# ADDENDA AND CORRIGENDA.

Page 68 note (*c*) *for* 437 *read* 137.
„ 96 note (*a*) line 4 *for* Brammoge *read* Brammoye.
„ 169 note (*b*) *for* Tevan *read* Tevar.
„ 201 note (*a*) line 5, *after* p. 350, *insert* S. C. I. L. R. 7 Bom. 188.
„ 202 note (*e*) last line *add* S. C. I. L. R. 6 Bom. 298.
„ 202 note (*e*) last line *add* S. C. I. L. R. 6 Bom. 298, and 7 Bom. 217.
„ 207 note line 4 *for* founders, *read* founders'.
„ 217 line 2 *for* conception *read* conceptions.
„ 224 line 4 from bottom of text *for* 1871 *read* 1870.
„ 259 line 6 from bottom of text *after* it does *insert* not.
„ 267 note (*c*) *dele* 'in the appendix.'
„ 285 note (*b*) *for supra* p. 386 read *infra* pp. 818-19.
„ 333 line 11 *for* Sûlka *read* Śulka.
„ 368 line 1 *for* the *read* a.
„ 381 line 6 *for* Maina *read* Mannu.
„ 443 Remark 3 line 1 *for* Rajoneekâut *read* Rajoneekânt.
„ 604 note line 10 *for* Bhawat *read* Bhagwat.
„ 608 note *after* P. J. 1883 p. 31 *insert* S. C. I. L. R. 7 Bom. 222.
Page 612 note (*b*) *for* Jaganath read *Jagannâtha*.
„ 629 note (*c*) *after* Dig *add* Title 'Action.'
„ 653 note (*c*) line 6 *for* Gujerâth *read* Gujarât.
„ 664 note (*a*) para. 2 *for* Bilass *read* Bilaso.
„ 681 note (*a*) para. 2 line 10 *for* Ramakaunt *read* Ramakaunt.
„ 682 note line 7 from bottom *add* see below p. 703.
„ 715 note (*a*) *for* Chap. VI. Sec. 7 *read* Sec. VII. para. 2 and Sec. V.
„ 732 note line 9 *for* Uśânas *read* Uśanas.
„ 742 line 12 *for* Guneshidappa *read* Gurushidappa.
„ 743 note (*c*) *for* Goccolannund *read* Goccolanund.
„ 751 note (*d*) line 9 from bottom, *for* bhartvyam *read* bhartavyam.
„ 777 note (*c*) line 9 *after* 1883 *add* S. C. I. L. R. 7 Bom. 155.
„ 781 note (*o*) *for* (*o*) *read* (*a*).
„ 786 note (*f*) line 4 from bottom *for* Brigg's *read* Briggs's.
„ 793 note (*d*) *for* Hîrâta *read* Hârîta.
„ 817 note (*a*) line 2 *for* Sec. *read* See

Page 873 note (*f*) *for* Samskâra *read* Saṃskâra or Saṁskâra.

„ 884 note (*a*) line 5 *for* Alamauni *read* Alamanni.

„ 905 note (*d*) line 6 *for* Anundmonee *read* Anundmoyee.

Page 921 note (*c*) *for* Bhyubbnath *read* Bhyrubnath.

„ 926 note (*c*) *for* Mânasputra *read* Manasputra.

„ 964 note (*a*) *for* Bhoobyn *read* Bhoobun.

„ 1070 note (*a*) line 3 *for* p. 1 *read* 199.

„ 1115 line 7 *after* that *insert* of.

# INTRODUCTION.

## I.—*Operation of the Hindú Law.*

The Hindû Law, so far as it governed the private relations of the inhabitants of any part of India, was not affected by their reduction under British rule. But the new Sovereign thus acquired a power to legislate for them, and this sovereignty was in part delegated to the East India Company during its existence and down to 1833 A. D. (*a*)

The application of the Hindû Law to litigation by the courts in British India is authorized and regulated by statutes of the Imperial Parliament and by Regulations (*b*) and Acts of the local Legislatures.

It is subject even without a statutory provision to modification by custom, (*c*) which indeed may be regarded as the

(*a*) See *Campbell* v. *Hall*, 1 Cowp. 204; *Moodley* v. *The East India Company*, 1 Br. R. 460; *Dobie* v. *The Temporalities Board*, L. R. 7. A. C. at p. 146. Lewis on the Government of Dependencies, 203, ss., and Note *m*.

(*b*) *See* the Statutes 13 Geo. III. c. 63; 21 Geo. III. c. 70; 4 Geo. IV. c. 71; St. 24 and 25 Vic. c. 104; and the Letters Patent of the High Court under that Statute. These are discussed in the case of *Káhándás Nárandds*, I. L. R. 5 Bom. 154, and other cases there referred to. For the Mofussil, *see* Bombay Reg. IV. Sec. 26 of 1827. Under this a collection of the caste rules of Gujarât was made by Mr. Borradaile, to which the Courts were directed to conform in all cases to which they applied, by a Circular Order of the late Saddar Adálat, dated 24th December 1827.

(*c*) *See* Manu I. 103, 110. II. 12, 18. VII. 203. VIII. 41, 42, 46. Vyavahâra May. Ch. I. Sec. 13. Ch. IV. Sec. V. 10, 11. *Vijñáneshwara* on Yájñavalkya B. II. Sloka 4; Coleb. Dig., Bk. I., Ch. II., T. 49. Comm. ad fin. and note; T. 50. Bk. II., Ch. IV., T. 13. Com. Yájñavalkya, Bk. II. 117 note by Roer and Montriou; *Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A. 397.

basis, for all secular purposes, of the Hindû Law itself. (*a*) Thus, when a custom is proved, it supersedes the general law so far as it extends; but the general law still regulates all that lies beyond the scope of the custom. (*b*) The duty devolving, according to the Hindû sages, upon a conqueror of maintaining the customary private law of the conquered territory, (*c*) has been recognized as fully, or even more fully, by the British Courts than by the Legislature. Thus the Privy Council says in *Rámalakshmi Ammal* v. *Sivánantha Perumal Sethurayar* (*d*):—"Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India." They give effect to a course of descent in a family, differing from the ordinary course of descent (*e*); and to a right of a reigning rájá to select his heir (*f*) founded on custom though for some time disused or not distinctly asserted. In the *Collector of Madurá* v. *Moottoo Rámalinga Sathupathy* (*g*) their Lordships dwell on the importance of the opinions of Pandits, such as those collected in the present work. By Bombay Regulation II. of 1827, a Hindû law officer was attached to the Saddar Adálat, and one to each Zilla Court, and questions of Hindû Law were disposed

(*a*) See *Bhau Nánáji* v. *Sundrábái*, 11 Bom. H. C. R. 249; *Mathurá Náikin* v. *Esu Náikin*, I. L. R. 4 Bom. 545; *Lalloobhoy Bappoobhoy* v. *Cassibái*, L. R. 7 I. A. at p. 237.

(*b*) *Neelkisto Deb Burmono* v. *Beerchunder Thákoor and others*, 12 M. I. A. 523.

(*c*) Manu VII. 203. Yájñav. I. 342. The same edited by Janárdan Mahádev, p. 358; Coleb. Dig., Bk. II., Ch. III., T. 60.

(*d*) 14 M. I. A. 570, 585.

(*e*) *Soorendranáth Roy* v. *Mussamut Heerámonee Burmoneah*, 12 M. I. A. 81, 91.

(*f*) *Neelkisto Deb Burmono* v. *Beerchunder Thákoor and others*, 12 M. I. A. 523.

(*g*) 12 M. I. A. 397, 438, 439. *See* also *Lalloobhoy Bappoobhoy* v. *Cássibái*, L. R. 7 I. A. at p. 230. That the Śâstris were under strong religious obligation, *see* Vasishṭha III. 6. Compare Savigny's History of the Roman Law, English Translation, p. 284.

of in accordance, generally, with the responses of these officers. Each of the answers collected in this volume thus became the basis of an actual decision. The functions of the Hindû, as of the Mahomedan law officers were virtually set aside by the new Civil Procedure Code Act VIII. of 1859; and by Bombay Act IV. of 1864, supplementing (General) Act XI. of 1864, the sections of the Regulation relating to the Hindû law officers were repealed. Their services were discontinued, and the Hindû law has since then had to be collected from the recognized treatises and from the records which these officers (usually called Śâstris) had left behind them.

Residence within a Presidency town of which the chief inhabitants are English, does not, of itself, subject a Hindû to the English law,(*a*) though in Bombay particular legislation may to some extent have had this effect.(*b*)

Emigration from one to another province of India does not necessarily alter the law of inheritance to which the emigrant family originally belonged.(*c*) This marks the close connexion of the law of Inheritance amongst the Hindûs with their family law. But at the same time a customary law of inheritance may, it appears, be changed at his election by the person subject to it attaching himself to a class of the community on which the custom does not operate(*d*) and

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(*a*) *The Administrator General of Bengal* v. *Ranee Surnomoyee Dosee*, 9 M. I. A. 387.

(*b*) *Naoroji Beramji* v. *Rogers*, 4 Bom. H. C. R., p. 28 et seq.; *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154, 165, 170.

(*c*) *Rutcherputhy Dutt et al.* v. *Rájunder Nárráin Rúe et al.* 2 M. I. A. 132. Compare on this point *Rání Pudmávati* v. *B. Doolar Singh et al.* 4 M. I. A. 259, with *Rány Srimuti Debeah* v. *Rány Koond Lutá et al.* Ibid. 292; *Chundro Sheekhur Roy* v. *Nobin Soondor Roy et al.* 2 C. W. R. 197; *Nobin Chunder* v. *Junárdhun Misser*, C. W. R. Sp. No. p. 67; *Lukkeá Debeá* v. *Gungá Gobind Dobey et al.* Ibid. for 1864, p. 56; the Ráját of Coorg's case, and others quoted in 2 Nort. L. C. 474 and 12 M. I. A. 90; 1 Beng. Law R. 26 P. C. 8 C. W. R. 261.

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

subject to a different law. It may be abandoned in favour of the general law either by agreement or desuetude. (*a*) In *Rájáh Nugendur Nárain* v. *Rághonáth Náráyan Dey* (*b*) it was held that a family custom as to intermarriages might be proved by declarations made by members of the family. But still the course of devolution prescribed by law cannot be altered by a mere private agreement. (*c*)

In a recent case at Madras (*d*) it has been ruled that since the passing of the Indian Succession Act native Christian families have no longer been free to adhere to the Hindû Law of Succession, but that members born before the Act came into operation would not be deprived of their rights under the Hindû law. The latter point has been similarly ruled at Calcutta. (*e*)

In *Mynâ Boyee* v. *Ootarám* (*f*) it was held that the illegitimate sons of a European by two native women could not form a joint Hindû family in the proper sense, but could constitute "themselves parceners in the enjoyment of their property after the manner of a Hindû joint family." See further Lord Westbury's judgment in *Barlow* v. *Orde* (*g*) to the effect that in the absence of a general *lex loci*, the law applicable to the succession of any individual depends on his personal status, which again mainly depends on his religion. (*h*)

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(*a*) *Abraham* v. *Abraham supra*; *Court of Wards* v. *Pirthá Singh*, 21 W. R. 89, 92, C. R.; *Baroda Debeá* v. *Rájáh Pránkishen Singh*, 2 C. W. R. 81. 12 M. I. A. *supra*. See further below, and Index "Custom."

(*b*) C. W. R. for 1864, p. 20.

(*c*) *Bálkrishna Trimbak Tendulkar* v. *Sávitribái*, I. L. R. 3 Bom. 54, 57. See *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154,161.

(*d*) *Ponnusámi Nádan* v. *Dorasámi Áyyan*, I. L. R. 2 Mad. 209.

(*e*) *Sarkies* v. *Prosonomoyee Dossee*, I. L. R. 6 Cal. 794.

(*f*) 8 M. I. A., 400.

(*g*) 13 M. I. A., 277, 307.

(*h*) See *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154.

In litigation between a Hindû on the one side and a Mahomedan, a Christian or a Parsee on the other, it sometimes happens that the decision would be different according as the law governing the one or the other party as a member of a class should be applied. The Statute 21 Geo. III., c. 70, § 17, enabling the Supreme Court to hear and determine all suits against inhabitants of Calcutta provides "that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos; and where only one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant." The Statute 4 Geo. IV., c. 71, § 7, 17, enabled the Crown to confer a jurisdiction on the Supreme Court of Bombay, similar to that enjoyed by the Supreme Court of Bengal, and the Charter founded on this Statute, after giving authority to the Supreme Court "to hear and determine all suits and actions that may be brought against the inhabitants of Bombay," continues thus—"yet, nevertheless, in the cases of Mahomedans or Gentoos, their inheritance and succession to lands, rents, and goods and all matters of contract and dealing between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court; and where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant."

On the construction of the Statute 21 Geo. III., c. 70, § 17, Pontifex, J., would "confine the words 'their inheritance and succession' to questions relating to inheritance and succession by the defendants." "The present," he said, "is a question of the plaintiff's succession and, therefore, not

determinable by the laws and usages of the Gentoos."(*a*) It can hardly have been intended that a Gentoo should lose his law of inheritance whenever he entered the Court to enforce it. In the Bombay Charter (as in that of the Supreme Court of Madras, para. 32,) the expression is slightly varied, yet the mere words would, equally with the Statute, admit of the construction put on the latter at Calcutta. It cannot well be doubted, however, that the Statutes and the Charters alike were intended to preserve the Hindû and Mahomedan laws of inheritance amongst Hindûs and Mahomedans.(*b*) The provision for the case of only "one of the parties" being "a Mahomedan or Gentoo" had relation primarily, if not solely, to the cases of "contract and dealing between party and party" in which the principle "In pactionibus et conventionibus unusquisque se sua lege defendere potest"—is one of general though not of universal application. On a different construction of these provisions the property of a Hindû transferred to a Christian might have been freed from the claim of widows and daughters to maintenance, but at the same time subjected to dower. "It could not have been intended by the Legislature that the power of a Mahomedan to convey should be measured by the Hindû law." (*c*) But where there has been a contract between a Christian and a Hindû, on which the Hindû is sued, the right of each to his own law is equal to that of his adversary, and in such a case it is provided in favour of the defendant that he shall have the benefit of his own law, with which he is assumed to have been comparatively familiar. (*d*)

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(*a*) *Sarkies* v. *Prosonomoyee Dossee*, I. L.R. 6 Cal. 794, 808. "Gentoo" means Hindû.

