

"A surety;" a person, who has become bound *for another*. "Being

haraſſed;" being adjudged by the arbitrators to pay the debt, *in this form*, "ſince he became ſurety for that man, he muſt pay the debt to the creditor." "After the lapſe of three fortnights *or a month and a half*;" after forty five days. A debt of one hundred *ſuvernas*, having accumulated with intereſt to two hundred *ſuvernas*, is again doubled and amounts therefore to four hundred *ſuvernas*; that ſum he ſhall receive from the debtor. The cauſe of doubling the debt is the offence committed in not immediately paying it.

CLXI.

VISHNU and NĀREDA:—IF the ſurety, being haraſſed by the creditor, diſcharge the debt, the debtor ſhall pay twice as much to the ſurety.

CLXII.

YĀJNYAWALCYA:—WHEN the ſurety is compelled to pay a notorious debt to the creditor, the debtor ſhall be forced to repay double the ſum to the ſurety.

"NOTORIOUS;" adjudged by arbitrators. "Notorious" ſhould be underſtood in the text of VISHNU and NA'REDA, for it has the ſame import with the text of YA'JNYAWALCYA. VRĬHASPATI renders the meaning evident.

CLXIII.

VRĬHASPATI: — IF dull *ſureties* innocently pay the debt, when unbidden, or when required to pay another debt, how and from whom can they recover the ſum?

"DULL;" whoſe underſtanding is ſluggliſh; being ſlow *even* in their own affairs, *it is perceived, that* their minds are heavy. "Innocently;" without guile. "Unbidden" by the umpire.

The *Retnácara*.

THE meaning is, not told by arbitrators, "pay the ſum to that man." Here "unbidden by arbitrators" alſo implies, that it is not any how proved

proved by witneſſes, that the debt ſhould be paid by the ſurety. Accordingly YA'JNYAWALCYA ſays "notorious," that is, not unbidden by arbitrators. So

CLXIV.

CA'TYA'YANA: — THE ſurety ſhall *immediately* receive from the debtor, *but without intereſt*, the ſum which he has paid, when legally urged by the creditor, on proving the caſe by witneſſes.

ON proof by witneſſes, that the debt ought to be paid. "Urged by the creditor;" mentioned as a matter of courſe; for payment would hardly be made by one who was not urged. From the expreſſion, "he ſhall receive the ſum," it appears, that the ſurety ſhall receive ſo much only as was paid by him to the creditor, and not double that ſum. But the double ſum has been directed by the text of YA'JNYAWALCYA; there is conſequently an inconſiſtency. It muſt therefore be ſettled, that within a month and a half he can only receive the exact ſum paid, but after a month and a half he ſhall receive twice that ſum. In this caſe, however, there is no reference to the period in which a debt is regularly doubled, ſuch as fifty months and the like, for no ſuch law exiſts; the expiration of a month and a half is alone a ſufficient term, under the text of VRĪHASPATI (CLX), to double the ſum. Such is the beſt mode of interpretation approved in the *Retnácara*.

GRAHE'SWARA and MISRA explain the text of CA'TYA'YANA as intending only the following caſe; a conſiderable ſpace of time having elapſed beyond the ſtipulated term, if the creditor reſolve on recuring to the king, but the ſurety, apprehending puniſhment, pacify the creditor at a pecuniary expenſe, and diſcharge the debt, the ſurety ſhall in that caſe recover from the debtor the money employed in appeaſing the creditor; but ſhall only receive back the exact ſum, not twice the amount. But the author of the *Mitácſharà* ſays, twice the ſum muſt be immediately paid. He holds, that the lapſe of a month and a half is not required. To reconcile the text of VRĪHASPATI, money expended in appeaſing the creditor muſt be ſuppoſed. On this ſubject YA'JNYAWALCYA propounds a diſtinction.

CLXV.

CLXV.

YÁJNYAWALCYA:—FEMALE ſlaves and cattle delivered *by a ſurety* muſt be made good with their offſpring, grain *ſhall* only *be repaid* two fold; cloth is declared to be quadrupled; and liquids octupled.

"FEMALE ſlaves and cattle;" a debt conſiſting of female ſlaves or cattle. If a ſurety be compelled by a creditor to deliver female ſlaves, goats, and the like, they ſhall be received back by the ſurety with their offſpring only: but grain and the reſt with the accumulation mentioned. Other things can only be doubled.

The *Dípacalicá*.

THE doubling of every kind of property having been ſuggeſted, it is here directed by a ſpecial law, that liquids ſhall be repaid octuple; cloth quadruple; and female ſlaves or cattle with their offſpring, that is, with no other recompenſe but their offſpring. If one female goat, having been lent, be made good by the ſurety in conſequence of the debtor being unable to diſcharge the debt, then, after the lapſe of conſiderable time, the debtor being able to diſcharge the debt, one female goat ſhall be delivered to the ſurety, and as many kids as have been produced from that *firſt* goat. If that female goat die *unproductive*, the debtor muſt afterwards deliver a ſingle goat, and no kids, for none have been produced. "Grain and the reſt;" grain, cloth and liquids. "Other things;" gold and the like. The gloſs of the *Dípacalicá* may be taken in a literal ſenſe.

HERE an obſervation ſhould be made. When the ſurety would have been liable for the payment of the debt in conſequence of the debtor's abſence; if the ſurety be dead, it ſhall be paid by his ſon alone, and without intereſt, as has been mentioned. Afterwards, when the debtor is amenable for the payment of the debt, it is reaſonable, that he ſhould pay to the ſon of the ſurety twice the amount of the original ſum paid by him without intereſt. Muſt that debtor again pay the *arrear of* intereſt to the creditor, or not? On this queſtion ſome remark, that the principal ſum only, and no intereſt, has been received from the ſon of the ſurety: the intereſt ſhall

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therefore be recovered from the debtor; for it is inconſiſtent with reaſon, that the creditor ſhould ſuſtain a loſs without any fault on his part. But others ſay, that intereſt need not in that caſe be paid by the debtor, ſince no law directs it. Is not the general law, which ordains intereſt at the rate of an eightieth part, applicable to this caſe? No; for that is precluded by the text of CA'TYA'YANA (CLVIII), the terms of which are expounded "void of intereſt:" ſince, if intereſt were payable by any perſon whomſoever, it could not be void of intereſt. Of theſe two opinions, preferring that which is beſt and moſt firmly eſtabliſhed, a ſingle rule of deciſion ſhould be adopted.

ON this *text* (CLXV) the *Mitâcſharâ has this comment:* that kind of property, for which a ſpecial *recompenſe or* rate of intereſt has been propounded, being paid by a ſurety, the debtor muſt immediately make it good, without any reference to particular periods, but with the intereſt propounded: ſuch is the implied ſenſe. The author conceived, that intereſt is propounded by the text on female ſlaves, cattle, and the like; now there can be no intereſt without a loan, as has been already ſtated; but female ſlaves and cattle may be lent by one, who is unable to maintain them himſelf, and wiſhes they ſhould be ſupported: this text intends only ſuch a loan.

CHAPTER V.

ON THE PAYMENT OF DEBTS.

A DEBT of ſuch a kind ſhould be paid; a debt of ſuch a kind ſhould not be paid; it ſhould be paid by this heir; it ſhould be paid at this time; it ſhould be paid in this mode: thus the ſubject is five fold in reſpect of the debtor. It is two fold in reſpect of the creditor, namely the rule for delivery, and the rule for receipt. Of theſe ſeven topicks of loans and payment, one topick, the rule for delivery by the creditor, has been expounded. Explaining the verb "give" or deliver in the ſenſe of payment, the other ſix topicks are expounded in *the* two *following* chapters. Such is the method authorized by the *Mitācſharā*.

CLXVI.

VRĬHASPATI:—BY whom, to whom, and in what mode, ſhould, or ſhould not, be paid a loan, which has been received from the hands of another in the form of a loan on intereſt, ſhall be now declared:

2. If the time of payment be not expreſſed, the debt ſhall be paid on demand *with the intereſt then due*; *if expreſſed*, at the full time limited; and *if not previouſly demanded*, when intereſt ceaſes *on becoming equal to the principal:* if the father ſhould die *in debt*, it ſhall be paid by his ſons *with intereſt as far as the law allows.*

BY the text of NĀREDA (I) the forenſick term of "loans and payment" is ſtated as comprehending twenty topicks in reſpect of the creditor and debtor.

debtor.* The verb "give" or deliver has conſequently the double ſenſe of lend and pay. The topicks ſuggeſted by the verb taken in its ſenſe of "lend," namely the eight fold rule for delivery by the creditor (intereſt and the reſt), and the rule for receipt by the debtor (ſtipulated intereſt and the delivery of the intereſt promiſed and ſo forth), which conſtitute ten topicks of loan and payment, have been directly or virtually expounded. The topicks, ſuggeſted by the verb taken in its ſenſe of "pay," are now propounded, namely the eight fold rule for payment by the debtor, and the rule for receipt by the creditor, which alſo conſtitute ten topicks of loan and payment.

"FROM the hands of another;" from the hands of the lender. "In the form of a loan on intereſt;" with a declaration, "that ſhall be repaid with intereſt by me to him:" the conſtruction is, 'the debt which had been received *in this manner.*' By what debtor that ſhould, or ſhould not, be repaid; to what creditor it ſhould, or ſhould not, be paid; and how or in what form it ſhould, or ſhould not, be paid. Again; imagining the word "what," the topicks of what ſhould, or ſhould not, be paid, may be underſtood, as in one reading of the text of NĀREDA (I).

"IT ſhall be now declared;" this, ſignifying 'almoſt at the preſent time,' expreſſes, that it ſhall be forthwith declared. The ſage proceeds to the rule for payment (CLXVI 2): that debt, which has been received for no ſtipulated term, muſt be repaid on demand; that is, on a ſimple demand. Conſequently, for that loan, which has been received on requeſting it in this ſimple form, "lend me the ſum," the rule of payment is ſuch, that no delay muſt be made when the debtor is told, "pay the debt."

WHEN it is ſettled by both parties, that the will of the creditor ſhall regulate the time of payment, the debt muſt be paid on a ſimple demand; but, when another term has been fixed, it muſt be paid at the full time limited.

MISRA.

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* By whom { what may be lent / what may not be lent / what muſt be paid / what need not be paid } to whom { } in what form

Rules for delivery / Rules for receipt } by the creditor { } by the debtor.

AND

AND BHAVADE'VA ſays, when *a time* has been ſettled by both parties, as the period of payment, *or when the debt has been made payable* at the option of the creditor, &c. In this gloſs, the words "ſpecifick time" muſt be ſupplied. To both theſe opinions it may be objected, that the ſubſequent phraſe "at the full time limited" would be a needleſs repetition. But that phraſe concerns a debt, for which a time of payment has been fixed. Conſequently, for that loan, which has been received on application made in this form, "I will pay the debt within two years, lend me the ſum *required*," the rule of payment is ſuch, that no delay muſt be made, when that period is complete. But, when a loan has been received on a ſimple requeſt in this form, "lend me the ſum *required*," and the creditor meanwhile has not demanded it, what ſhould be done? The ſage adds, "when the intereſt ceaſes;" now intereſt ceaſes on the debt after the lapſe of time ſufficient to double it, as has been already mentioned: that it muſt be then paid, is the rule of payment for ſuch debts. This and other points may be argued.

IT has been thus explained, that the very perſon, who contracted the debt, muſt diſcharge it. But in the caſe of his death, the ſage adds, "if the father ſhould die *in debt*, it muſt be paid by his ſons." On failure of the father, who contracted the debt; that is, if he die, or be ſecluded from the world, or go to a foreign country; the debt muſt be paid by his ſons with intereſt. It muſt be paid even by his ſon's ſon *but* without intereſt.

CLXVII.

VRĬHASPATI: — THE father's debt muſt be firſt paid, and next a debt contracted by the man himſelf; *but* the debt of the paternal grandfather muſt even be paid before either of thoſe.

2. THE ſons muſt pay the debt of their father, when proved, as if it were their own, *or with intereſt;* the ſon's ſon muſt pay the debt of his grandfather, *but* without intereſt; and

his ſon, *or the great grandſon*, ſhall not be compelled to diſcharge it, *unleſs he be heir, and have aſſets.**

FIRST the debt of the grandfather *ſhould be diſcharged*, next the debt of the father, and laſtly the debt contracted by the man himſelf: ſuch is the legal order of payment. "As if it were their own;" as their own debts are paid with intereſt, ſo muſt this be paid with intereſt. "When proved;" when eſtabliſhed by the teſtimony of witneſſes. But the debt of a grandfather may be diſcharged without intereſt. "His ſon;" the grandſon's ſon, readily ſuggeſted by the preceding term, is thence underſtood. Conſequently the great grandſon ſhall not be compelled againſt his will to diſcharge the debt of his great grandfather; but, if the great grandſon be willing, it may be diſcharged by him.

CLXVIII.

VISHNU: — IF he, who contracted the debt, ſhould die, or become a religious anchoret, or remain abroad for twenty years, that debt ſhall be diſcharged by his ſons or grandſons, but not by remoter deſcendants againſt their will.

"TWENTY years" are connected *in the ſentence* with abſence in a foreign country. "Not by remoter deſcendants;" not beyond the third generation *incluſively*: it need not be paid by the fourth in deſcent and ſo forth. "Againſt their will;" but if they wiſh well to a great grandfather or other remoter anceſtor, the debts even of ſuch anceſtors ſhould be paid by the fourth in deſcent and ſo forth.

The *Retnacara*.

CIVIL and natural death being in effect equal, a lapſe of time cannot properly be required; therefore the commentator ſays, the conſtruction refers twenty years to the caſe of abſence in a foreign country. "If they wiſh well to an anceſtor;" ſince the non-payment of a debt is declared a crime in the

* Without which, the ſon and grandſon are under a moral and religious, not a civil, obligation to pay the debt, if they can; but aſſets may be followed in the hands of any repreſentative. Note by Sir WILLIAM JONES.

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third degree, by a text of MENU*, the great grandfather ſuffers torment in a region of horrour if his debt remain undiſcharged; to prevent that, is a benefit to the great grandfather; when they wiſh this benefit to him, they muſt pay the debt. In like manner, the debt contracted even by a ſon or other deſcendant may be diſcharged by the parent, if he be willing.

THAT, which affords no gain or permanence of capital, is not a debt†; and if this be not repaid by any perſon, it is *conſequently* no debt: how then can torment in a region of horrour be the conſequence of its remaining undiſcharged? It ſhould not be objected, that the text muſt therefore be unmeaning, ſince the law only ſuggeſts torment in a region of horrour, ſhould the debt be not diſcharged by thoſe, whom the law declares indiſpenſably bound to pay the debt. This argument is ill founded, ſince the great grandfather was himſelf bound for the indiſpenſable payment of the debt, and the word expreſſive of cauſe, in the definition of debt (II), there ſignifies a circumſtance only, *not an efficient cauſe*.

IF the father die, his debts muſt be paid by his ſons, as abovementioned; this NA'REDA declares with ſpecial diſtinctions.

CLXIX.

NA'REDA:—A FATHER being dead, his ſons, whether after partition or before it, ſhall diſcharge his debt in proportion to their ſhares; or that ſon alone, who has taken the burden upon himſelf.

"BEING dead;" having deceaſed, or having retired from worldly affairs: this alſo ſuggeſts long abſence, as expreſsly ſtated in the rule of VISHNU (CLXVIII). "In proportion to their ſhares;" whether after partition or before it: ſuch is the meaning. Conſequently, after partition, ſons muſt diſcharge the debt at its full term, whether known or unknown when partition was made, in proportion to their ſhares. But, if they be undivided, they ſhall pay it out of the common property. However, if the eldeſt brother, or any other brother ſkilful in buſineſs, ſuperintend

* See MENU, Chapter 11, v. 66. † See the definition of loan or debt at v. II.