(*b*) See *In re* Kâhândâs Nârandâs, I. L. R. 5 Bom 154, 166.

(*c*) *Per* Sir M. R. Westropp, C. J., in *Lakshmandâs Sarupchand* v. *Dasrat*, I. L. R. 6 Bom. 168, 184.

(*d*) Compare the language of Lord Ellenborough in *R.* v. *Picton*, 20 Howell's St. Trials, 944-5, quoted by Sir G. C. Lewis, Government of Dependencies, Note (*m*), p. 372.

In the mofussil of the Bombay Presidency the Regulation (IV. of 1827, § 26,) says—"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone." Here the law of the defendant prevails, failing Statute law and usage of the country, but such usage there is governing inheritance, partition, adoption and the whole province of family law amongst the Hindûs. The provision in favour of the defendant is not meant to have an operation such as to enable one man to dispose of another's rights. (*a*) It is frequently a matter of accident which of the two parties to a suit is plaintiff and which defendant, and only where the plaintiff for instance could dispose and has disposed of rights of his own, is he deprived, failing Statute law and custom, in case of an alleged infringement of the right under another personal law, of a remedy adhering to the right under his own personal law. A son or a wife cannot be deprived of a real right under the Hindû law by a mere transfer to a Christian; the "ownership" transferred cannot be greater than that of him who transfers it, and cannot be enlarged in the Christian's hands merely because under the English law the (Hindû's) ownership would perhaps have been unencumbered. How far then the volition of a Hindû passes property, depends on his law, as in the case of a Christian on the English law. What personal duty can be enforced against a Hindû will sometimes depend on the Hindû law, and especially the law of Inheritance. In the sphere of contract the Statute law (*b*) has now, for most purposes, superseded the Hindû law, and even in giving effect to the Hindû law of property and family law, equitable

(*a*) *Lakshmandás Sarukchand* v. *Dasrat*, I. L. R. 6. Bom. 183.

(*b*) The Indian Contract Act IX. of 1872. See also in *Mollwo March and Co.* v. *The Court of Wards*, the dictum Supp. I. A at p. 100.

principles derived from the English Courts are brought to bear on its development in the exigencies to which the present age gives rise. (*a*) This process is consistent with the Hindû law which seeks always to undo what has been fraudulently done, (*b*) and strives to enforce a conscientious fulfilment of engagements (*c*); but as regards a heritage or the mutual relations of the persons interested in property through family connexion or by rights derived from those so connected, it rests always on the basis of the positive law. This, therefore, is by no means superseded by the perpetual extension and the diversity of the cases brought to decision in the courts: a firm grasp of its principles and main provisions becomes all the more necessary as details and particular instances multiply in the reports, in order to prevent the confusion which must arise from the incautious admission of rules incongruous in their logical consequences with the Hindû system.

To be correctly apprehended the Hindû law, like other systems of law, must be studied in its history, and in its connexion with the religious and ethical notions of the people amongst whom it has come to prevail. The interpretation given to its ancient precepts by the commentators of authority, has been largely influenced by the philosophical systems. (*d*) The texts have in some instances been manipulated in order to bring them into accordance with notions of comparatively recent growth. Thus to reduce the law presented by the sources to precision and harmony, there is need for a strict

(*a*) See *In re* Káhándás Nárandás, I. L. R. 5 Bom. 154. File of Printed Judgments for 1880, p. 118, referring to 1 Morl. Dig. 106; 2 Bom. H. C. R. 52; 4 Beng. L. R. 8, A. C. As to the doctrine of notice, *see* I. L. R. 6 Bom. 193, 207, referring to *Rádhánáth Doss* v. *Gisborne*, 14, M. I. A., at p. 17.

(*b*) Vyav. May. Ch. IV., Sec 7, para. 24. Stokes H. L. B. 79.

(*c*) Vyav. May. Ch. IX., 4, 10. Stokes H. L. B. 134, 136.

(*d*) See Vasishtha, Ch. XVI., paras. 1, 5, and Note. Transl. p. 79. Co. Di. B. I., Ch. II., T. 49. Comm. and note.

and rather widely-ranging criticism. Those sources, however, or at least the more ancient ones, are looked on as of so sacred a character; the references to them by the accepted guides of ethical and legal thought, are so frequent and so submissive; the tendency of custom, even where it has diverged from their teaching, is so strong to revert to obedience to their rational commands, (*a*) that a study of them, some comprehension of their character and teachings, is indispensable as a foundation for a true mastery of the practical law of to-day.

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## II.—SOURCES OF THE HINDU LAW.

### I.—*On the Authorities of the Hindú Law as prevailing in the Bombay Presidency.*

Enumeration

THE authorities on the written Hindû Law in Western India are, according to Colebrooke, (*b*) the Mitâkshará of Vijñáneśvara and the Mayûkhas, especially the Vyavahâramayûkha of Nîlakaṇṭha. Morley (*c*) adds the Vyavahâramâdhava Nirṇayasindhu, Smritikaustubha, Hemádri, Dattakamîmâṁsâ, and Dattakachandrikâ. The quotations of the Śâstris, appended to their Vyavasthâs, which perhaps afford the most trustworthy information on the subject, show that the following works are considered by them the sources of the written law on this side of India:—

1. The Mitâkshará of Vijñaneśvara,

2. The Mayûkhas of Nîlakaṇṭha, and especially the Vyavahâramayûkha,

3. The Viramitrodaya of Mitramiśra,

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(*a*) Compare the remarks of Innes, J., as to the submission of the non-Aryan tribes to the Hindû Law in *Muttu Vaduganadha Tévar* v. *Dora Singha Tévar*, I. L. R. 3 Mad. at p. 309.

(*b*) Strange, El. H. L., 4th ed., p. 318. Preface to Treatises on Inheritance, Stokes's H. L. B., p. 173.

(*c*) Digest II. CCXXII.

and 5. The Dattakamîmâṁsâ of Nandapaṇḍita and the Dattakachandrikâ of [Devaṇḍabhaṭṭa] Kubera. (*a*)

6. The Nirnayasindhu of Kamalâkara,

7 and 8. The Dharmasindhu of Kâśinâtha Upâdhyâya and the Saṁskârakaustubha of Anantadeva,

9, and lastly, in certain cases the Dharmaśâstras, or the Smritis and Upasmritis, which are considered to be Rishivâkyâni, 'sayings of the sages,' together with their commentaries. These results have been corroborated by the concurrent testimony of those Law Officers and Paṇḍits whom we have had an opportunity of consulting.

tive position. 2. The relative position of these works to each other may be described as follows:—In the Marâthâ country and in Northern Kânara the doctrines of the Mitâksharâ are paramount; the Vyavahâramayûkha, the Viramitrodaya and the rest are to be used as secondary authorities only. They serve to illustrate the Mitâksharâ and to supplement it. But they may be followed so far only as their doctrines do not stand in opposition to the express precepts or to the general principles of the Mitâksharâ. (*b*) Among the secondary authorities, the Vyavahâramayûkha takes precedence of the Viramitrodaya. (*c*) The Dattakamîmâṁsâ and the Dattaka-

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(*a*) Rao Saheb V. N. Mandlik, Vyavahâramayûkha and Yâjñ. Introd., p. lxxii., is right in objecting to Mr. Sutherland's conjecture, which attributes the authorship of the Dattakachandrikâ to Devaṇḍabhaṭṭa.

(*b*) See *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, 12, M. I. A. 438; *Nârâyan Bâbâji* v. *Nânâ Manohar*, 7 Bom. H.C.R. 167, 169, A. C. J.; *Krishnâji Vyankatesh* v. *Pândurang*, 12 Ibid. 65; *Râhî* v. *Govind valad Tejâ*, In. L. R. 1 Bom. 106; *Lakshman Dâdâ Nâik* v. *Râmchandra Dâdâ Nâik*, 565 S. C. in appeal to P. C. L. R. 7 I. A. at p. 191; *Ramkoomeur* v. *Ummer*, 1 Borr. R. 460.

(*c*) *See* Colebrooke's Introduction to Treatises on Inh., Stokes's H. L. B. 173, 176, 178; *Gridhari Lall* v. *The Bengal Govt.*, 12 M. I. A. 646.

chandrikâ, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance, but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavahâramayûkha or of the Dharmasindhu and Nirṇayasindhu. The two latter works and the Saṁskârakaustubha, occupy an almost equal position in regard to questions on ceremonies and penances. They are more frequently consulted by the Śâstris of the Marâṭhâ country than the Mayûkhas, which refer to the same portions of the Dharma. Among these three, the Nirṇayasindhu is held in the greatest esteem.

All points of law, which may be left undecided by the works mentioned, may be settled according to passages from the Smṛitis or Dharmaśâstras, or even from the Purâṇas. The latter have less authority than the former, and may be overruled by them. (*a*) In case of a conflict between the rules of the Smṛitis either may be followed, as reasoning on principles of equity (yuktivichâra) shall decide the solution. (*b*)

The law of Gujarât in some cases, it seems, alters the order of the authorities and places the Vyavahâramayûkha before the Mitâkshará. As an instance may be quoted the case of a sister's succession to her brother's estate, immediately after the paternal grandmother, which, in accordance with the Mayûkha, is allowed in Gujarât. How far precisely this preference of the Mayûkha goes, is a matter of some doubt, to be cleared up by judicial determination. (*c*)

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(*a*) Vyâsa I. 4. "Where a conflict between the Śruti, Smṛiti and Purâṇas appears, the text of the Śruti is the norm; but in case of a conflict between the (latter) two, the Smṛiti is preferable."

(*b*) See Muir's Sanskrit Texts, II., 165, and III., 179, &c.

(*c*) See below; B. I. Introd., sect. 4, B. (7); Introductory remarks to Ch. II., sect. 14. I. A. I.; the case of *Vijayarangam* v. *Lakshman*, 8 Bombay H. C. R. 244 O. C. J.; *Lalubhai* v. *Mankuvarbai*, I. L. R.

tâkshará. 3. The first of these authorities, the Mitâkshará,(*a*) is the famous commentary of Vijñâneśvara on the Institutes of

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2 Bom. 388; L. R. 7. I. A. 212; S. A. No. 158 of 1870, decided on March 27, 1871. Bom. H. C. printed Judgments File for 1871.

Rao Saheb V. N. Mandlik (Introd. to Vyavahâramayûkha and Yâjnavalkya, p. 1.) has found fault with the above statement of the sources of the Hindû Law in Bombay, and of their relative importance. He thinks that the editors of the Digest consider the Mitâkshará, the Mayûkha and the Nirnayasindhu the only recognised official guides for settling the Hindû law, and adds that this opinion is a grave error. The censure however rests on an entire misapprehension of the views entertained. In the first two editions of this work, the *Dharmaśâstras and their Commentaries* have been mentioned as the ninth division of the sources of the law (as administered in Bombay), and in the amplification of that passage, the *Purâṇas*, likewise, have been named. What the editors have stated and still hold, is that the eight works, enumerated by name, hold the first rank among the legal works, used in Bombay, and that their doctrines cannot be set aside lightly in favour of conflicting opinions of other authors, however much the latter may please individual taste. The editors have further pointed out that the numerous omissions in the standard works may be supplied by information, derived from the *dicta* of the authors of Smritis, whether these be contained in complete original treatises (Sûtras or Dharmaśâstras), or in quotations given by the medieval Nibandhakâras, and by reasoning on principles of equity. In accordance with these principles, they have in the notes on the cases, freely drawn on published and unpublished legal works, not contained in their list, in order to elucidate points left undecided or doubtful in the Mitâkshará Mayûkha, &c. But it did not enter into their plan to give a review of the medieval literature on Dharma or on Vyavahâra, and without such a review no useful purpose, they thought, could be served by printing a mere list of authors' names and of titles. The Rao Saheb has given such a list, at pp. lx. and lix. of his Introduction, but one drawn up with so little regard to system that in some instances the same works are entered under two names, and treatises on sacrifices, astrology, astronomy and philosophy, nay poetical and story-books are placed side by side with works on the civil and religious law. The list, given at pp. lxviii. and lxix.,

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(*a*) The proper title of the work, which however is used in the MSS. only, is Rijumitâksherâṭîkâ.