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the affairs of the family like a father, he muſt diſcharge the paternal debt out of the common ſtock. In effect there is no difference in the two caſes. This diſtinction may nevertheleſs be underſtood; by the firſt part *of the text* it is ſuggeſted, that, if all the brothers be ſimilarly circumſtanced, all, or any one of them as ſubſtitute for the reſt, may be impleaded; but, if any one brother have taken the burden upon himſelf, he alone is impleadable.

OR the phraſe, "that ſon alone who has taken the burden upon himſelf," may be thus expounded; when the other ſons reſide at various places, and one ſon occupies his father's abode and enjoys his father's property, he alone bears the burden, namely the load *formerly* borne by his father, and therefore he muſt alſo pay his father's debts: for MISRA ſays, 'when any one of the ſons is inſtalled in the place of his father, he alone *muſt pay the debt*:' and *he muſt pay it* becauſe he has taken the heritage. So muſt two or more *brothers*, who have taken the burden upon themſelves; for the term "that ſon," *though* expreſſed in the ſingular number, muſt be taken indefinitely.

AGAIN; if any one of the ſons declare, "I will neither receive *my ſhare* of my father's property, nor pay his debts," and the others aſſent to that *arrangement*; in that caſe, thoſe only, who have accepted the father's eſtate with his debts, ſhall diſcharge the debts of their father. This alſo is intended by the expreſſion, "that ſon alone, who has taken the burden upon himſelf." Or the expreſſion, "whether after partition or before it," may be explained, whether ſeparated from their father or not ſeparated; and the particle may be taken in a determinate ſenſe. If there be undivided ſons, they alone muſt diſcharge the debt; or on failure of them, the divided ſons. This interpretation ſhould be admitted.

CLXX.

YĀJNYAWALCYA:—THE father being gone to a foreign country, or deceaſed *naturally or civilly*, or wholly immerſed in vices, the ſons, or their ſons, muſt pay the debt; but, if diſputed, it muſt be proved by witneſſes.

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"BEING gone to a foreign country;" having gone to a distant abode in a foreign country, and not returning within twenty years: for it coincides with the rule of VISHNU (CLXVIII), and the text which will be cited from NÁREDA (CLXXV). Seclusion from the world *or civil death* must also be understood. "Deceased;" meaning natural demise.

"WHOLLY immersed in vices;" the term *(vyasana)* is explained by lexicographers, 'danger, disease, or calamity; falling low, vice originating in lust or wrath.'* Consequently, the father being involved in distress, that is, being afflicted with a hopeless distemper, or long confined in fetters by the king in consequence of the offence of another; or fallen from his class, as a degraded person or the like, and excluded from the patrimony; or immersed in vices originating from *irregular* desires, (whether avarice, lust, or any impulse of the mind,) such as gaming or the like, and love of harlots; or immersed in vices originating from a wrathful temper, or governed by pride; *in all these cases the son must pay the debt.* For instance; the father, behaving with insolent pride, says, "I will not pay the debt, the creditor may take what measures he pleases;" in such a case, the son should pay the debt, lest he fail in duty to his father, out of any possible funds, either the paternal wealth or other property: but on failure of sons, the debt should be discharged by the son's son. However, the debt may be paid by the son's son without interest, as abovementioned: the case is the same. CHANDE'SWARA has briefly said, should the father be unable to pay the debt, it must be discharged by his son, or, on failure of sons by his grandson.

THE son does not know, that his father had contracted a debt from that man; or he knows it, but conceals his knowledge; in these cases "it must be declared by witnesses:" it must be established by the evidence of witnesses. But on the reading approved by MISRA *(sácshi bhávitam* instead of *sácshi bháshitam)* the *literal* sense is "proved by witnesses."

THE father, who contracted the debt, being absent, or dead, or addicted to gaming, to *frequentation of harlots and* the like, or (under *the suggestion of* the particle "or" *taken in a large sense*) afflicted with an incurable distemper

* AMERA SINHA, on words with many senses.

of the like, or degraded, his debts muſt be paid by his ſon, or, on failure of him, by his ſon's ſon; but, if diſputed, the debt muſt be proved by oral or other *ſufficient* teſtimony.

The Dípacalicá.

THE word "witneſſes," ſtanding in the text, is ſuppoſed in the *Dípacalicá* to intend alſo written evidence and the like. Here the debt has remained undiſcharged in conſequence of degradation, becauſe the degraded perſon held not the patrimony; not becauſe he is *equally* incapable of paying debts as of performing religious rites. It muſt be paid by his ſon to reſcue him from a region of torment. But according to RAGHUNANDANA and others, an outcaſt is only incapable of property, ſo long as he be averſe from the *neceſſary* penance.

MUST a debt, contracted by a man who has no aſſets, be paid after his death by his ſon or grandſon? On this queſtion it is ſaid, even in ſuch a caſe the debt contracted by him ought to be paid by his ſon, or, on failure of ſons, by the grandſon; for, commenting on the following text, it is ſaid in the *Dípacalicá*, the ſon, who is capable of inheriting the eſtate, not being blind nor otherwiſe diſqualified, but who has not received aſſets left by the father, *is meant*; not one who has taken the father's eſtate, for he is ſuggeſted by the expreſſion, "who has received the eſtate:" and it is mentioned in the *Mitácſhará*, that the ſon or grandſon may be compelled to pay the debt, even if no aſſets have been received: and it is ſtated in the *Retnácara*, that a ſon capable of inheriting the paternal eſtate, not being blind or otherwiſe diſqualified, is here deſigned, not one who has received aſſets left by the father; for he is ſuggeſted by the expreſſion, "who has received the eſtate."

CLXXI.

YÁJNYAWALCYA:—HE, who has received the eſtate of a proprietor leaving no ſon *capable of buſineſs*, muſt pay the debts *of the eſtate*, or, on failure of him, the perſon who takes the wife *of the deceaſed*; but not the ſon, whoſe *father's* aſſets are held by another.

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THE order, in which perſons are liable for debts, is therefore as follows: in the firſt place the debtor himſelf; on failure of him, his ſon competent *to inherit and manage the eſtate*; on failure of ſuch, the ſon's ſon; if there be no *ſuch grandſon*, the great grandſon, wife, uncle or other heir, who has ſucceeded to the eſtate, or the brother or other guardian of it; ſhould there be no ſuch perſon, he, who has taken the widow; if there be none ſuch, a ſon incompetent *to inherit or to manage the eſtate*. So the *Chintámeni*, *Retnácara*, *Dípacalicá* and the reſt. However the obligation on an *incompetent* grandſon to pay the debt is not noticed in thoſe works under this head. This point ſhall be diſcuſſed. On failure of him, the great grandſon or remoter deſcendant, who has not received property left by his anceſtor, may pay the debt if he be willing, but not otherwiſe. Such is our opinion. It ſhould be affirmed, ſince it is poſitively ſaid in the *Dípacalicá*, 'uncles and other kinſmen, capable of taking the heritage of one who leaves no iſſue, *muſt pay the debt*.'

THAT the debtor is bound to pay the debt appears from many texts (CLXVI 2 &c.); that, on failure of him, his ſon, if competent, *muſt pay the debt*, *appears* from the latter part of the text quoted (CLXVI 2) *and from other texts*; on failure of him, the ſon's ſon if competent (CLXX); on failure of him, the great grandſon or other repreſentative who has received aſſets (CLXXI): and the text YA'JNYAWALCYA juſt cited is thus explained: of a debtor, who leaves no competent ſon but had aſſets for the payment of his debts, he, who ſucceeds to the eſtate, muſt pay the debts. On failure of him, the perſon who has taken the widow: and not, if either of thoſe be *amenable*, a ſon, while the aſſets are held by another, or when the aſſets left by his father have been transferred from him to another. How can the aſſets be held by another notwithſtanding the exiſtence of a ſon? The ſon may be diſqualified, having been born blind, deaf, or the like; or he may be incompetent by reaſon of diſeaſe, minority or the like: and the author of the *Mitácſhará* remarks, that the aſſets may be held by another notwithſtanding the exiſtence of a vicious ſon (Book V, v. CCCXVI).