Yâjñavalkya. The latter work, which probably is a versification of a Dharmasûtra, *i.e.*, of a set of aphorisms on Dharma belonging to the White Yajurveda, (*a*) contains about a thousand verses divided into three chapters (kâṇḍas) which treat respectively of 'the rule of conduct' (âchâra), of civil and criminal law (vyavahâra), and of penances (prâyaśchitta). As may be inferred from the small extent of Yâjñavalkya's

which is stated to have been compiled from answers of Śâstrîs, contains several double and inaccurate entries, (such as Mitâksharâ and Vijñâneśvara, Sarvamayûkha, = all the Mayûkhas and the separate titles of the twelve Mayûkhas, such as Mâdhava, Dinakareddyota, &c., where specifications are required. It is incomplete also, as the Rao Saheb himself suspects, and appears to have been made up exclusively by Konkaṇastha and Deśastha Paṇḍits. Much fuller information on the legal books, consulted by the Bombay Paṇḍits may be obtained from Dr. Bühler's Catalogues of MSS. from Gujarâth (fasc. III., p. 67 seq.) and Dr. Kielhorn's Catalogue of MSS. from the Southern Marâthâ Country. As regards the comparative estimation in which the books, contained in the Rao Saheb's list, are held, no information is given—an omission which makes it almost valueless for the purpose which it is intended to serve. The fact that a good many other books besides those enumerated in the Digest are consulted, *i. e.*, occasionally referred to by Paṇḍits, proves nothing against the opinion advanced by the editors that the eight works, named above, are the standard authorities, nor do the Rao Saheb's remarks on the Mitâksharâ (p. lxxi) disprove its preëminence, as far as questions of the Civil Law are concerned. His *dictum* that there is nothing remarkable about the book is controverted by the view of the responsible Court Śâstris as pointed out in *Krishnâji Vyankatesh* v. *Pânduraṅg*, 12 Bom. H. C. R. 65, and in *Lallubhâi Bâpubhâi v. Mânkuverbâi*, I. L. R. 2 Bo. S., at pp. 418, 445, and of many excellent native authorities, as well as by the respectful treatment accorded to Vijñânayogin, in the best native compilations of the 16th and 17th centuries. His remark that the works of Kamalâkara, Mâdhava, Nârâyaṇa and other Bhaṭṭas are more frequently consulted than the Mitâksharâ is true. But the reason of this is that, under British rule, with its organized judiciary, Paṇḍits are consulted by the people not on civil law, but on vows, penances, ceremonies, and other matters of the religious law, on which subjects the books, named by him, give fuller information than the Mitâksharâ.

(*a*) *See* below.

work, this author gives fragmentary rules only, which neither exhaust their subject, nor are in every case easily intelligible. Vijñâneśvara remedies the defects of his original, not only by full verbal interpretations, but also by adding long discussions on doubtful points, and by illustrating and developing Yâjñâvalkya's and his own doctrines by quotations from the Institutes of other Rishis. For he holds the opinion, which is also the generally received one among modern Hindû lawyers, that the Smritis or various Institutes of Law form one body, and are intended to supplement each other. (*a*) But this opinion occasionally misleads him, and causes him in some few cases to explain the text of Yâjñâvalkya in a manner inconsistent with the rules of sound interpretation. With these occasional exceptions, his expositions certainly merit the high repute in which they long have stood with the learned of the greater part of the Indian Peninsula. The

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(*a*) Vijnâneśvara says in his commentary on Yâjñâvalkya I. 5, which contains an enumeration of certain authors of Smritis, (Mit. Âchârak, *l.* 15, Bâbûrâm's edition of Saṁvat 1869):—

"The meaning (of this verse, I. 5,) is that the Institutes of Law composed by Yâjñavalkya ought to be studied. The enumeration (of authors of Smritis given in this verse) is not intended to be exhaustive, but merely to give examples. Therefore (this verse) does not exclude (the works of) Baudhâyana and others (who are not mentioned) from the Institutes of Law; as each of these (Smritis) possesses authority, the points left doubtful (by one) may be decided according to others. If one set of Institutes contradicts the other, then, there is an option."—See Manu II., 10, 14; XII. 105, 106; Vyav. May., ch. I., pl. 12; Col. V. Dig. sect. 7, 424; Mit. in 1 Macn. H. L. 188. Muir's Sanskrit Texts II., 165; III., 179, ss., and as to the applications of the texts, *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 M. I. A. 390, and *Collector of Madura* v. *Mootoo Ramalinga Sâthapathy*, 12 M. I. A., at p. 438.

The Hindû commentators always endeavour, even at the cost of much straining, to extract consistent rules from texts which they regard as equally above human censure "comme d'après la méthode des légistes il faut que les textes aient raison lorsqu'ils ne présentent aucun sens." *See* Goldstücker "On the Deficiencies in the Administration of the Hindu Law," p. 2.

discussions and amplifications, added by Vijñâneśvara to his explanation of Yâjñâvalkya's text, make the Mitâkshará rather a new and original work, based on Yâjñâvalkya than a mere gloss, and one more fit to serve as a code of law than the original. But extensive as the Mitâkshará is, it does not provide for all the cases arising, and, if used alone, would often leave the lawyer without guidance for his decision.

Regarding the life and times of Vijñâneśvara little is known. Recent discoveries, however, make it possible to fix his date with greater certainty than could be done formerly. Mr. Colebrooke (*a*) placed Vijñâneśvara between 800—1300 A. D., because, on the one hand, he is said to have belonged to an order of ascetics founded by Śankarâchârya, who lived in the 8th century A. D., and because, on the other hand, Viśveśvara, the oldest commentator, flourished in the 14th century of the Christian era. He adds that if the Dhâreśvara, (*b*) 'the lord of Dhârâ,' quoted in the Mitâkshará is the same as the famous Bhojarâja, king of Dhârâ, the remoter limit of Vijñâneśvara's age will be contracted by more than a century. In favour of Mr. Colebrooke's latter statement, Kamalâkara's testimony may be adduced, who in the Vivâdatândava (succession of a widow) ascribes the same opinion to Bhojarâja, which the Mitâkshará attributes to Dhâreśvara (the lord of Dhârâ).

A much better means for settling the date of Vijñâneśvara is, however, furnished by some verses, which are found at the end of the Mitâkshará in some of the oldest MSS. (*c*) and in the Bombay lithographed edition, and which were apparently not unknown to Mr. Colebrooke. (*d*)

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(*a*) Stokes's Hindû Law Books, p. 178.

(*b*) *See, e. g.*, Col. Mit. II. 1., 8 (Stokes, p. 429).

(*c*) The MS. of the Govt. of Bombay, dated Śaka Saṁvat 1389, Dr. Bhâû Dâji MS. and Ind. Off. No. 2170, dated Vikrama Saṁvat, 1835.

(*d*) Stokes, p. 178.

There we read verses 4 and 6 (*a*) :—

4. "There has not been, nor is nor will be on earth a city, comparable to Kalyâṇapura; no king has been seen or heard of, who is comparable to the illustrious Vikramâṅka; nothing else that exists in this kalpa bears comparison with the learned Vijñâneśvara. May these three who resemble (three) kalpa-creepers, be endowed with stability."

6. "Up to the bridge of famous (Râma), the best of the scions of Raghú's race, up to the lord of mountains, up to the western ocean, whose waves are raised by shoals of nimble fishes, and up to the eastern ocean, may the lord Vikramâditya protect this world, as long as moon and stars endure."

Vijñâneśvara lived, therefore, in a city called Kalyâṇapura, under a king named Vikramâditya or Vikramâṅka. As the learned Paṇḍit, by speaking of his opponents as 'the Northerners' shows (*b*) that he was an inhabitant of Southern India, it cannot be doubtful that the Kalyâṇapura named by him is the ancient town in the Nizâm's dominions, which from the 10th to the 14th century was the seat of the restored Châlukya dynasty. (*c*) This identification is supported by the consideration that Kalyâṇa in the Dekhan is the only town of that name, where princes, called Vikramâditya, are known to have ruled. One of these, Vikramâditya-Kalivikrama-Parmâḍirâya, bore also, according to the testimony of his chief Paṇḍit and panegyrist, Bilhaṇa, the not

(*a*) *See* Journ. Bo. Br. Roy. As. Soc. IX., pp. 134-138, and lxxiv.—lxxvi. The recovery of the Vikramâṅkadevacharita makes it probable that Vikramâṅkopamaḥ, not Vikramârkopamaḥ, is the correct reading in verse 4. The statement made at the end of the article, that the concluding verses belong not to Vijñâneśvara, but to some copyist, is no longer safe. Recent researches show that most if not all Sanskrit authors appended to their works statements regarding their own private affairs, which frequently are not in harmony with our notions of modesty.

(*b*) See Journ. Bo. Br. As Soc. IX., p. lxxv.

(*c*) Regarding the Châlukya dynasty, *see* Sir W. Elliott, Journ. Bengal Br. As. Soc. IV., p. 4.

very common appellation, Vikramânka. (*a*) He appears to be the prince named as Vijñâneśvara's contemporary. His reign falls according to his inscriptions between the years 1076—1127 A.D. Hence it may be inferred that Vijñâneśvara wrote in the latter half of the eleventh century, a conclusion which agrees well enough with his quoting Bhoja of Dhârâ, who flourished in the first half of the same century. (*b*) It may be added that Vijñâneśvara certainly was an ascetic, because he receives the title paramahaṁsapârivrâjakâchârya. By sect he was a Vaishṇava. His father's name was Padmanâbha-bhaṭṭa and belonged to the Bhâradvâja gotra. The discovery that Vijñâneśvara was an inhabitant of Kalyâṇa in the Dekhan, and a contemporary, if not a protegé, of the most powerful king whom the restored Châlukya dynasty produced, explains why his book was adopted as the standard work in Western and Southern India, and even in the valley of the Ganges.

The explanation of the Mitâksharâ is facilitated by two Sanskrit commentaries, the above-mentioned Subodhinî of Viśveśvarabhaṭṭa and the Lakshmîvyâkhyâna, commonly called Bâlambhaṭṭaṭîkâ, the work of a lady, Lakshmîdevî, who took the *nom de plume* Bâlambhaṭṭa. (*c*) Viśveśvara's comment explains selected passages only, while Lakṣhmîdevî gives a full and continuous verbal interpretation of the Mitâksharâ accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of Yâjñavalkya.

Instances of this tendency may be seen in the quotations given below. Her opinions are held in comparatively small esteem, and are hardly ever brought forward by the Śâstris, if unsupported by other authorities.

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(*a*) *See* Vikramânkadevacharita of Bilhaṇa, *passim*.

(*b*) *See* Indian Antiquary, VI., p. 50, seq.

(*c*) *See* Colebrooke Stokes's H. L., p. 177, Aufrecht, Catal. Oxf. MSS. p. 262*a*; F. E. Hall Contribution *towards* Ind Bibl., p. 175. The correct form of Lakṣhmîdevî's family name is *Páyagunde*.

Two other works, the Viramitrodaya and the Yâjñavalkya-dharmaśâstranibandha, a commentary on Yâjñavalkya, by Aparâdityadeva, or Aparârka, also give great assistance for the explanation of the Mitâkharâ. About the former more will be said below. As regards Aparârka's bulky work, it must be noted that Mr. Colebrooke recognised its importance, and frequently quoted it. (*a*) If his example has not been followed in the first edition of this work, the sole reason was that no MSS. were then procurable in Bombay. The Nibandha is now accessible in several copies, and has been used to elucidate several important points. Aparârka or Aparâdityadeva belonged to the Konkaṇa branch of the princely house of the Śilâras, or Śilâhâras, who had their seat at Purî, and held the Konkaṇa as well as the adjacent parts of the Dekhan as feudatories, first of the Râṭhors of Mânyakheṭa-Mâlkheṭ, and later of the Châlukyas of Kalyâṇa. He reigned and wrote between 1140—1186 A. D., shortly after Vijñâneśvara's times. (*b*) His doctrines closely resemble those of his illustrious predecessor; several passages of his work look like amplifications of Vijñânesvara's dicta, and are of great value for the correct interpretation of the Mitâkharâ. It is, however, difficult to say whether Aparârka in these cases actually used the Mitkharâ, or whether both drew from a common source.

Besides the native commentaries and Nibandhas, there is the excellent translation of the Mitâkharâ on Inheritance, by Colebrooke, (*c*) which has always been made use of in translating the authorities appended to the Vyavasthâs. In some places we have been compelled to dissent from Colebrooke;

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(*a*) Stokes's Hindu Law Books, p. 177, and Translation of the Mit. on Inh., *passim*.

(*b*) *See* Journ. Bo. Br. As. Soc., Vol. XII. Report on Kaśmîr, p. 52.

(*c*) Two treatises on the Hindû Law of Inheritance, translated by H. T. Colebrooke, Calcutta, 1810, 4to. Reprinted in Wh. Stokes's Hindû Law Books, Madras, 1865, and by Girish Chandra Tarkalankar, Calcutta, 1870.

but we are persuaded that in nearly all these instances Colebrooke had different readings of the text before him. The first part of the Vyavahârakânda of the Mitâsharâ has been translated by W. H. Macnaghten. The edition of the Sanskrit text of the Mitâksharâ used for the Digest is that issued by Bâbûrâm, Saṁvat 1869.

4. The Vyavahâramayûkha is the sixth Mayûkha or 'ray' of the Bhagavanta-bhâskara, 'the sun,' composed (with the permission of, and dedicated to, king Bhagavantadeva,) by Nîlakaṇṭhabhaṭṭa. The Bhâskara, which consists of twelve 'rays' or divisions, forms an encyclopedia of the sacred law and ethics of the Hindûs. It contains :— Vyavahâramayûkha.