THE text is read, *putró nányáśritadravyah*, not the ſon, whoſe *father's* aſſets are held by another, inſtead of *putró' nanyáśritadravyah*, the ſon, whoſe *father's*

father's aſſets are not held by any other; if the aſſets be held by another, although the ſon be living, that ſon is not liable for the payment of his father's debts. It is ſtated in the *Retnâcara*, that this *part of the ſentence* is connected with the phraſe "muſt pay the debt;" the conſtruction therefore is, the ſon ſhall not be compelled to pay the debt while the aſſets are held by another. Such is the intention of that gloſs.

If no perſon have taken the widow, the incompetent ſon muſt pay the debt.

CLXXII.

NA'REDA:—Of the ſucceſſor to the eſtate, the guardian of the widow, and the ſon *not competent to the management of affairs*, he, who takes the aſſets, becomes liable for the debts; the ſon, *though incompetent, muſt pay the debt* if there be no guardian of the widow, nor a ſucceſſor to the eſtate; and the perſon, who took the widow, if there be no ſucceſſor to the eſtate, nor *competent* ſon.

This text may be thus interpreted; whoever takes the aſſets, whether he be *the regular* ſucceſſor to the eſtate, guardian of the wife, or ſon *of the deceaſed* but incompetent *to the management of affairs*, is ſucceſſor to the eſtate and muſt pay the debts. It is ſo expounded in the *Retnâcara* and other works. Its object has been already ſtated. "If there be no guardian of the widow &c.;" if no perſon have the care of the widow or of the eſtate; if none take the widow or the eſtate; the ſon, that is, the incompetent ſon, muſt pay the debt. This, however, intends only a caſe where he may be juſtly liable, namely a caſe of incompetency ariſing from minority or the like; for no one has ſaid, that a ſon *born* blind, or otherwiſe *excluded from* inheritance, ſhall pay the debts. "And the guardian of the widow;" ſhould there be no ſucceſſor to the eſtate, nor competent ſon, the guardian of the widow is liable for the debts. The object of this has alſo been already explained.

We hold, that great grandſons are *only* liable for the payment of debts, *if willing*

willing to pay them; under the rule of VISHNU (CLXVIII). According to the *Dípacalicá*, they may be liable for the debts, under the text of YÁJNYAWALCYA (CLXXI). Still, however, that portion of the text of YÁJNYAWALCYA, which is there adduced, muſt be reſtricted to the caſe of *a* conſenting *deſcendant;* for it has the ſame import with the rule of VISHNU (CLXVIII).

SHOULD a man leave both a competent ſon, and a ſucceſſor to his eſtate, by whom ſhall his debt be paid? Let it not be anſwered, if a competent ſon be living, there can be no other ſucceſſor to the eſtate. If that ſon live in the houſe of his maternal grandfather, in conſequence of the partiality of that grandſire, or in conſequence of the grandſire's being childleſs; and the father live as a coparcener with his *own* brothers and the reſt; when the father dies, that ſon may poſſibly not take the trouble of obtaining his heritage. Or a ſiſter lives in his father's houſe; and the ſon, through natural affection, has not taken the eſtate. In ſuch caſes there may be another ſucceſſor to the eſtate, although a ſon be *left*. Nor ſhould it be objected, that in ſuch a caſe the competent ſon is firſt liable for the debts, as already propounded. It would be unreaſonable, that the ſucceſſor to the eſtate ſhould not be firſt liable for the debts. That whole argument is wrong, for CÁTYÁYANA declares the ſucceſſor to the eſtate liable for the debts only in the caſe where the ſon is incompetent.

CLXXIII.

CÁTYÁYANA:—THE judge ſhall compel a ſon to pay the debt of his father, provided he be involved in no diſtreſs, be capable of property, and liable to bear the burden; but in no other caſe ſhall he compel the ſon to pay his father's debt:

2. If the ſon be afflicted with diſeaſe, or under *the* age *fit for buſineſs*, and *another* perſon be found to have taken the aſſets, the judge muſt enforce payment from him; or, on failure of ſuch perſons, from one, who has taken the widow.

NOT driven to a foreign country by the oppreſſion of the king or the like, is implied in the phraſe, "involved in no diſtreſs." "Capable of property;" not born blind, deaf, or the like. "Liable to bear the burden;" not a minor or the like. If there be ſuch a ſon, him the judge ſhall compel to pay the debt. But if the ſon be afflicted with diſeaſe, or be an infant; or if he be involved in diſtreſs, or blind from his birth, and ſo forth; and if another perſon be found to have received the aſſets, from that perſon alone ſhall the judge enforce payment: if there be none ſuch, from the perſon who has taken the widow. Such is the ſenſe of the text. Here "afflicted with diſeaſe" is merely an inſtance. Therefore, ſhould a man die childleſs, the ſame rule ſhould be adduced.

CLXXIV.

VRIHASPATI:—THE ſucceſſor to the eſtate is liable for the debt, if the ſon be involved in diſtreſs; but the perſon, who takes the widow, ſhall be liable for the debt, on failure of ſucceſſors to the eſtate.

THE ſenſe of the text is obvious. Let it not be objected*, as inconſiſtent with reaſon, that, on this conſtruction, one would take the aſſets of the deceaſed, and another pay his debts. Inconſiſtency with reaſon may not be objected to that, in which ſages and authors concur. In fact, when there is a competent ſon, no other can be *the legal* ſucceſſor to the eſtate. In the caſe ſtated, why does he not obtain his own father's eſtate from his uncle and coparcener? If he voluntarily yield it to his uncle, that uncle is not the ſucceſſor to the eſtate *of the deceaſed*, but the occupant of property given by the ſon. It is the ſame in the *ſuppoſed* caſe of a ſiſter. Conſequently there is no occaſion for a ſpecial text on this point; the ſon muſt pay the debts in conſequence of his own voluntary act. But if the uncles or the reſt forcibly withhold the aſſets, the king ſhall compel the delivery. If, through any accident, that cannot be done, he muſt enforce payment from the uncle and the reſt; for the aſſets of the father make *the holder of them* liable for the payment of his debts.

* The author reſumes the argument interrupted by the quotation of the texts clxxiii and clxxiv.

CONSEQUENTLY the intention of the texts of YA'JNYAWALCYA and the reſt is this; after the deceaſe of the debtor, if he left no aſſets, or if there be aſſets which have devolved on the ſon, the debt muſt in either caſe be paid by the ſon, agreeably to the order of payment propounded by NA'REDA (CLXIX). If there be no ſon, it muſt be paid by the ſon's ſon; and here alſo the order of payment propounded by NA'REDA muſt be aſſumed from parity of reaſoning. If there be neither a ſon nor a ſon's ſon, or if there be a ſon or grandſon, to whom the aſſets have not deſcended, but are held by ſome other perſon, the debt muſt be paid by him who has received the aſſets; on failure of ſuch, by him who has taken the widow; or, on failure of him, by the ſon or grandſon, who was competent to take the heritage. But an incompetent grandſon is not liable for the payment of debts, any more than an incompetent ſon.

THE text of YA'JNYAWALCYA is read *putró'nanyáśritadravyah*, the ſon, whoſe *father's* aſſets are not held by another: and that reading is approved by MISRA and VIJNYA'NE'SWARA. Under the expreſſion, "whoſe *father's* aſſets are not held by another," may be underſtood one, who has taken his father's aſſets, as well as one, whoſe father had no aſſets. The difference between the two interpretations conſiſts in this; if a ſon, through generoſity or the like, do not exact his father's property from his uncles and the reſt, he muſt pay the debt *according to one opinion*, and need not pay *it according to the other*, as is evident. The preferable interpretation may be determined by the wiſe; but ultimately one only can be admitted.

OR, if a ſolvent perſon contract a debt and die, and his ſon be a minor or be gone to a foreign country, and his uncle or other *kinſman*, or ſome ſtranger, through tenderneſs for that ſon, take care of the eſtate, ſuch perſon alone may be underſtood from the expreſſions, "he who has received the eſtate of a proprietor," "the ſucceſſor to the eſtate," and "a perſon who has taken the aſſets." As the guardian recovers money due from others to the eſtate, ſo muſt he pay the debts out of the eſtate. But if there be no aſſets, or if no ſuch perſon take care of the eſtate, the perſon, who has taken the widow, muſt diſcharge the debt. If no widow be left, or if a widow ſurvive but no perſon take *the guardianſhip of* her, the

ſon

ſon or the ſon's ſon, in order, ſhould pay the debt, acquiring funds by any practicable means. If there be neither ſon nor grandſon, and if no perſon take the widow, or if no widow ſurvive, and if the great grandſon or remoter deſcendant, or the brother or other *collateral relation*, take the property left by the deceaſed, he ſhould diſcharge the debt. Such is the ſenſe of the text of YA'JNYAWALCYA. Accordingly it is ſaid in the *Dípacalicá*, the uncles or other *collateral heirs* of the deceaſed who leaves property. This ſhould be admitted as *an* accurate *interpretation*. Both are ſuggeſted by the ambiguous terms of the texts.

ALL authors concur in opinion, that a ſon, being blind or deaf from his birth or the like, ſhall on no account be liable for the payment of debts. But, according to the *Dípacalicá*, the debt ſhould be paid by an incompetent ſon, if no perſon have taken the widow. The word "incompetent" intends ſuch diſqualification as is ſtated by CA'TYA'YANA, diſeaſe and the like (CLXXIII). But the author of the *Mitácſharà* ſtates two caſes: a ſon, grandſon, or any other perſon, who has taken the aſſets, muſt diſcharge the debt; on failure of ſuch, he, who has taken the widow; on failure of him, any ſon not *born* blind or the like; and on failure of him, the great grandſon or other repreſentative who takes the heritage: they are again mentioned to ſhow the poſitive obligation of paying debts then only, when they have received aſſets. Or the perſon, who takes the widow, that is, who takes a widow falling under the fourth deſcription of women wilfully libidinous, or the firſt of twice married women,* becomes liable to the payment of debts on failure of ſucceſſors to the eſtate; if there be no ſuch perſon, the ſon, who would have been competent to receive the heritage, not being blind *from his birth* or the like; on failure of him, any perſon who has taken the widow *muſt pay the debt*, under the text of NA'REDA (CCXXII).

THESE rules of deciſion ſhall be ſucceſſively diſcuſſed. In the firſt place, if the father die, or reſide abroad or the like, the competent ſon is liable for the payment of his debts. Natural deceaſe, and *civil demiſe or* retirement in

* v. CCXX and Book IV, v. CLVIII 2 & 8.

the

the order of devotion, are ſimilar. Concerning abſence in a foreign country, the rule of VISHNU above cited (CLXVIII) propounds a diſtinction.

CLXXV.

NA'REDA: — THE father, or, *if the family be undivided*, the uncle or the elder brother, having travelled to a foreign country, the ſon ſhall not be forced to diſcharge the debt, until twenty years have elapſed.

HERE *the mention of* "uncle or elder brother" intends the payment of debts contracted by them; and that muſt be underſtood in the order above-mentioned, when there is any ſufficient cauſe, ſuch as the uncle or brother leaving no ſon. Its further application will be mentioned. The particle "or," repeated in the text, is indefinite, comprehending all perſons holding aſſets of the debtor.

CLXXVI.

CA'TYA'YANA: — IF the father be at home, but afflicted with a chronick diſorder, *though not without hope of recovery*, or live in a foreign land, *but expected in time to return*, his debt ſhall be paid by his ſons after a lapſe of twenty years.

"TWENTY years;" after a lapſe of twenty years, for the text coincides with that of NA'REDA (CLXXV). And this muſt be underſtood when the cure of the diſeaſe is poſſible, or when the return of the abſent *parent* may be expected. But, when the diſtemper is deemed incurable, or the return of the abſent parent is impracticable, the ſon ſhall pay the debt of his father, though living, as if he were dead. The creditor need not wait twenty years.

The *Retnácara*.

OR *the expreſſion uſed* in the text, "if the father be at home," *may ſignify*, if he be living; that is, if it be aſcertained, that he is alive. Hence, if no intelligence be received, during twelve years, concerning any man who has travelled to a foreign country, the law requires his ſon to perform obſequies and the like, preſuming his death; if the ſon did not then pay the debt until

twenty years had elapſed, that would be inconſiſtent with common ſenſe and with the reaſon of the law. The *following* text of CA'TYA'YANA is authority for this poſition.

CLXXVII.

CA'TYA'YANA:—A CREDITOR may enforce payment of ſuch debts from the ſons of his debtors, who, though alive, are incurably diſeaſed, mad, or extremely aged, or have been very long in a foreign country, *provided their ſons have aſſets of the debtor.*

BOTH "diſeaſed" and "mad" are here mentioned by the ſame rule by which two names for kine are uſed, the one in a generick ſenſe, the other in a particular ſenſe; or to include inſanity or intoxication ariſing from the uſe of prugs or the like. "Extremely aged;" incapacitated by old age for *the management of* affairs. "Very long in a foreign country," and not expected to return. "Such" or of this kind; an epithet of debt intended to exclude debts contracted for ſpirituous liquors and the like. This will be ſubſequently explained. Here, from the concurrence of the preceding text (CLXXVI) it appears, that the creditor need not wait twenty years; for the expreſſion "very long in a foreign country" would be ſuperfluous, the ſenſe would be the ſame with the preceding text, and there would be a needleſs repetition.

CLXXVIII.

VRI'HASPATI:—A DEBT of the father being proved, it muſt be diſcharged by his ſons, even in his lifetime, if he were blind *or deaf* from his birth, or be degraded, inſane, or afflicted with a phthiſis or leproſy, or other hopeleſs diſorder.

"BLIND from his birth;" born blind: for the word *játi* ſignifies both claſs and birth. "Degraded" muſt be underſtood of one who is averſe from *the neceſſary* penance. "Phthiſis, or leproſy, or other diſorder;" this is illuſtrative of any incurable diſeaſe. The *Retnácara.*

"PHTHISIS" or maraſmus: when a father has been twenty years afflicted with

with any diſeaſe whatſoever, his debt muſt be diſcharged by his ſon; the amplified gloſs "phthiſis, leproſy, or other incurable or hopeleſs diſorder," would therefore be unmeaning; hence the interpretation ſuggeſted in the *Retnácara*, that in the caſe of phthiſis or the like, the creditor need not wait twenty years, ſhould be admitted. VA'CHESPATI MISRA and others concur in this expoſition. But the *Párijáta* and MISRA add, if the father, through indigence, be *wholly* unable to diſcharge the debt, it muſt be paid, even though the family be divided, by his ſon who is able to diſcharge it, or on failure of him, it is reaſonable, *that it ſhould be paid* by his grandſon ſo circumſtanced. Since the father being born blind was incapable of inheriting his own father's eſtate, and is unable to acquire property himſelf, he may be conſidered almoſt *literally* as moneyleſs.

"EVEN though the family be divided;" even though his father be ſeparated: *the debt muſt be paid* by a ſon, whoſe father is ſeparated from his own brothers and the reſt. Or it may be explained, 'by a ſon who is ſeparated from his uncles and the reſt;' for no diſtinction is expreſſed.

THE firſt caſe ſhall be now conſidered.

CLXXIX.