1. The Saṁskâramayûkha, on the sacraments.

2. The Âchâramayûkha, on the rule of conduct.

3. The Samayamayûkha, on times for festivals and religious rites.

4. The Śrâddhamayûkha, on funeral oblations.

5. The Nîtimayûkha, on polity.

6. The Vyavahâramayûkha, on Civil and Criminal Law.

7 The Dânamayûkha, on religious gifts.

8. The Utsargamayûkha, on the dedication of tanks, wells, &c.

9. The Pratishṭhâmayûkha, on the consecration of temples and idols.

10. The Prâyaśchittamayûkha, on penances.

11. The Śuddhimayûkha, on purification.

12. The Śântimayûkha, on averting evil omens.(*a*)

The Vyavahâramayûkha, which has the greatest interest

(*a*) *See* Borradaile in Stokes's H. L. B., p. 8. The correctness of the order in which the books are enumerated is proved by the introductory verses of each Mayûkha, where the immediately preceding one is always mentioned, as well as by the longer introduction to one of the MSS. of the Nîtimayûkha.

for the student of Hindû law, is, like all the other divisions of the Bhâskara, a compilation based on texts from ancient Smritis, and interspersed with explanations, both original and borrowed from other writers on law. It treats of legal procedure, of evidence, and of all the eighteen titles known to Hindû law, which, however, are arranged in a peculiar manner differing from the systems of other Pandits. In his doctrines Nîlakaṇṭha follows principally the Mitâkshârâ and the Madanaratna of Madanasiṁhadeva(*a*), sometimes preferring the latter to the former. From a comparison of the portions on inheritance of the Mayûkha and Madanaratna, it would seem that Nîlakaṇṭha sometimes even borrowed opinions from Madana without acknowledgment. Some passages of the Mayûkha, *e.g.*, the discussion on the validity of certain adoptions, are abstracts of sections of the Dvaitanirṇaya, a work by Śaṅkara, the father of Nîlakaṇṭha, and are not intelligible without the latter work. (*b*)

Of Nîlakaṇṭha's life and times some account has been given by Borradaile. (*c*) According to him, that Pandit was of Deśastha-Mâhârâshṭra descent and born in Benares. He lived, as one of his descendants, Harabhaṭṭa Kâśîkar, told Captain Robertson, the Collector of Puṇa, upwards of two hundred years ago, *i.e.*, about 1600, sixteen generations having passed since his time. Other Puṇa Paṇḍits gave it as their opinion that Nîlakaṇṭha's works came into general use about the year 1700, or 125 years before Borradaile wrote. (*d*)

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(*a*) This author compiled an encyclopedia, similar to that of Nîlakaṇṭha, the twelve Uddyotas. The work, commonly called Madanaratna, bears also the title Vyavahâraddyota.

(*b*) Stokes's Hindu L. B., p. 58, seq.; May., chap. IV., sect. V., ss. 1—5.

(*c*) Stokes's H. L. B., p. 7, seq.

(*d*) The correctness of the information given to Borradaile is now attested by the paper of Professor Bâl Śâstri, translated in the Introd to Rao Saheb V. N. Mandlik's Vyavahâramayûkha, p. lxxv. For it appears that Nîlakaṇṭha was the grandson of Nârâyaṇabhaṭṭa, who wrote in Śaka Saṁvat 1459, or 1535 A. D.

Borradaile adduces also the statement made at the end of some MSS. of the Vyavahâramayûkha, that Nîlakaṇṭha lived, whilst composing the Bhâskara, under the protection of Bhagavantadeva, or Yuddhaśûra, a Râjput chief of the Sangara tribe, who ruled over the town of Bhareha, near the confluence of the Chambal and of the Jamnâ. A possible doubt as to whether the passage containing these notes is genuine and its contents trustworthy, is removed by the fact that many copies of the Śrâddha, Saṁskâra and Nîtimayûkhas likewise contain the statement that Nîlakaṇṭha-bhaṭṭa, son of Śankara-bhaṭṭa, and grandson of Nârâyaṇasûri, was ordered by Bhagavantadeva, a king of the Sangara dynasty, to compose the Bhâskara. Some copies of the Nîtimayûkha and of the Vyavahâramayûkha enumerate also nineteen or twenty ancestors of Bhagavantadeva. (*a*) At the same time the author calls himself there Dâkshiṇâtyâvatamsá 'of Dekhanî descent,' and thus confirms the report of the Puṇa Brahmins. The edition of the Sanskrit text of the Vyavahâramayûkha used for the Digest is the oblong Bombay edition of 1826. The translation of the passages from the Mayûkha quoted in the Digest has been taken from Borradaile's translation. This work, though in general of great service, is frequently inaccurate. Some passages of the text have been misunderstood, and others are not clearly rendered. Where this occurs in the passages quoted, the correct translation has been added in a note. (*b*)

5. The Viramitrodaya is a compilation by Mitramiśra, which consists of two kâṇḍas on Âchâra and on Vyavahâra. (*c*) Viramitrodaya.

(*a*) *See* Aufrecht, Oxf. Cat., pp. 280-81. His list does not quite agree with that given in the 1st edition of the Digest. The text of the verses is so corrupt that it cannot be settled without a collation of fresh and more ancient copies.

(*b*) The translation of Rao Saheb V. N. Mandlik, published in Bombay, 1880, is, though in some respects better than Borradaile's, not sufficiently accurate to warrant its adoption in the place of the old one.

(*c*) This would not be a matter of surprise if a third kâṇḍa on penances (prâyaśchitta) were found. But hitherto only two have become known.

The latter is written nearly in the same manner as the Mayûkha. But Mitramiśra adheres more closely to the Mitâksharâ than any other writer on law. He frequently quotes its very words; to which he adds further explanations and paraphrases. At the same time he enters on lengthy discussions regarding the opinions advocated by Jîmûtavâhana, Raghunandana, and the Smritichandrikâ. Occasionally he goes beyond or dissents from the doctrines of the Mitâksharâ. In the Vyavahârakânḍa (*a*) which has been published, Mitramiśra says that he was the son of Paraśurâma and grandson of Hañsapandita, and that he composed his work by order of king Vîrasiñha, who, according to the last stanza of the book, was the son of Madhukarasâha. The beginning of the unpublished âchârakânḍa gives a fuller account of the ancestors of Mitramiśra's patron, among whom, Medinîmalla, Arjuna, Malakhâna, Pratâparudra, and Madhukara are enumerated. Besides, it is stated that these kings were Bundelâs. (*b*) This last remark makes it possible to identify the author's patron.

Virasiñha is nobody else but the well-known Bîrsinh Deo of Orchhâ, who murdered Abul Fazl, the minister of Akbar, and author of the Ayîn-Akbari.(*c*) This chief, who was violently persecuted by Akbar for the assassination of his minister, was also a contemporary of Jehangîr and Shâh Jehân. The Vîramitrodaya, therefore, must have been written in the first half of the 17th century, or a little later than we had placed it according to internal evidence in the first edition of this work. The references in the Digest are to the quarto edition published by Chûḍâmani at Khidirapura, 1815. A careful translation of the part of the Vîramitrodaya relating to inheritance has been published,

(*a*) Vîramitrodaya, śloka 2.

(*b*) Vîramitrodaya, Ind. Off. No. 930, ślokas 1—37.

(*c*) *See* Gazetteer North-West Provinces, I., pp. 21-23, where Birsinh's pedigree, which exactly corresponds with Mitramiśra's genealogy of Vîrasiñha, has been given.

accompanied by the text, by Mr. Golâpchandra Sarkár Śástrî, Calcutta, 1879.

6. The next two authorities, the Dattakamîmâṁsâ and Dattakachandrikâ, do not call for any remark here, as they have little importance for the law of inheritance. The discussion of them belongs to the law of adoption. Dattakamîmâṁsâ and Dattakachandrikâ.

7. The Nirṇayasindhu of Kamalâkara, called also Nirṇayakamalâkara, consists of three parichhedas, or chapters. The first and second contain the kâlanirṇaya, *i.e.* the division of time, the days and seasons for religious rites, eclipses of the sun and moon, and their influence on ceremonies, &c. The third chapter is divided into three prakaraṇas or sections. The first of these treats of the sacraments or initiatory ceremonies, the second of funeral oblations, and the third of impurity, of the duties of Saṁnyâsîs and other miscellaneous topics of the sacred law. The book is a compilation of the opinions of ancient and modern astronomers, astrologers, and authors on sacred law, from whose works it gives copious quotations. The passages quoted are frequently illustrated by Kamalâkara's own comments, and occasionally lengthy discussions are added on points upon which his predecessors seem to him to have been at fault. Kamalâkara himself tells us that in the first and second chapters he chiefly followed Mâdhava's Kâlanirṇaya and the section of Hemâdri's work which treats of Times.(*a*) His learning is esteemed very highly in Western India, especially among the Marâṭhâs, and the Nirṇayasindhu is more relied upon in deciding questions about religious ceremonies and rites than any other book. Nirṇayasindhu.

In the introductory and in the concluding ślokas of the Nirṇayasindhu, Kamalâkara informs us that he was the son of Râmakrishṇa, the grandson of Bhaṭṭa Nârâyaṇasûri, and the great grandson of Râmeśvara. He also names his mother Umâ, his sister Gaṇgâ, and his elder brother

(*a*) Nirṇayasindhu I. 7.

Dinakara, the author of the Uddyotas. (*a*) His literary activity was very extensive. He wrote, also, the Vivâdatâṇḍava, a compendium of the civil and criminal law, based on the Mitâkshará, a large digest of the sacred law, called Dharmatattva-Kamalâkara, divided into 10 sections: 1, vrata, on vows; 2, dâna, on gifts; 3, karmavipâka, on the results of virtue and sin in future births; 4, śânti, on averting evil omens; 5, pûrta, on pious works; 6, âchâra, on the rule of conduct; 7, vyavahâra, on legal proceedings; 8, prâyaśchitta, on penances; 9, śûdradharma, on the duties of Śûdras; 10, tîrtha, on pilgrimages. The several parts are frequently found separate, and many are known by the titles śûdrakamalâkara, dânakamalâkara, &c. Kamalâkara, further, composed a large work on astronomy, the siddhântatattva, vivekasindhu and other treatises. (*b*) He himself gives his date at the end of the Nirṇayasindhu, where he says that the work was finished in Vikrama Saṁvat 1668 or 1611—12 A. D. The edition of the Nirṇayasindhu, used for the Digest, is that issued by Vitthal Sakhârâm, Śaka 1779, at Puṇa.

Saṁskâra-kaustubha.

8. The Saṁskârakaustubha of Ânantadêva, son of Âpadeva, or one of the numerous compilations treating of the sixteen sacraments and kindred matters. It is said to belong to the same time as the Nirṇayasindhu.

The author (*c*) compiled a good many other treatises on philosophical subjects, a Smṛitikaustubha and a Dattakaustubha on the law of adoption. (*d*) The edition referred to in

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(*a*) Compare also Professor Bâl Śâstrî's paper in Rao Saheb Mandlik's Vyavahâramayûkha, &c. pp. lxxv.—vi.

(*b*) *See* Râjendralâl Mitra, Bikaner Catalogue, pp. 499, 504.—Hall, Index of Indian Philosophical Systems, pp. 177, 183, where the date is, however, given wrongly. The latter is expressed by words: vasu (8), ritu (6), bhû (1), mite gatêbde narapativikramato. The second figure has, as is frequently required in dates, to be read twice.

(*c*) The author's patron was a certain Râjâ Chaṇḍadeva Bahâdur, about whom nothing further is known.

(*d*) Compare F. E. Hall, l. c., p. 62, 145, 186, 190, 191, and particularly p. 185, Râjendralâl Mitra, Bikaner Catalogue, p. 466.

the Digest is the one printed at Bâpû Śadâśiv's Press, Bombay, 1862.

9. The Dharmasindhu or Dharmasindhusâra, by Kâśînâtha,(*a*) son of Anantadeva, is a very modern book of the same description as the Nirnayasindhu. The author, according to the Pandits, was a native of Pandarpur, and died about forty or fifty years ago. Dharmasindhu.

10. The word Smṛiti means literally 'recollection,' and is used to denote a work or the whole body of works, (*b*) in which the Ṛishis or sages of antiquity, to whose mental eyes the Vedas were revealed, set down *their recollections* regarding the performance of sacrifices, initiatory and daily rites, and the duty of man in general. The aphorisms on Vedic sacrifices (Śrautasûtras), the aphorisms on ceremonies for which the domestic fire is required (Gṛihyasûtras) and the works treating of the duties of men of the various castes and orders (Dharmasûtras, Dharmaśâstras,) are all included by the term Smṛiti. In the common parlance of our days, however, the term has a narrower meaning, and is restricted to the last class of works. Of these there exist, according to the current tradition, thirty-six, which are divided, at least by the Śâstris of the present day, into Smṛitis and Upasmṛitis, or supplementary Smṛitis. Neither the limitation of the number, nor the division is, however, found in the older works on law, such as the Mitâkśharâ and those books which contain it, do not always place the same works Smṛitis.

(*a*) Prof. Goldstücker 'On the Deficiencies in the present Administration of Hindu Law,' App., p. 35, is mistaken in stating that the Editors of the Bombay Digest have invented the abbreviation 'Dharmasindhu.' Pandits of the Marâṭhâ Country generally use this form, and the Law Officers quote the book under this title. The form Dharmasindhusâra finds just as little favour with the learned of Western India, as the full title of Vijñâneśvara's great commentary, Rijumitâkśharâ, instead of which the abbreviation Mitâkśharâ, alone, is current.

(*b*) Hence the word is sometimes used in the singular as a collective noun and sometimes in the plural.

in the same class.(a) According to Hindû views, the Smṛitis were mostly composed and proclaimed by the Ṛishis whose names they bear. But in some cases it is admitted that the final arrangement of these works is due to the pupils of the first composers.(b) The Hindûs are driven to this admission by the circumstance that some times the opening verses of the Dharmaśâstras contain conversations between the composer and other Ṛishis, stating the occasions on which the works were composed. In other cases the Smṛitis are considered to have originally proceeded from gods or divine beings, and to have descended from them to Ṛishis, who in their turn made them known among men. Thus the Vishṇu Smṛiti is ascribed to Vishṇu; and Nandapaṇḍita in his commentary suggests that it must have been heard by some Ṛishi who brought it into its present shape. Or, in the case of the Mânava Dharmaśâstra, it is asserted that Brahmâ taught its rules to Manu, who proclaimed them to mankind. But his work was first abridged by Nârada, and the composition of the latter was again recast, by Sumati, the son of Bhṛigu. (c) But, as even such Smṛitis were proclaimed by men, they partake of the *human* character, which the Mîmâṁsakas assign to this whole class of works, and the great distinction between them and the revealed texts, the Veda or Śruti remains.

Hindû tradition is here, as in most cases where it concerns literary history, almost valueless. Firstly, it is certain that more than thirty-six Smṛitis exist at the present time, and that formerly a still greater number existed. From the quotations and lists given in the Smṛitis, their commentaries,

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(a) Borradaile in Stokes's Hindû Law Books, p. 4, seq.

(b) Mit. Âchâra 1*a*, 13. "Some pupil of Yâjñavalkya abridged the Dharmaśâstra composed by Yâjñavalkya, which is in the form of questions and answers, and promulgated it, just as Bhṛigu, that proclaimed by Manu."

(c) *See* preface to Nârada, translated by Sir W. Jones, Institutes of Manu, p. xvi. (ed. Haughton).

the Purâṇas and the modern compilations on Dharma, as well as from the MSS. actually preserved, it appears that, counting the various redactions of each work, upwards of one hundred works of this description must have been in existence. Their names are: 1, Agni; 2*a*, Aṅgiras; 2*b*, Madhyama-Aṅg.; 2*c*, Bṛihat-Aṅg. (two redactions in verse exist, which seem to be different from the treatises quoted); 3, Atri (two redactions exist); 4, Âtreya; 5*a*, Âpastamba (prose, exists); 5*b*, Ditto (verse, exists); 6, Âlekhana; 7, Âsmarathya; 8*a*, Âśvalâyana (verse, exists); 8*b*, Bṛihat-Â. (verse, exists); 9*a*, Uśanas (prose, fragment exists); 9*b*, Ditto (verse, exists); 10, Ṛishyaśṛiṅga; 11, Eka; 12, Audulomi; 13, Aupajandhani; 14, Kaṇva (verse, exists); 15, Kapila (verse, exists); 16, Kaśyapa (prose, exists); 17*a*, Kâṇva; 17*b*, Kâṇvâyana (prose, exists); 18 Kâtya; 19*a*, Kâtyâyana (verse); 19*b*, Ditto (karmapradîpa, exists); 19*c*, Vṛiddha Kâty (verse); 20, Kârshṇâjini; 21*a*, Kâśyapa; 21, Upa-Kâśyapa (prose, exists) (*a*); 22, Kuṭhumi; 23, Kuṇika; 24, Kutsa; 25, Krishṇâjini; 26, Kauṇḍinya; 27, Kautsa; 28, Gârgya; 29*a*, Gautama (prose, exists); 29*b*, Ditto (verse, exists); 29*c*, Vṛiddha Gaut; 30, Chidambara; 31, Chyavana; 32, Chhâgaleya; 33, Jamadagni; 34, Jâtukarṇya; 35, Jâbâli; (*b*) 36, Datta; 37*a*, Daksha (verse, exists); 37*b*, Ditto (quoted); 38, Dâlbhya (verse, exists); 39*a*, Devala (verse, exists); 39*b*, Ditto (quoted); 40, Dhaumya; 41, Nâchiketa; 42, Nârada (verse, vyavahâra-section exists); 43*a*, Paraśara (verse, exists); 43*b*, Bṛihat Par. (verse, exists); 44, Pâraskara; 45, Pitâmaha; 46*a*, Pulastya; 46*b*, Laghu Pul; 47, Pulaha; 48, Paiṭhînasi; 49, Paushkarasâdi or Pushkarasâdi; 50*a*, Prachetas; 50*b*, Laghu. Prach.; 51, Prajâpṭi (verse, exists); 52, Budha (prose, exists); 53*a*, Bṛihaspati (verse, part exists); 53*b*, Bṛihat Bṛihaspati; 54, Bandhâyana (prose, exists); 55, Bharadvâja (verse, exists); 56, Bhṛigu (said to exist); 57*a*,

(*a*) Burnell, Tanjor Cat., p. 124.
(*b*) Sometimes spelt Jâbâla.

Manu (prose, quoted); 57*b*, Ditto (verse, exists); 57*c*, Vriddha M.; 57*d*, Bṛihat M.; 58, Marîchi; 59, Mârkandeya; 60, Maudgalya; 61*a*, Yama; 61*b*, Laghu Y. (verse, exists); 62*a*, Yâjñavalkya (verse, exists); 62*b*, Vriddha Y.; 62*c*, Bṛihat Y. (exists); 63, Likhita (verse, exists); 64, Lohita (verse, exists); 65, Langâkshi; 66, Vatsa; 67*a*, Vasishṭha (prose, exists); 67*b*, Ditto (verse, exists); 67*c*, Ditto (verse, exists); 67*d*, Vriddha V.; 67*e*, Bṛihat V.; 68, Vârshyâyani; 69, Viśvâmitra (verse, exists); 70*a*, Vishṇu (prose, exists); 70*b*, Laghu V. (verse, exists); 71, Vyâghra; 72, Vyâghrapâda (verse, exists); 73*a*, Vyâsa; 73*b*, Laghu Vy. (verse, exists); 73*c*, Vriddha Vy.; (verse, exists); 74*a*, Śaṅkha (prose); 74*b*, Ditto (verse, exists); 74*c*, Bṛihat or Vriddha S. (chiefly verse, exists); 75, Śaṅkha, and Likkita (verse, exists); 76, Śâkaṭâyana; 77, Śâkalya (verse, part exists); 78, Śâṅkhâyana (verse, part exists); 79, Śâtyâyana; 80, Śâṇḍilya (verse, exists); 81*a*, Śâtâtapa (verse, exists); 81*b*, Vriddha or Bṛihat Ś. (verse, exists); 82*a*, Śaunaka (prose); 82*b*, Ditto (kârikâ or bṛihat, verse, exists); 82*c*, Ditto Yajñâṅga (verse, exists); 83*a*, Saṁvarta (verse, exists); 83*b*, Laghu S.; 84, Satyavrata; 85, Sumantu; 86, Soma; 87*a*, Hârîta (prose); 87*b*, Bṛihat H. (verse, exists); 87*c*, Laghu H. (verse, exists); 88*a*, Hiraṇyakeśin (prose, exists). (*a*)

Even this list most likely does not comprise all the ancient works on Dharma, and a more protracted search for

(*a*) All those Smṛitis, to which the word 'exists' has been added, have been actually procured. The remainder of the list is made up from the authorities quoted in Wh. Stokes's Hindu Law Books, p. 5, note (*a*) in the Âpastamba, Baudhâyana, Vasishṭha Dharmasûtras, in the Mâdhava Parâśara and other modern compilations. Owing to the looseness of the Hindû Pandits in quoting, it is not always certain if the redactions, called Vriddha (old) and Bṛihat (great) had a separate existence. In some cases the same book is certainly designated by both. Collections of Smṛitis, and extracts from them, such as the Chaturviṁśati, Shaṭtriṁśat, Kokila and Saptarshi Smṛitis have been intentionally excluded from the above list.

MSS., and a more accurate investigation of the modern compilations, will, no doubt, enlarge it considerably.

As regards the value of the Hindû tradition about the origin and history of the Smṛitis, the general assertion that these works belong to the same class of writings as the Śrauta and Gṛihyasûtras, and that in many instances they have been composed by persons who were authors of such Sûtras, is in the main correct. But the tradition is utterly untrustworthy in the details regarding the names and times of the authors, and the immediate causes of their composition, and it neglects to distinguish between the various classes, into which the Smṛitis must be divided.

It is, of course, impossible for the critic to agree with the Hindû in considering Vishṇu or any other deity of the Brahmanic Olympus, or Manu, the father of mankind, as authors of Dharmaśâstras. But it is, in most cases, also highly improbable that the Ṛishis, who may be considered historical personages, composed the Smṛitis which bear their names. For, to take only one argument, it is not to be believed, that, for instance, Vasishṭha and Viśvâmitra, the great rival priests at the court of King Sudâs, or Bharadvâja or Saṃvarta, are the authors of the hymns preserved in the Ṛigveda under their names, and of the Smṛitis called after them, as the language of the former differs from that of the latter more considerably than the English of the fifteenth century from that of the present day. Much less can it be credited that Aṅgiras or Atri, who, in the Ṛigveda, are half mythic personages, and spoken of as the sages of long past times, proclaimed the treatises on law bearing their names, the language of which obeys the laws laid down in Pâṇini's grammar. Nor can we, with the Hindûs, place some of the Smṛitis in the Satyayuga, others in the Tretâ, others in the Dvâpâra, and again others in the Kali age.(*a*) The untrustworthiness of the Hindû tradition has also been always recognised by European scholars, and, in discussing the age and

(*a*) This division is found in Parâśara Dharmaśâstra I., 12.

history of the Smritis they have started from altogether different data. In the case of the Mânava and of the Yâjñavalkya Dharmaśâstras, Sir W. Jones, Lassen, and others have attempted to fix their ages by means of circumstantial, and still more, of internal evidence, and the former work has been declared to belong perhaps to the ninth century, B.C. (*a*) or, at all events, to the pre-Buddhistic times, whilst the latter is assigned to the period between Buddha and Vikramâditya.(*b*) But the bases on which their calculations and hypotheses are grounded are too slender to afford trustworthy results, and it would seem that we can hardly be justified in following the method adopted by them. The ancient history of India is enveloped in so deep a darkness, and the indications that the Smritis have frequently been remodelled and altered, are so numerous, that it is impossible to deduce the time of their composition from internal or even circumstantial evidence.(*c*)

(*a*) Sir W. Jones, Manu, p. xi.

(*b*) Lassen, Ind. Alt. II., 310.

(*c*) A statement of the case of the Mânava Dharmaśâstra will suffice to prove this assertion. Tradition tells us that there were three redactions of Manu,—one by Manu, a second by Nârada, and a third by Sumati, the son of Bhṛigu, and it is intimated that the Dharmaśâstra, proclaimed by Bhṛigu, and in our possession, is the latter redaction. Now this latter statement must be incorrect, as the Sumati's Śâstra contained 4,000 ślokas, whilst ours contains only 2,885. Sir W. Jones, therefore thought that, as we find quotations from a vṛiddha or "old" Manu, the latter might be a redaction of Bhṛigu, a conjecture for which it would be difficult to bring forward safe arguments. Besides the Vriddha Manu, we find a Brihat-Manu, "great Manu," quoted. Further, Manu VIII., 140, quotes Vasishṭha on a question regarding lawful interest, and this rule is actually found in the Vâsishṭha Dharmaśâstra, (last verse of chapter II). But nevertheless the Vâsishṭha Dharmaśâstra quotes four verses from Manu (mânavân ślokân), two of which are found in our Mânavadharmaśâstra, whilst one is written in a metre which never occurs in our Saṁhitâ. Besides, the Mahâbhârata and Varâhamihira, who lived in the sixth century, A. D., quote verses from Manu which are only found in part in our Dharmaśâstra. See Stenzler in the Indische Studien I., p. 245, and Kern Bṛihatsaṁhitâ, preface, p. 43.

Of late, another attempt to fix the age of the Dharmaśâstras, at least approximately, and to trace their origin, has been made, by Professor M. Müller. According to him, the Dharmaśâstras formed originally part of those bodies of Sûtras or aphorisms in which the sacrificial rites and the whole duty of the twice-born men is taught, and which were committed to memory in the Brahminical schools. As he is of opinion that all the Sûtras were composed in the period from 600—200 B. C, he, of course, assigns Dharmaśâstras in Sûtras or Dharmasûtras to the same age, though he states his belief that they belong to the latest productions of the period during which the aphoristic style prevailed in India. (*a*) He moreover considers the Dharmaśâstras in verse to be mere modern versifications of ancient Dharmasûtras. Thus he takes the Mânava Dharmaśâstra not to be the work of Manu, but a metrical redaction of the Dharmasûtra of the Mânavas, a Brahminical school studying a peculiar branch or Śâkhâ of the Black Yajurveda. This view of the origin of the Smṛiti literature was suggested chiefly by the recovery of one of the old Dharmasûtras, that of Âpastamba, who was the founder of a school studying the Black Yajurveda, and author, also, of a set of Śrauta and Gṛihyasûtras.

The results of our inquiries in the main agree with those of Professor Müller, and we hope that the facts which, through the collection of a large number of Smṛitis, have come to light, will still more fully confirm his discovery, which is of the highest importance, not only for the Sanskṛit student, but also for the lawyer and for the Hindû of our day, who wishes to free himself from the fetters of the âchâra.

We also divide the Smṛitis into two principal classes, the Sûtras and the metrical books. In the first class we distin-

(*a*) *See* M. Müller's Hist. of Anc. Skt. Lit., pp. 61, 132, 199, 206—208, and his letter printed in Morley's Digest and Sacred Books, vol II., p. lx. That Sûtras, especially the Gṛihyasûtras, were the sources of the Smṛitis, was also stated by Professors Stenzler and Weber in the first volume of the Indische Studien.

guish between those Dharmasûtras which still form part of the body of Sûtras studied by a Charaṇa or Brahminical school, those which have become isolated by the extinction of the school and the loss of its other writings, those which have been recast by a second hand, and finally those which appear to be extracts from or fragments of larger works.

The second class, the poetical Dharmaśâstras, may be divided into—

1. Metrical redactions of Dharmasûtras and fragments of such redactions.
2. Secondary redactions of metrical Dharmaśâstras.
3. Metrical versions of Gṛihyasûtras.
4. Forgeries of the Hindû sectarians.

As regards the Dharmasûtras, it will be necessary to point out some of the most important facts connected with the history of the ancient civilization of India, in order to make the position of these works in Indian literature more intelligible. The literary and intellectual life of India began, and was, for a long time, centred in the Brahminical schools or Charaṇas. It was from the earliest times the sacred duty of every young man who belonged to the twice-born classes, whether Brahman, Kshatriya, or Vaiśya, to study for a longer or shorter period under the guidance of an âchârya, the sacred texts of his Śâkhâ or version of the Veda. The pupil had first to learn the sacred texts by heart, and next he had to master their meaning. For this latter purpose he was instructed in the auxiliary sciences, the so called Angas of the Veda, phonetics, grammar, etymology, astronomy, and astrology, the performance of the sacrifices, and the duties of life, the Dharma.