VRĬHASPATI:—A SON, born before partition, has no claim on the paternal eſtate, nor a ſon born after it, on the portion of his brother, whether in reſpect of property or debts; nor have they any claims on each other except to purification and an oblation of water, *if either of them die.**

A SON, born before partition, has no concern with the debts contracted, or property acquired, by his father after partition; he is incapable of taking the eſtate and paying the debts: and the ſon, born after partition, has no concern with the portion of his brothers; *that is*, with the debts undertaken by his brothers, and the property received by them on partition. But all are qualified for purification and oblations of water. By this text ſo explained it is curſorily intimated, that a ſon need not pay a debt contracted after partition. Still,

* Book V.

however,

however, if the father be unable to diſcharge the debt, and there be no ſon in coparcenary *with him* able to diſcharge it, that debt muſt be paid by *another* ſon, who is able to diſcharge it, even though he be ſeparated from the family (CLXIX). But if there be no ſon amenable *for the debt*, it muſt be paid, even though the family be divided, by a grandſon who is competent *to the inheritance and management of the eſtate*. Although the text of YA'JNYAWALCYA, which directs generally, that the debt ſhould be diſcharged by the ſon or by the ſon's ſon (CLXX), may be expounded as relating to a grandſon not ſeparated from his coheirs, ſtill, if either the ſon or grandſon, who are thus placed on a ſimilar footing, may be liable for the debts even after partition, is it not reaſonable to affirm the ſame in reſpect of the other? That is actually expreſſed in the *Párijáta*; "it is reaſonable" &c. and that part of the ſentence relates to the grandſon. Thus may the law be conciſely expounded.

SHOULD the father die, or enter into an order of devotion, or be long abſent in a foreign country whence his return cannot be expected, or be afflicted with a hopeleſs diſorder, or be blind from his birth, the debt muſt be immediately diſcharged by his ſon competent *to inherit and manage the eſtate*; but, if he be long abſent in a foreign land, whence his return may be expected and ſo forth, it muſt be paid after the lapſe of twenty years. If the father, having been born blind, was excluded from the patrimony, and the ſon be capable of inheritance and be not ſeparated from his father, it muſt be paid by that ſon out of his own property. But, if ſuch a father were nevertheleſs able to acquire property, it muſt be then paid out of the property acquired by him: this is demonſtrably true. If there be two ſons both able to diſcharge the debts, and one be not ſeparated, and the other be ſeparated, it muſt be paid by that ſon only, who is able to diſcharge the debts and lives in coparcenary (CLXXIX). It is the ſame in the caſe of reunion *after ſeparation*, by parity of reaſoning. But, if the ſon, who lives in coparcenary, be unable to pay the debt, or if there be none ſuch, the debt muſt be paid by the ſon able to diſcharge it, even though he be ſeparated from the family; on failure of him, by all the grandſons in the male line, who are able to diſcharge it, not ſingly by the ſon of him who was born after partition. But, ſhould the debtor have aſſets, then, while he lives, it muſt

muſt be paid by his ſon or grandſon out of his property only; after his death, his effects deſcend, on failure of ſons born after partition, to the other ſons, or to all the grandſons of the male line, whoſe fathers are deceaſed; his debt muſt therefore be paid by them, out of his aſſets. In that caſe, ſince they have received aſſets, there is no difference between a ſon and a grandſon. It is the ſame alſo in reſpect of the great grandſon. On failure *of lineal male deſcendants* within the degree of great grandſon, the heritage devolves on the widow and ſo forth; and the debts muſt alſo be paid by the widow or other heir in *the* order *of ſucceſſion*. But, if there be no aſſets, the debt ſhould in the firſt place be diſcharged by the ſon out of his own property, or, on failure of him, by all the grandſons of the male line; the great grandſons are under no neceſſity of paying the debt, as has been already noticed.

But, if there be a ſon born after partition, and the father die, and the ſons, with whom partition was made, ſurvive, but the ſon born after partition die leaving male iſſue; ſince he, who was born after partition, was alone entitled to the heritage of his parent, his ſon can alone claim the aſſets; not the ſons born before partition, nor their offspring: hence the debt ſhall not be diſcharged by them, but ſhall be paid in ſucceſſion, or jointly, by the ſon born after partition and by his ſon, whether they have, or have not, aſſets of the debtor. Yet, ſhould they be unable to diſcharge the debt, *the rule of payment* muſt be underſtood as before.

But, ſhould a ſon, ſeparated from his father, make a partition with his own ſons of the property acquired by himſelf, and, bringing the remainder of his eſtate, live reunited with his father, and other ſons be born to him; ſhould his father die, and afterwards he alſo deceaſe; his ſons, as well thoſe born before, as thoſe born after, partition, ſhall equally ſhare the property and pay the debts of their grandfather; but the ſons born after partition ſhall alone take the property and pay the debts of their father. Thus may the law be conciſely ſtated. This method ſhould be followed in all caſes; the ſubject will be fully conſidered under the title of inheritance.

Since the text of Yājnyawalcya (CLXX) does not expreſs, *that the debt ſhall be paid* in ſucceſſion *by the ſons or by their ſons*, may it not be well aſſerted, that the debt muſt be diſcharged jointly by ſons and grandſons? No;

for VRIHASPATI, ordaining that the debt ſhall be paid without intereſt by a grandſon, ſhows a leſs obligation on the grandſon than on the ſon; it is therefore incongruous to affirm, *that debts ſhould be paid* jointly with the grandſons. Accordingly the *Mitácſharà* expreſſes, on failure of the father, the ſon *ſhall pay his debt*; on failure of ſons, the grandſon.

BUT the author of the *Smrĭtiſâra* adds, a debt, contracted after partition by the father or kinſman on his own ſole account, muſt be paid by his ſon and the reſt, if he be *long* abſent in a foreign land: in this caſe only is the period *of twenty years* preſcribed; not in the caſe of a debt contracted for the ſupport of an undivided family or the like, for the parceners are alſo concerned in ſuch a debt. They are equally bound *with* the ſingle parcener, by whom they are ſheltered. The precept is not grounded on a latent motive: hence, when payment *is demanded* in conſequence only of the declaration *or engagement* of a ſingle *parcener*, without any *oſtenſible* cauſe *for contracting the debt*, then only is a lapſe of time required by that precept; but a debt contracted for the ſupport of the family muſt be paid before *that time elapſe*, as ordained by another text of YÁJNYAWALCYA.

CLXXX.

YÁJNYAWALCYA:—IF one of *two or more parceners or* undivided kinſmen contract a debt for the ſupport of his family, and either die or be very long abſent abroad, the other parceners or joint-tenants ſhall pay it.

THE creditor need not wait a ſpecifick time; for there is no authority *for ſuch a ſuppoſition*: the time allowed ſolely concerns divided kinſmen.

MISRA.

"FAMILY" ſignifies all the perſons entitled to maintenance. Since all *the parceners* are concerned in the debt, a lapſe of time is not required: the gloſs ſhould be ſo interpreted from the preceding ſentence. The meaning is, ſince all partake of the benefit ariſing from money borrowed by a ſingle parcener, all are bound for the debt. "They are equally bound with the ſingle parcener, by whom they are ſheltered;" a ſingle parcener, contracting debts

and

and ſo forth, ſupports all the perſons entitled to maintenance: he is as it were their ſcreen or umbrage, ſheltering them from ardent diſtreſs. Conſequently whatever is done by him, may be juſtly conſidered as the act of all; and all being legally bound for the debt, it is deemed a debt actually contracted by thoſe among them, who are forthcoming: it is therefore improper to require a lapſe of time.

MUST not the *literal* ſenſe of the text be preſerved, even though it be inconſiſtent with the reaſon of the law; elſe a ſin would be committed by deviating from the precepts of ſages? This poſition may therefore be thus reconciled: when a ſin is ſtated in deviating from the precepts of ſages, that intends a precept, the grounds of which are not apparent; but this is a precept of demonſtrable law founded on reaſoning: ſuch is the notion adopted in the *Smrĭtiſára*.

" HENCE, when payment *is demanded* &c.;" payment muſt be made in conſequence of an engagement common to all the parceners; the creditors may have lent the money to any one of them; it was not neceſſary, that ſuch an engagement ſhould be expreſsly declared when the debt was contracted: ſuch is the ſenſe *of the gloſs*. *Or that gloſs may be thus interpreted:* payment muſt be made in conſequence of one, that is a ſingle, declaration or text of ſages, *or in other words* a text independent of reaſoning, ſuch as the following text; even without a cauſe *of payment ariſing* from the *joint* receipt of the loan, that is, without the payer's having been concerned in the receipt of the loan, or having enjoyed *the benefit of* it or the like, payment muſt be made; ſo interpreted by reference to the preceding phraſe. In the laſt caſe only is a lapſe of time required by the texts of ſages. But a debt, contracted for the ſupport of the family, excluded from the purport of the preceding text, muſt be paid before the lapſe of twenty years. This the commentator alſo notices.