In order to fulfil the duty of Vidyâdhyayana, studying the Veda, the young Aryans gathered around teachers who were famous for their skill in reciting the sacred texts, and for their learning in explaining them; and regular schools were established, in which the sacred lore was handed down from

one generation of pupils and teachers to the other. We still possess long lists which give the names of those âchâryas who successively taught particular books. These schools divided and subdivided when the pupils disagreed on some point or other, until their number swelled, in the course of time, to an almost incredible extent. If we believe the Charaṇa-vyûha, which gives a list of these schools or Charaṇas, the Brahmans who studied the Sâmaveda were divided into not less than a thousand such sections.

The establishment of these schools, of course, necessitated the invention of a method of instruction and the production of manuals for the various branches of science. For this purpose the teachers composed Sûtras, or strings of rules, which gave the essence of their teaching. In the older times these Sûtras seem to have been more diffuse, and more loosely constructed than most of those works are, which we now possess. Most of the Sûtras, known to us, are of a highly artificial structure. Few rules only are complete in themselves; most of them consist of a few words only, and must be supplemented by others, whilst certain general rules have to be kept constantly in mind for whole chapters or topics. The Sûtras are, however, mostly interspersed with verses in the Anushṭubh and Trishṭubh metres, which partly recapitulate the essence of the rules, or are intended as authorities for the opinions advanced in the Sûtras.

Each of the Charaṇas seems to have possessed a set of such Sûtras. They, originally, probably, embraced all the Aṅgas of the Veda, and we still can prove that they certainly taught phonetics, the performance of sacrifices, and the Dharma or duties of life. We possess still a few Prâtiśâkhyas, which treat of phonetics, a not inconsiderable number of Śrauta and Gṛihyasûtras, and a smaller collection of Dharmasûtras. Three amongst the latter, the Sûtras of Âpastamba, of Satyashâḍha Hiraṇyakeśin, and of Baudhâyana, still form part of the body of Sûtras of their respective schools.

In the cases of the Âpastamba- and Hiraṇyakeśi-Sûtras, the connection of the portion on Dharma with those referring to the Śrauta and Gṛihya sacrifices appears most clearly. The whole of the Sûtras of the former school are divided into thirty Praśnas or sections, among which the twenty-eighth and twenty-ninth are devoted to Dharma.(*a*) In the case of the Hiraṇyakeśi-Sûtras, the twenty-sixth and twenty-seventh of its thirty-five Praśnas contain the rules on Dharma. As no complete collection of the Sûtras of the Baudhâyana school is as yet accessible, it is impossible to determine the exact position of its Dharmasûtra.(*b*) All these three books belong to schools which study the Black Yajurveda. The first and second agree nearly word for word with each other. Among the remaining Dharmasûtras, those of Gautama and Vasishṭha stand alone, being apparently unconnected with any Vedic school. But, in the case of the Gautama Dharmasûtra we have the assertion of Govindasvâmin, the commentator of Baudhâyana, that the work was originally studied by the Chhandogas or followers of the Sâmaveda. Moreover, its connection with that Veda has been fully established by internal evidence, and it is highly probable that, among the adherents of the Sâmaveda, one or perhaps several schools of Gautamas existed, which also possessed Śrautasûtras. The obvious inference is that our Gautama Dharmasûtra formed part of the Kalpa of one of these sections of Sâmavedîs.(*c*) In the case of the Vasishṭha Dharmasûtra it is clear from the passage of Govindasvâmin, referred to above, that it originally

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(*a*) Compare Burnell Indian Antiquary I., 5-6; Sacred Books of the East, vol. II., pp. XI.—XV.

(*b*) The Baudhâyana Dharmasûtra seems to have suffered by the disconnection of the whole body of the Kalpas of that school, and has been considerably enlarged by later hands. *See* Sacred Books, vol. XIV., Introd. to Baudhâyana.

(*c*) For the details of the arguments which bear on this question, *see* Sacred Books of the East II., XLI.—IX.

belonged to a school of Rigvedis.(*a*) Though it has not yet been possible to determine the name of the latter with certainty, it is not improbable that it may have been called after the ancient sage, Vasishṭha, who plays so important a part in the Rigveda. It is, however, hardly doubtful that a considerable portion of our Vasishṭha Dharmasûtra has been recast or restored after an accidental mutilation of the ancient MSS.(*b*) while Gautama has probably suffered very little. (*c*)

As regards another Dharmasûtra, the so-called Vishṇusmṛiti, which formerly was considered to be a modern recension of a Vishṇusûtra, further investigations have shown that it is a somewhat modified version of the Dharmasûtra of the Kâṭha school of the Yajurveda. The first information on this point was furnished by a Puṇa Paṇḍit, Mr. Dâtâr, whose opinion was subsequently confirmed by the statements of several learned Śâstrîs at Benares.(*d*) The recovery of the Kâṭhaka Grihyasûtra in Kaśmîr, and a careful comparison of its rules with those of the Vishṇusmṛiti, as well as of the mantras or sacred formulas prescribed in the Smṛiti, with the text of the Kâṭhaka recension of the Yajurveda, and with those given by Devapâla, the commentator of the Gṛihyasûtra, leave no doubt as to the correctness of the tradition preserved by the Paṇḍits.(*e*) It is now certain that the Vishṇusmṛiti on the whole faithfully represents the teaching of the Kâṭha school on dharma, the sacred law. The portions which have been added by the later editor, who wished to enhance the authoritativeness of the work by vindicating

(*a*) Sacred Books, II., XLIX. The older theory that the work belonged to the Sâmaveda is, of course, erroneous.

(*b*) Sacred Books, XIV. Introduction to Dr. Bühler's translation of the Vasishṭha Dharmaśâstra.

(*c*) Sacred Books, II., LIV.

(*d*) Journ. Bo. Br. Roy. As. Soc. XII., p. 36 (Supplement, Report on Kaśmîr).

(*e*) *See* Jolly, Das Dharmasûtra des Vishṇu und das Kâṭhaka-gṛihyasûtra, and Sacred Books VII., X.—XIII.

a sacred character to Vishnu, are the first and last chapters and various isolated passages, chiefly verses, in the body of the book which enjoin bhakti or devotion to Vishnu or amplify the prose portions.(*a*)

There are finally the Kâṇvâyana, Kaśyapa and Budha Dharmaśâstras, small treatises in sûtras or aphorisms, which refer to portions only of the sacred law. By their style and form they undoubtedly belong to the Dharmasûtras. But it would seem that they are extracts from or fragments of larger works. In the case of the Uśanas Dharmaśâstra this is certain, as we meet in the medieval compilations on law, with numerous quotations from the Uśanas Sûtras, which refer to other topics than those treated in the chapters now extant. It is, however, not clear to what Veda or school these books originally belonged.

As may be seen from the translations of the five Dharmasûtras, published in vols. II., VII., and XIV. of Professor M. Müller's Sacred Books of the East, these works treat the Dharma much in the same manner as the metrical law books, *e.g.*, those of Manu and Yâjñavalkya. But they are not, like some compilations of the latter class, divided into sections on âchâra, 'the rules of conduct,' vyavahâra, 'civil and criminal law,' and prâyaśchitta, 'penances.' They divide the sacred law into varṇadharma, 'the law of castes,' âśramadharma, 'the law of orders,' varṇâśramadharma, 'the law of the orders of particular castes,' guṇadharma, 'the law of persons endowed with peculiar qualities' (*e. g.* kings), nimittadharma, 'the law of particular occasions' (penances), and so forth, exactly in the manner described by Vijñâneśvara in the beginning of the Mitâkṣharâ. (*b*)

The order in which the several topics follow each other, is, however, not always the same.

The materials out of which the Dharmasûtras have been constructed, are, besides the opinions of the individual

(*a* Sacred Books VII., XXIX.—XXXI.

(*b*) Mitâkṣharâ I. A. 7.

authors, passages from the Vedas quoted in confirmation of the doctrines advanced, rules given by other teachers which are also considered authoritative or are controverted, and maxims which were generally received by the Brahminical community. These maxims contain that which had been settled by *samaya*, the agreement of those learned in the law (dharmajña). Hence the Dharmasûtras are also called Sâmayâchârika Sûtras, *i.e.*, aphorisms referring to the rule of conduct settled by the agreement (of the Śishṭas). The passages, containing such generally approved maxims, are frequently in verse, and introduced by the phrase athâpyudâharanti, 'now they quote also.' Numerous verses of this kind recur in nearly all the Dharmasûtras. All the Sûtras, with the exception of those attributed to Gautama, Budha and Kâṇvâyana, which are written throughout in prose, are, besides, interspersed with other ślokas or gâthâs, as they are sometimes called, which partly are attributed to schools or individual authors, such as the Bhâllavins, Hârîta, Yama, Prajâpati, Manu and others, and partly have been inserted by the writers of the Sûtras in order to sum up the substance of the doctrines taught in the preceding prose portion. The introduction of ślokas is found not only in the Dharmasûtras, but also in the Gṛihya and Śrauta Sûtras, nay even in the Brâhmaṇa portions of the Veda, where several of the verses, read in the Dharmasûtras, occur. The same verses, too, recur in great numbers in the metrical Smṛitis, and they contributed, as we shall show presently, a good deal to the rise of the latter class of works.

As regards the age of the Dharmasûtras, they are mostly each as old as the school to which they belong, and consequently possess a very considerable antiquity. The existence of Dharmasûtras is expressly testified by Patañjali, the author of the famous commentary on Pâṇini, who wrote in the second century B. C. (*a*) As Yâska, the author of the

(*a*) Weber, Indische Studien I., 143; XIV., 458. Mahâbhâshya (ed. Kielhorn) I. 115 and I. 5 where Sûtras on permitted and forbidden good are quoted.

Nirukta, who belongs to a much remoter age than Patanjali, quotes a number of rules on the civil law in the Sûtra style, it may be inferred that Dharmasûtras existed in his time too. (*a*) But, of course, this does not prove anything for the age of the particular Dharmasûtras which have come down to us. Regarding them we learn from the Brahminical tradition which in this case is confirmed by other evidence, (*b*) that among the three Sûtras connected with the Taittirîya Veda, Baudhâyana is older than Âpastamba and Hiraṇyakeśin Satyâshâdha. Among the latter two Âpastamba is the older writer, as is shown by the modern tradition of the Pandits, and by the fact that the Hiraṇyakeśi-Dharmasûtra, which agrees almost literally with Âpastamba's work, is clearly a recast of the latter. Further, the quotations from Gautama and the unacknowledged appropriation of several lengthy passages of Gautama, which occur in the Sûtras of Baudhâyana and Vasishṭha, show that Gautama is older than both, and, in fact, the oldest Dharmasûtra which we possess. (*c*) As regards the absolute determination of the age of the existing Sûtras, the school of Âpastamba, or, Âpastambha, as the name is also spelt, is mentioned in inscriptions which may be placed in the fourth century A. D. (*d*) The Âpastambasûtras on sacrifices, together with a commentary, are quoted in Bhartrihari's gloss on the Mahâbhâshya, which, as Professor Max Müller has discovered, was composed in the seventh century A. D. (*e*) The oldest quotations from the Âpastamba Dharmasûtra occur in the Mitâksharâ, the date of which has been shown to be the end of the eleventh century A. D. From internal evidence it would, however, appear that the Âpastamba Dharmasûtra

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(*a*) Yâska, Nirukta I., 3.

(*b*) Sacred Books II., XXII.—XXIV.

(*c*) Sacred Books II., XLIX.—LIV.

(*d*) Sacred Books II., XXXIII.

(*e*) MS. Chambers, 553, fol. 10*b*. (Berlin Collection).

cannot be younger than the fifth century B. C. (*a*) If that is so, the works of Baudhâyana and Gautama must possess a much higher antiquity. It is of some interest for the practical lawyer to know that four of the existing Dharmasûtras, those of Gautama, Baudhâyana, Âpastamba and Hiranyakeśin, have been composed in the South of India, while the fifth, Vasishṭha, probably belongs to the North.

The original of the remodelled Kâṭhaka Dharmasûtra or Vishṇu Smṛiti was probably composed in the Panjâb, the original seat of the ancient Kaṭha school, and, no doubt, dates from very remote times. (*b*) The existing recension, the Vishṇu Smṛiti cannot be older than the third century A. D. For in chapter 78, 1–7, the week days are enumerated, and the Thursday is called *Jaiva*, *i. e.*, the day of Jîva. Jîva is the usual Sanskṛit corruption of the Greek Ζευς, or rather of its modern pronunciation Ζεφς (Zevs). Whatever the origin of the Indian week may be, there can be no doubt that a Sanskṛit work which gives a Greek name for a week-day cannot be older than the time when these names came into use in Greece. (*c*)

Among those Smṛitis which are quoted, but no longer preserved entire, there were probably many Dharmasûtras. In most cases, however, especially in those where the quotations occur in the old Dharmasûtras, it is difficult to decide, if the opinions attributed to the ancient authors, are given in their own words, or, if the quotations merely summarise their views. But, in a few instances, it is possible to assert with some confidence that the works quoted really were Dharmasûtras and written in aphoristic prose, mixed with verses. This seems certain for that Mânava Dharmaśâstra, which Vasishṭha repeatedly quotes, for the work of Hârîta, which Âpastamba, Baudhâyana and Vasishṭha cite, and for the Śaṅkha Smṛiti

(*a*) Sacred Books VII., XIV.—XV.

(*b*) Sacred Books VII., XIV.—XV.

(*c*) Sacred Books VII., XXIX., XXXII.

to which the medieval compilators frequently refer. About Manu more will be said below. As regards Hârîta there is a long passage in prose, attributed to him by Baudhâyana and by Âpastamba (*a*) which looks like a verbal quotation, while Vasishtha II., 6, quotes a verse of his. It has long been known that Hârîta was a teacher of one of the schools connected with the Black Yajurveda. A quotation from his Dharmasûtra, given by the Benares commentator of Vasishtha (XXIV., 6), indicates that the particular school to which he belonged was that of the Maitrâyaṇîyas.

As regards the third work, the Dharmaśâstra of Śaṅkha, our knowledge of its character is not derived from quotations alone. We still possess a work which is partly an extract from and partly a versification of the old Smṛiti. Among the now current Smṛitis, there is Bṛihat Śaṅkha, or, as it is called in some MSS., a Vṛiddha Śaṅkha, consisting of eighteen chapters, which treat of the rule of conduct (âchâra) and penances (prâyaśchitta). The whole work is written in verse, with the exception of two chapters, the twelfth and thirteenth, where prose and verse are mixed. A comparison of the passages from the Śaṅkha Smṛiti, quoted by Vijñâneśvara in the Prâyaśchittakânda of the Mitâkshará, with the corresponding chapters of the existing Bṛihat Saṅkha, shows that the latter contains nearly all the verses of the work which Vijñâneśvara had before him, while the Sûtras have either been left out, or in a few instances, have been changed into verses.(*b*) As at the same time our Bṛihat Saṅkha does not contain anything on civil law which, according to the quotations in the Mitâkshará and other works, was treated of in the old Śaṅkha Smṛiti, it appears that the existing work is not even a complete extract. But, nevertheless, it possesses

(*a*) Âpastamba I., 10, 29, 13-14.

(*b*) The verses identified are Vijñâneśvara on Yâjñ. III. 260 = B. Ś. XVII. 1*b*—3*b*; on Yâjñ. III. 293 = B. Ś. XVII. 46*b*—47*a*, 48*b*—49*a* and 50*b*—51*a*; on Yâjñ. III. 294 = B. Ś. XVII. 43*a*, 37*b*, 38*a*, 39*a*; on Yâjñ. III. 309 = B. Ś. XII. 7—9.

great interest, as it clearly shows how the metrical law-books arose out of the Sûtras. In the classification of the Smṛitis, a place intermediate between the Dharmasûtras and the metrical Smṛitis must be assigned to the Bṛihat Śaṅkha.

In the first division of the second class of Smṛitis to which the metrical versions of Dharmasûtras have been assigned, we may place the works, now attributed to Manu and to Yâjñavalkya, and perhaps those of Parâśara and Saṁvarta as well as the fragments of Nârada and Bṛihaspati. The first two among these works begin, like many other metrical Smṛitis, with an introduction in which the origin of the work is described, and its composition or rather revelation is said to have been caused by the solicitations of an assembly of Ṛishis. In the case of the Manu Smṛiti this exordium has been excessively lengthened by the introduction of philosophical matter, and has been so much expanded that it forms a chapter of 119 verses. Moreover, the fiction that the book is being recited, is kept up by the insertion of verses in the middle of the work, in which the conversation between the reciter and the sages is again taken up, while in the Yâjñavalkya Smṛiti the Ṛishis in the last verses are made to praise the rules promulgated by the Yogin. This kind of introduction which the metrical Smṛitis have in common with the Purâṇas, Mâhâtmyas, the sectarian Upanishads and the forged astronomical Siddhântas, though based on the ancient custom of reciting literary productions at the festive assemblies of the Paṇḍits, the Sabhâs of our days may be considered as a sign of comparatively recent composition. For most of the works, in which it occurs, have been proved to be of modern origin, or to have been remodelled in modern times.

Another reason to show that the metrical Dharmaśâstras are of modern date has been brought forward by Professor Max Müller.(*a*) He contends that the use of the Indian

(*a*) Hist. Anc. Lit., p. 68.

heroic metre, the Anushṭubh śloka, in which they are written, belongs to the age which followed the latest times of the Vedic age, the Sûtra period. Professor Goldstücker has since shown(*a*) that works written throughout in ślokas, existed at a much earlier period than Professor Müller supposed; in fact long before the year 200 B. C., which Professor Müller gives as the end of the Sûtra period. Still it would seem that we may avail ourselves of Professor Müller's arguments in order to prove the late origin of the metrical Smṛitis. For, though the composition of works in ślokas and of Sûtras may have gone on at the same time, nevertheless, it appears that in almost every branch of Hindû science where we find text books, both in prose and in verse, one or several of the former class are the oldest. If we take, for instance, the case of grammar, the Saṁgraha of Vyâḍi, which consisted of one hundred thousand ślokas, is certainly older than the Sûtras of Vopadeva, Malayagiri and Hemachandra, authors who flourished in the twelfth century A. D. But we know that in its turn it was preceded by the works of Śâkaṭâyana, Pâṇini and others who composed Sûtras. In like manner the numerous Kârikâs on philosophy are younger than the Sûtras of the schools to which they belong, just as the Saṁgrahas, Pradîpas and Pariśishṭas are mostly of more recent date than the Sûtras on Śrauta and Gṛihya sacrifices, which they illustrate and supplement. For all we know, the Gṛihyasaṁgraha of Gobhilaputra, or the Karmapradîpa of Kâḍyâyana may be older than the Gṛihyasûtras of Pâraskara or Âśvalâyana, but both are of later date than the Gṛihyasûtra of Gobhila which they explain, and the Pradîpa is younger than the writings of Vasishṭha, the founder of the Vasishṭha school of Sâmavedis, whose Śrâddhakalpa it quotes. In short, we never find a metrical book at the head of a series of scientific works, but always a Sûtra, though, at the same time, the introduction of metrical hand-

(*a*) Mânavakalpasûtra, p. 78.

books did not put a stop to the composition of Sûtras. (a) If we apply these results to the Smṛitis, it would seem probable that Dharmaśâstras, like those ascribed to Manu and Yâjñavalkya, are younger than the Sûtras of the schools to which they belong, though, in their turn, they might be older than the Sûtra works of other schools.

The opinion that the metrical Smṛitis are versifications of older Sûtra may be supported by some other general reasons. Firstly, if we take off the above-mentioned introductions, the contents of the metrical Dharmaśâstras, entirely agree with those of the Dharmasûtras, while the arrangement of the subject-matter differs only slightly, not more than the Dharmasûtras differ among themselves. Secondly, the language of the metrical Dharmaśâstras and of the Sûtras is nearly the same. Both show archaic forms and in many instances the same irregularities. Thirdly, the metrical Smṛitis contain many of the ślokas or gâthâs given in the Dharmasûtras, and some in a modified more modern form. Instances of the former kind are very numerous. A comparison of the gâthâs from Vasishṭha, Baudhâyana and Âpastamba with the Manu Smṛiti shows that a considerable number of the former has been incorporated in the latter. As an instance of the modernisation of the form of ancient verses in the metrical Dharmaśâstras, we may point out the passage in Manu II., 114–115, containing the advice given by Vidyâ, the personification of sacred learning, to a Brahman regarding the choice of his pupils, which is clearly an adaptation of the Trishṭubh verses, found in Nirukta II., 4, Vasishṭha II., 8–9, and Vishṇu XXIX., 10. Another case where Manu has changed Trishṭubh verses into Anushṭubhs occurs II., 144, where the substance of Vasishṭha II., 10, has been given. Finally, the fact that several peculiarities of the Sûtra style are, also, found in the metrical Smṛitis, affords a strong presumption that the latter draw

(a) The most modern Sûtra of which I know, is a grammar of the Kaśmîrian language in Sanskrit aphorisms, which in 1875 was not quite finished.—*G. B.*

their origin from the former. As the great object of Sûtra writers was shortness, in order that the pupils in their schools might, by learning as few words as possible, be able to remember the more explicit teaching of the masters, they invented a peculiar and very intricate system for arranging their subjects, according to which certain fundamental rules have constantly to be kept in mind, and, certain important words given once in the main rule, have to be understood with a long string of succeeding ones. Besides, they use certain words, especially particles, in a peculiarly pregnant sense, which is unknown in the common language. All these peculiarities occur in the metrical Smritis also. Every body who has read Manu in Sir W. Jones's translation, will know how frequently the text is expanded by the addition of words, printed in italics, without which it would be either unintelligible or self-contradictory. Students of the Mitâkharâ, moreover, will remember how considerable the additions are which Vijñâneśvara is obliged to make in order to render Yâjñavalkya's rules intelligible. This cramped and crabbed style of the metrical Smritis finds an easy explanation if their derivation from the Sûtras is admitted. Without such a supposition it is difficult to account for the fact. As regards the peculiar meanings in which particles are used, it will be sufficient to point out that the particle cha 'and,' as well as chaiva 'likewise,' in the Yâjñavalkya Smriti repeatedly are intended to include something that is known from other sources, but not specially mentioned in the text. Thus Yâjñavalkya II., 135, the particles chaiva 'likewise' which follow in the enumeration of heirs to a separated male deceased without leaving sons, indicate, according to the very plausible explanation of the Mitâkharâ, that the daughter's son must be inserted after the daughter. (*a*) Similar eccentricities of language occur frequently in the Sûtras where 'the saving of

(*a*) Stokes's Hindú Law Books, p. 441. For similar cases, *see* the Sanskrit text of the Mitâkharâ, 16, 12; 26 a 1 and *passim*.

half a short vowel is considered as joyful an event as the birth of a son.' If they are found in the metrical Smṛitis, too, the probable reason is that they are remnants of the style of the works on which the metrical Smṛitis are based.

If we turn from these general considerations to the particular books, placed in the first class of metrical Smṛitis, we find that several facts, connected with the Dharmaśâstras, attributed to Manu and Yâjñavalkya, further corroborate the views expressed above. As regards Manu, Professor Max Müller (*a*) conjectured as long ago as 1849 that the existing Smṛiti, attributed to the son of Brahman Svayambhû, was a modern redaction of a lost Dharmasûtra, belonging to the Mânava school, a subdivision of the Maitrâyaṇîyas, (*b*) who study a peculiar version of the Yajurveda. One portion of this conjecture has been fully confirmed. Owing to the discovery of trustworthy MSS. of the Vasishṭha Dharmasûtra, it is now possible to assert with confidence that Vasishṭha IV., 5—8, quotes a *Mânavam, i. e.* a work proclaimed by Manu, which was written, like most of the Dharmasûtras, partly in prose and partly in verse. In the note of the translation on the above passage (*c*) it has been pointed out that Vasishṭha gives two Sûtras (5 and 8) and two verses (6—7) taken from a Mânava Dharmasûtra. At the end of the first Sûtra the unmistakeable words *iti* mânavam, 'thus (says) the mânava' are added. The first of the following verses (6), which is marked as a quotation by the addition of the word *iti*, 'thus,' is found entire in the existing Manu Smṛiti. The second (7) has been altered so as to agree with the ahiṃsâ doctrine which forbids the slaughter of animals under any circumstances, while the verse, quoted by Vasishṭha, declares 'the slaughter of animals at sacrifices not to be slaughter' (in the ordi-

(*a*) Letter to Mr. Morley, Sacred Books II., p. IX.

(*b*) *See* L. von Schroeder's edition of the Maitrâyaṇî Saṃhitâ.

(*c*) Sacred Books XIV., p. 26.

nary sense of the word). This discovery furnishes a firm basis for Professor Müller's opinion that the existing Manu Smṛiti is based on a Dharmasûtra, and makes it a good deal more than an ingenious speculation. The other half of his proposition that the Mânava Dharmasûtra on which the metrical Smṛiti is based, originally belonged to the school of the Mânavas, can, as yet, not be proved with equal certainty. For, though the Śrautasûtra and the Gṛihyasûtra of the Mânavas have been recovered, and though these works are distinctly ascribed by the tradition of the school to a human teacher, called Manu or Mânava, (*a*) the Dharmasûtra has not yet been recovered, and no clear proof has been furnished that the teaching of the Manu Smṛiti regarding the ritual closely agrees with that of the Sûtras of the Mânava school. Nevertheless, Professor Müller's suggestion seems very probable. On the question when the Mânava Dharmasûtra was turned into a metrical Smṛiti very little can be said. From the times of Medhâtithi, the oldest commentator known to us, who certainly cannot have lived later than in the 9th century, A. D., the text has not undergone any great change. But the earliest quotation from a metrical Manusmṛiti which occurs in the Bṛihatsaṁhitâ of Varâhamihira (died 580, A. D.) differs very considerably from the text known to us.(*b*) It would, however, be dangerous to infer from this fact that the existing metrical law book dated from a later time than Varâhimira, because, firstly, several metrical works ascribed to Manu Svâyambhuva or to his pupils seem to have existed, and, because inscriptions of the 4th century A. D., when speaking of the Smṛitis, invariably place Manu first, (*c*)

(*a*) Both forms occur in the commentary on the Gṛihyasûtra, which probably belongs, like that of the Śrautasûtra, to the ancient Mîmâṁsaka, Kumârila.

(*b*) Kern, Bṛihatsaṁhitâ, p. 43.

(*c*) *See, e.g.*, the description of Mahârâja Dronasiṁha on the plates of Dhruvasena I. of Valabhî, dated 207 and 216; Indian Antiquary IV. 106, V. 205.

and thereby indicate the existence of a law book which possessed greater or more general authoritativeness than would belong to a simple school book studied and reverenced by the title Mânava Charaṇa alone.