" PARCENERS or joint tenants" (CLXXX); heirs, ſuch as brothers and the reſt. " For there is no authority &c.;" for there is no expreſſion in this text denoting, that the creditor ſhould wait the lapſe of time, nor does the reaſon of the law ſuggeſt it. It ſhould not be objected, that a period *of ſuſpenſion* may be deduced from the concurrence of the text above cited (CLXXV).

Since

Since it is proved from the reaſon of the law, that no delay ſhould be allowed to ſons and the reſt living in coparcenary, there is no difficulty in reſtricting the text of NA'REDA to ſons and others with whom partition has been made. Such is the notion adopted in the *Smrĭtiſâra:* and that is proper; for, immediately after the text cited, NA'REDA thus proceeds,

CLXXXI.

NA'REDA:—A DEBT contracted before partition by an uncle, or a brother, or a mother, for the ſupport of the family, all the parceners or joint-tenants ſhall diſcharge. *

IF it were intended, that an interval of ſuſpenſion ſhould alſo be underſtood in this caſe, the enunciation of the preſent text would be vain; for that ſenſe was already conveyed by the preceding text (CLXXV). It is therefore evident, that the three texts of NA'REDA relate to diſtinct ſubjects, as follows: a father being dead, his ſons ſhall diſcharge his debt (CLXIX); a debt muſt be paid, after the lapſe of twenty years (CLXXV); a debt, contracted before partition by a father or kinſman for the ſupport of the family, muſt be *immediately* paid (CLXXXI). This text, expreſſing "before partition" as well as "for the ſupport of the family," cannot have the ſame import with that, which preſcribes a time. But the firſt text (CLXIX) relates to a debt contracted by the father on his own ſole account; in that caſe only is a lapſe of time required.

BUT, ſays MISRA, CHANDE'SWARA holds, that a debt contracted before partition by a father or kinſman, who travels to a foreign land whence his return may be expected, muſt be paid by his ſon or other parcener, after waiting twenty years. This however has been haſtily ſaid; for, in fact, CHANDE'SWARA had declared in his own work, 'if that father were ſo circumſtanced as to be incapable of participating *in the patrimony*, and his ſon be not ſeparate in regard to property, his debt muſt be paid *by the ſon;* but if the father, though he be ſo circumſtanced, have any ſeveral property, it ſhall be diſcharged by him alone. Yet, if the father be wholly unable, and the ſon be able, to diſcharge the debt, it ſhall be paid by the ſon.' Here the expreſſion, "ſo

* See Book V, v. CCCLXXI.

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"circumſtanced as to be incapable of participating *in the patrimony*," deſcribes the father as indigent in conſequence of his excluſion from the patrimony. "Not ſeparated in regard to property" relates to the ſon; it ſignifies reſiding together and partaking of the ſame food: the conſequence is, that, if the father any how acquired wealth, it would be joint property. Such a father therefore contracts a debt for the ſupport of his *own* family, and travels on account of his affairs to a foreign country, but his return may be expected; in ſuch a caſe muſt his debt be paid by his ſon? And muſt it be paid after the lapſe of twenty years, or within that period? On theſe queſtions the rule formerly mentioned muſt be adduced; for no diſtinction has been ſtated. Conſequently it ſhall only be paid after the lapſe of twenty years.

SINCE no time is ſpecified in the text of VRĬHASPATI (CLXXVIII), ſhould not the debt of a man blind from his birth or the like be paid without waiting a lapſe of time? However the law may be in that caſe, ſtill, when a father is afflicted with a fever or ſimilar diſorder, and his ſon is not ſeparated in regard to property, it appears from parity of reaſoning, that the debt ſhall only be paid by his ſon after a lapſe of twenty years; without diſtinguiſhing whether it were contracted for the ſupport of his family, or for the borrower's own uſe. Such appears to be CHANDĒSWARA'S notion.

ON this we remark, that, although no limitation have been expreſſed, there is no difficulty in reſtricting the text (CLXXV) to debts, which have been contracted on the borrower's ſole account; for, as it does not expreſs a debt contracted on his ſole account, ſo likewiſe it does not expreſs a debt contracted for the ſupport of the family. However, even in that caſe it muſt be ſuppoſed, that payment cannot be expected *from the debtor himſelf* within ten or fifteen days. In fact it muſt only then be paid, when the burden devolves on the ſon. That virtually is the meaning.

VRĬHASPATI propounds a ſpecial rule in reſpect of undivided parceners.

CLXXXII.

VRĬHASPATI:—A DEBT, contracted by the father acting for his coheirs, ſhall be all paid by the ſon, if the father have

 been

been long abroad; but, if the father die, the ſon ſhall pay only the ſhare of his father, and never that of another debtor.

FIVE brothers live together and partake of the ſame food; one, acting for all, contracts a debt on his own judgment, or with the conſent of all, for the ſupport of the family, and afterwards travels to a foreign country; the other brothers are alive and incompetent *to the management of affairs*, or they are not living; and the abſent brother has, or has not, made a partition with his brethren: in ſuch a caſe that debt muſt be paid by his ſon out of the common ſtock; on failure of that, out of his proportionate ſhare; or, on failure of that again, out of his own *ſeveral* property.

"A DEBT contracted by one acting for his coheirs;" ſince all are equally bound for that debt. Or *it may be literally interpreted*, contracted by one *of the coheirs* ſerving as umbrage to ſcreen *the others* from ardent *diſtreſs*. Payment by the ſon is ordained, provided the father be living; but, if he die, the ſon ſhall only pay the ſhare of his father and not the ſhares of his uncles and the reſt. The meaning is this: while he lives, the acts done by his ſon are in a manner done by the father himſelf; hence payment then made is on the part of the father: conſequently the debt contracted by the father alone is virtually paid by him alone, and a contribution of ſhares is not therefore proper in that caſe. But, when the father is deceaſed, the debt contracted by him, for the ſupport of his own brothers and the reſt, ſhould, on failure of him who actually contracted the debt, be paid by thoſe only, for the ſupport of whom it was contracted: this is *clearly* ſettled. That proportion of the debt, which was contracted by the father for the maintenance of his own immediate dependants, muſt be paid by his ſon; not the ſhares of the reſt: he is exonerated by the ſage, becauſe the burden had not yet devolved on the ſon, at the time when the debt was contracted.

IN the *Vivâda Chintâmeni* the text is read *pitrarnam*, the debt of his father, inſtead of *pitranſam*, the ſhare of his father. If that reading be authentick, it may ſtill be expounded, the ſhare of the father *in the debt*.

CLXXXIII.

NA'REDA:—ANY one ſurviving parcener may be compelled to pay another's *ſhare of a* debt contracted by joint-tenants; but, if they be dead, the ſon of one is not liable to pay the debt of another.

"JOINT-TENANTS;" undivided kinſmen: and this muſt be underſtood of a caſe where the debt was contracted for the ſupport of the family. If it were contracted for the borrower's ſole uſe, the whole debt muſt be paid by his ſon alone, as is juſt. The reaſon of the law proves this; but to ſtate it at large would unneceſſarily ſwell the work.

BUT the author of the *Retnácara* thus expounds the text of VRĬHASPATI (CLXXII); a debt of the father, for which he was bound together with another, jointly and ſeverally, ſhall be *all* paid by the ſon, both the ſhare of the father and the ſhare of the joint-debtor, if the father have been long abroad, *and the other joint-debtor cannot be found*; but, if the father die, the ſon ſhall only pay the ſhare of his father. The ſame author thus interprets the text of NA'REDA (CLXXXIII); any one ſurviver may be compelled to pay the whole debt, which was contracted by perſons jointly and ſeverally bound; but, if all the joint-debtors die, their ſons ſhall pay their proportionate ſhares of the debt: no one ſhall be liable to pay the whole. He conſiders both theſe texts as relating to a ſubject ſimilar to that of partnerſhip in commerce.

HERE it ſhould be remarked, that, if one of five brothers die, but leave a ſon, from parity of reaſoning that ſon may be impleaded like one of the brothers: this expoſition ſeems reaſonable to ſuch men as we are. Here 'die' intends alſo civil death; for religious mendicity is ſimilar to natural death. A degraded man, who is averſe from the requiſite penance, is alſo in effect ſimilar to one naturally deceaſed.

CLXXXIV.

CA'TYA'YANA:—AMONG perſons jointly and ſeverally bound *for a debt*, whoever is found, may be compelled to pay *that debt*; the ſon of one *long* abſent abroad *may be compelled*

pelled to pay the whole *debt*, but the ſon of one deceaſed *need only pay* his father's ſhare.

OF perſons contracting a debt, for which they are jointly and ſeverally bound, if one alone be found, he may be compelled to pay the whole debt; or if a ſon, whoſe father has been long abſent abroad, be found, he alſo may be compelled to pay the whole; but if a ſon, whoſe father is dead, be found, he can only be compelled to pay his father's ſhare, and not the whole ſum.

CLXXXV.

VISHNU:— A DEBT, contracted *jointly and ſeverally* by parceners, ſhall be paid by any one of them, who is preſent and amenable; and ſo ſhall the debt of the father, by *any one of* the brothers before partition; but, after partition they ſhall ſeverally pay according to their ſhares of the inheritance.

A DEBT, contracted by parceners or by perſons jointly and ſeverally bound, muſt be paid by any one of them, who is forthcoming; and ſo muſt the debt of the father by any one of the undivided brethren, who is forthcoming; but brothers who have made a partition, ſhall pay their proportionate ſhares. The texts of CA'TYA'YANA and VISHNU are thus expounded by the author of the *Retnácara*. He conſiders the text of CA'TYA'YANA, and part of the text of VISHNU, as relating to a ſubject ſimilar to that of partnerſhip in commerce. The ſubject of partnerſhip in commerce may be thus exemplified: four traders, ſeverally ſubſcribing their names to the ſame written inſtrument, with one accord contract a debt for the purpoſe of traffick: in like manner four prieſts may contract ſuch a debt for the ſupport of their families or the like. The commentator conſiders the laſt half of the text of VISHNU as relating to the payment of their father's debt by brothers.

BOTH theſe texts may alſo be expounded as relating to debts contracted by undivided brethren, like the text of NA'REDA and VRĬHASPATI. In their reſult both interpretations of the text are accurate. The texts of

CA'TYA'YANA

CA'TYA'YANA and VR'IHASPATI are obviouſly applicable to ſubjects ſimilar to that of partnerſhip in trade; for they literally expreſs "a debt contracted under the ſame ſhade," and "among perſons ſheltered by the ſame ſhade." The text of VISHNU is obviouſly applicable to undivided brethren, ſince it expreſſes, "a debt contracted by parceners."

IF five brothers have the ſame abode, and partake of the ſame food; and one then contracts a debt for the ſupport of the family, with the aſſent of the reſt, or from his own judgment, and dies or travels to a foreign land; afterwards all *the ſurvivers* make a partition, and by accident become poor, but are ſubſequently enriched by wealth which they themſelves acquire: in ſuch a caſe, who ſhall pay that debt? out of what property?

CLXXXVI.

MENU:—IF the debtor be dead, and if the money borrowed was expended for the uſe of his family, it muſt be paid by that family, divided or undivided, out of their own eſtate.

"DEAD" is illuſtrative *of civil death and the like.* "Out of their own eſtate;" hence, if any one of the heirs, though they be ſeparate from each other, contract a debt for the ſupport of perſons whom all the heirs are obliged to maintain, and die or be unable to diſcharge the debt, it muſt be paid by all the heirs.

The *Retnācara.*

IT is ſtated in this gloſs, that partition had been made before the debt was contracted; there is this difference *between the gloſs and the caſe ſuppoſed.* But in fact both are right. Accordingly CULLŪCABHATTA ſays, if he, who contracted the debt, be dead, and the money were expended for the ſupport of the families of all the brethren, as well divided as undivided, that debt muſt be paid by the divided and undivided brethren out of their own property.

IF that debtor be living, he muſt pay the debt out of the *joint* eſtate of all

the brethren; or if it be true, that they have no aſſets, he muſt pay it out of his own property. Should any one of them die leaving no ſon, what would follow? Since the word "ſhare" does not occur in the text of MENU, the whole debt muſt be paid *by the ſurvivers*: this is a ſettled rule. It appears, that the whole debt ſhall be paid by the ſurvivers, out of the eſtate of the deceaſed; or, on failure of that, out of their own property. But it muſt not be deemed inconſiſtent with reaſon, that a debt, contracted by one brother for the maintenance of divided brethren, ſhould be paid by another brother out of his own property; for it is ſimilar to the caſe, where a debt, contracted by one of the aſſociated traders, muſt be paid by another. In this caſe, the creditor need not wait twenty years, as has been already mentioned. It is thus declared by VRĬHASPATI and other ſages, that the ſon muſt pay the debt of his father: CA'TYA'YANA diſtinguiſhes ſons.

CLXXXVII.

CA'TYA'YANA:—ON the death of a father, *his debt* ſhall in no caſe be paid by his ſons incapable from nonage of conducting their own affairs; but at their full age *of fifteen years*, they ſhall pay it in proportion to their ſhares; otherwiſe they ſhall dwell hereafter in a region of horrour.

THE father's debt muſt be underſtood. "By his ſons incapable from nonage of conducting their own affairs;" by infants unable to diſcharge the debt. Such in effect is the ſenſe. Conſequently, if it can be paid by any perſons during minority, it muſt be paid even during their minority: but how could it be paid during infancy and total incapacity? "At their full age;" at the age when they are able *to pay*. As a ſhare of the father's heritage is received by a ſon, whoſe father was joint-tenant with his own brothers and the reſt, but who is himſelf ſeparate, ſo muſt a proportionate ſhare of his debt be paid by that ſon. But, if his father were ſeparate from his own brothers and the reſt, or if he had no brothers, the whole debt contracted by him muſt be paid by the ſon. To explain theſe and ſimilar diſtinctions laws have been propounded. This text of CA'TYA'YANA is intended to ſhow, that thoſe, whom former texts have declared liable to the payment of debts,

muſt

muſt pay them at their full age. Conſequently "father" is here illuſtrative of a general ſenſe. How ſhould a debt, though contracted by the party himſelf, be paid during a period of diſability? But a debt, contracted by his father and the reſt, is ſtill more diſtant.

"OTHERWISE," if they do not pay it at their full age, the ſons and the reſt ſhall dwell hereafter in a region of horrour. It appears therefore, that ſons and the reſt are poſitively bound to pay ſuch debts. NA'REDA declares the ſame neceſſity.

CLXXXVIII.

NA'REDA:—EVEN though he be independent, a ſon incapable from nonage of conducting his affairs is not *immediately* liable for debts.

THE ſame:—FATHERS deſire male offspring for their own ſake, *reflecting*, "this ſon will redeem me from every debt whatſoever due to ſuperiour and inferiour beings:"

2. Therefore a ſon, begotten by him, ſhould relinquiſh his own property and aſſiduouſly redeem his father from debt, leſt he fall to a region of torment.

3. IF a devout man, or one who maintained a ſacrificial fire, die a debtor, all the merit of his devout auſterities, or of his perpetual fire, ſhall belong to his creditors.

"INDEPENDENT;" ſeparate. It is conſequently intimated, that there is no other perſon, ſuch as undivided brothers and the reſt, amenable for the payment of that debt. He, who has neither father nor mother, is deemed independent, as will be mentioned. Hence a minor ſon is bound to pay the debt; but in that caſe only a delay is allowed by NA'REDA. Such is the import of the text.

"WHATSOEVER" relates to the "debts due to ſuperiour and inferiour beings."