In the case of the Yâjñavalkya Smṛiti, it is possible to determine with perfect exactness the Vedic school to which its original belonged. But, hitherto, no trace of the actual existence of the Dharmasûtra has been found. As regards the former point, Yâjñavalkya is known to have been the founder of the school of the Vâjasaneyins, who study the White Yajurveda. In the Smṛiti III., 110, it is expressly stated that its author is the same Yâjñavalkya, to whom the Sun revealed the Âraṇyaka, *i. e.* the Bṛihadâraṇyaka, which forms part of the Brâhmaṇa of the Vâjaneyins, the Śatapatha. On account of this assertion, and because a number of the Mantras or sacred formulas, the use of which is prescribed in the Yâjñavalkya Smṛiti for various rites (*a*) have been taken from the Vâjasaneyi-Saṁhitâ of the White Yajurveda, it is highly probable that the Sûtra on which the Smṛiti is based, belonged to one of the Charaṇas in which the Vâjasaneyi-Śâkhâ was studied. Possibly the lost Sûtra may even have been composed by the founder of the Vâjasaneyi-Charaṇa himself.

As regards the Parâśara and Saṁvarta Smṛitis and the fragments of Bṛihaspati and Nârada, it is, at present, not possible to say to what Vedas or schools they or their originals belonged. But a verse of Bṛihaspati which Nandapaṇḍita quotes in elucidation of Vishṇu IV. 9, shows that the

(*a*) *See, e.g.*, Yâjñ. I. 229 = Vaj. Saṁh. VII. 34; Yâjñ. I. 231 = Vaj. Saṁh. XIX. 70; Yâjñ. I. 238 = Vaj. Saṁh. XIII. 27. It is a general maxim that the Mantras, used for daily and occasional rites, must be taken from that redaction of the Veda which is hereditary in the family of the sacrificer. Hence it is only necessary to find out from which redaction the Mantras prescribed in any work or those used by any individual are taken in order to ascertain the Vedic school to which the author or the sacrificer belongs.

metrical law book ascribed to the Guru of the gods, probably was written within the last sixteen or seventeen hundred years.

In the passage quoted there, Bṛihaspati gives an accurate definition of a gold *dînâra*. It has been pointed out long ago,(*a*) that the occurrence of the word *dînâra*, which is a corruption of the Latin *denarius*, is a test for the date of Sanskṛit works, and that no book in which it occurs can belong to a remote antiquity. Golden denarii were first coined at Rome in 207 B.C., and the oldest Indian pieces corresponding in weight to the Roman gold denarius, which are known are those of the Indo-Scythian kings,(*b*) who reigned in India from the middle of the first century B.C. It is, therefore, impossible to allot to Sanskṛit authors, who mention golden *dînâras*, and accurately define their value, an earlier date than the first century A.D., and, it is not improbable, that that limit is fixed rather too high than too low. If, then, the verse of Bṛihaspati, quoted by Nandapaṇḍita, is not a later interpolation, the Smṛiti called after him cannot be older than sixteen or seventeen hundred years.

The same remark applies to the lost metrical Smṛiti of Kâtyâyana, from which Nandapaṇḍita quotes (*loc. cit.*), also a verse, defining the value of the dînâra and to the fragment of Nârada which treats of civil and criminal law. With respect to the latter work, it must, however, be noted that the *vulgata*, which has been translated by Professor J. Jolly, (*c*) does not contain the verse giving the definition of the term dînâra, while another recension of the same work which is accompanied by the commentary of Asahâya, re-arranged by one Kalyâṇabhaṭṭa, has it.(*d*)

(*a*) *See, e.g.*, Max. Müller, Hist. Anc. Sansk. Lit., p. 245.

(*b*) E. Thomas, Jainism, p. 71, *seqq*.

(*c*) The Institutes of Nârada, translated by J. Jolly. London, Trübner, 1876.

(*d*) Sacred Books VII., p. XXV., and Report on Sansk. MSS. for 1874-75.

Asahâya is one of the oldest and most esteemed writers on civil law, whose name is quoted in several of the older Nibandhas and commentaries. In Bâlambhaṭṭa's commentary on Mitâkshará I., 7, 13, where the opinion of Asahâya, Medhâtithi and others is contrasted with the view of Bhâruchi, it is stated that Asahâya, literally 'the Peerless,' is an epithet of Medhâtithi. Colebrooke, however, doubts the correctness of Bâlambhaṭṭa's statement, because he found the word Asahâya used as a proper name in the Vivâdaratnâkara. His doubts are confirmed by the circumstance that in other digests, too, (*a*) Asahâya is mentioned as an individual writer, and that Kalyâṇabhaṭṭa says nothing about the identity of Asahâya and Medhâtithi, but evidently takes the former for a separate individual. As in the passage of the Mitâksharâ, quoted above, Asahâya stands before Medhâtithi, and as it is the custom of Sanskṛit writers in quoting the opinions of others to name the oldest and most esteemed author first, it may be inferred that Asahâya preceded Medhâtithi, who probably wrote in the 8th or 9th century A.D. Under these circumstances it must be conceded that the version of Nârada's Institutes accompanied by Asahâya's commentary has greater weight than the *vulgata* and that the definition of the term dînâra belongs to the original. Hence it would appear that the Nârada Smṛiti cannot lay claim to any greater antiquity than the first or second century A.D. On the other hand, the discovery that as ancient an author as Asahâya composed a commentary on the work, gives support to the view of Professor Jolly (*b*) that the Nârada Smṛiti is not later than the fourth or fifth century of our era. To the same conclusion points also the circumstance that the prose introduction, prefixed to the *vulgata* of the Nârada Smṛiti, (*c*) which gives a clearly erroneous and mythical account of the origin of the work, belongs to the commentary of

(*a*) *e.g.* in Varadarâja's Vyavahâranirṇaya, p. 38 (Burnell).

(*b*) Institutes of Nârada, p. XIX.

(*c*) *Ibidem*, pp. 1-3.

Asahâya. The tradition, given there, asserts that the Nârada Smṛiti is a recast of Sumati's abridgment of the original Manu Smṛiti. But a comparison of the doctrines of Nârada with those of Manu shows that the connection between the two authors is not very close. They differ on most essential points, such as the titles or heads of the civil and criminal law, the number and manner of the ordeals, the permissibility of the Niyoga, and the remarriage of widows, the origin of property, the kinds of slavery, and so forth.(*a*) Now if Asahâya's erroneous statement regarding the origin of the Nârada Smṛiti is not a deliberate fabrication, its existence can be accounted for only by the assumption that between his own times and those of the real author of the Nârada Smṛiti so long a period had elapsed that the true origin of the latter work had been forgotten. With respect to the latter point it may be mentioned that hitherto it has not been possible to determine the Vedic school to which the Nârada Smṛiti belongs.

Among the lost metrical Smṛitis, that ascribed to Laugâkshi, was possibly based on the Kâṭhaka Dharmasûtra. For, according to the tradition of the Kaśmîrians, Laugâkshi was the name of the author who composed the Sûtras of the Kaṭha school.

The Smṛitis which may be placed under the second head, that of secondary redactions of metrical Dharmaśâstras, may be subdivided into extracts and enlarged versions. Of the first kind are the various Smṛitis which at present go under the names of Aṅgiras, Atri Daksha, Devala, Prajâpati, Yama, Likhita, Vyâghrapâda, Vyâsa, Saṅkha, Śaṅkha-Likhita and Vṛiddha Sâtâtapa. All these works are very small and of small importance. That they are really extracts from, or modern versions of more extensive treatises, and not simply forgeries, as has been supposed, seems to follow from the fact that some of the verses quoted by the older commentators, such as Vijñâneśvara, from the works of Aṅgiras and so forth, are actually found in them. On the other hand, it is clear that they cannot be the original ancient works,

(*a*) *Ibidem*, pp. XIII–XVIII.

which Vijñâneśvara and other old Nibandhakâras know, because many verses quoted from the latter are not traceable in them. In the case of the Vṛiddha Sâtâtapa-smṛiti, the author himself states in the beginning (śl. 1) that he gives only so much of the ancient work 'as is required to understand its meaning.' To the second sub-division, that of the enlarged metrical Smṛitis, belongs the so-called Bṛihat Pârâśara. It is expressly stated that the book was composed or proclaimed by Suvrata (Suvrataproktâ Saṁhitâ). Though it is divided, like the original Pârâśara, into twelve chapters, it contains 3,300 ślokas against the 581 or 592 of the older book.

To the third class, that of the more recent compilations in verse which are not based on any particular old works belong, besides the Kokila, Saptarshi, Chaturviṁśati and similar Smṛitis, mentioned above, the existing Lohita Smṛitis, and perhaps that ascribed to Kapila. The author of the Lohita Smṛiti states in the last verse of his book "that Lohita having extracted the quintessence from the Śâstras, has proclaimed this work for the welfare of mankind."

The fourth division, that of the versified Gṛihyasûtras, includes the two Âśvalâyanas, the so-called Bṛihat Śaunaka, or Śaunakîyâ Kârikâ, and the fragments of Śâkala and Śâṅkhâyana. Both the Âśvalâyana Dharmaśâstras are simply metrical paraphrases of the Âśvalâyana Gṛihyasûtra, and the Bṛihat Âśvalâyana is distinguished only by the peculiarity that it contains the same matter twice, "for the sake of the slow-minded," together with some verses on Râjanîti, or 'polity.' The Bṛihat Śâunaka is particularly interesting not only because it seems to be the last remnant of the Smârta writings of that famous teacher of the Ṛigveda, but also because it apparently has been remodelled by a Vaishṇava of the sect of Râmânuja, and affords another instance of the activity which the Vaishṇavas displayed in turning ancient writings to their account. A detailed notice of this work will be found in a paper laid before the Asiatic Society of Bengal in September 1866. It is characteristic of the

negligence and want of critical discernment shown by Hindû writers, that Nîlakaṇṭha in the Vyavahâra Mayûkha treats the Bṛihat Sâunaka as a genuine production of the old Âchârya.

The fifth class, or that containing the forgeries, is unfortunately of not small extent. The Vaishṇavas seem to have been most unscrupulous in using old names in order to give weight to their doctrines. They have produced the Bṛihat Hârita, two Vasishṭha Smṛitis, a Śâṇḍilya and the Laghu Vishṇu. These books represent various shades of the Vaishṇava creed. Some are extremely violent in their diatribes against other sects, and teach practices and doctrines which would have astonished the ancient Ṛishis whose names they appropriated, while others are more moderate and conform more to the Smârta practices. The most extreme are the Bṛihat Hârîta and the third Vasishṭha of our list. There is only one work which may be safely called a Śaiva forgery, the second Gautama of the list. It is distinguished from the common Smârta works only by occasionally inculcating the worship and pre-eminence of Śiva. The rites prescribed are what one at the present day would call Smârta. Besides these, some other small works belong to this class, among which the second Âpastamba and the second Uśanas may be named. Their rules do not show any particular sectarian tendencies. It will, however, be proper to call them forgeries, because they bear the names of ancient teachers, though they apparently have nothing to do with the authentic writings of these persons. On the other hand, it must for the present remain undecided whether the commonplace Śâstras attributed to Viśvâmitra and Bhâradvâja are modern fabrications, or versifications of older Sûtras. In the case of Bhâradvâja there is some foundation for the latter opinion, as a great portion of the Sûtras of a Bhâradvâja school, which belongs to the Black Yajurveda, is still in existence.

In concluding this sketch of the Smriti literature, it ought to be remarked that the opinions advanced with respect to its origin and development are supported by the analogies of

other branches of Hindû literature. The older portions of the Upanishads, or the philosophical portions of the Vedas which inculcate the 'road of knowledge,' either still form part of the collections of texts or Śâkhâs studied by the various Vedic schools, or can be shown to have belonged to such collections. Thus the Aitareya and Kaushîtaki Upanishads are incorporated in the Śâkhâs of the Ṛigveda which bear these names. The Taittirîyâ, the Vârunî and other Upanishads still form part of the Taittirîya Śâkhâ, the Maitrâyaṇî of the Maitrâyaṇa Śâkhâ, the Bṛihadâraṇyaka of the Mâdhyandina and Kâṇva Śâkhâs of the White Yajurveda. Again, the names and contents of such works as the Bâshkala and Jâbâla Upanishads show that they belonged to extinct Śâkhâs of the Ṛig and Sâmavedas. Next we have the Upanishads which have been recast by the adherents of the fourth Veda, the Âtharvaṇas, further Upanishads which, though counted as parts of the Atharvaveda, proceed apparently from adherents of the philosophical schools, and lastly, the fabrications of sectarians, Vaishṇavas, Śaivas, Gâṇapatas and so forth. While the first classes of Upanishads are written in archaic Sanskṛit prose, or in prose mixed with verse, the later works show the common Sanskṛit, and many of them are *in verse*. In some instances the connection between the prose and the metrical treatises can be clearly traced. In all this the analogy to the Smṛiti literature is obvious, and in the case of the Upanishads, too, the truth of our fundamental position is apparent, viz., that the fountain of intellectual life in India and of Sanskṛit literature is to be found in the Brahminical schools which studied the various branches of the Vedas. Even in the case of grammar, of astrology and astronomy, the correctness of this principle might be demonstrated, though not with equal certainty, because the oldest works in those branches of science are lost, or at all events have not yet been recovered.

The bearing of our view regarding the history of the Smṛitis, on their interpretation, and on the estimation in

which they must be held, is obvious. The older still existing Smritis, and the originals of the rest, are not codes, but simply manuals for the instruction of the students of the Charanas or Vedic schools. Hence it is not to be expected that each of these works should treat its subjects in all its details. It was enough to give certain general principles, and those details only which appeared particularly interesting and important. It is, therefore, inappropriate to call the Smritis "codes of law," and unreasonable to charge their authors with a want of precision of discrimination between moral and legal maxims, &c.(*a*) Such strictures

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(*a*) In the ancient societies in their earlier stages there was no such thing as systematic legislation on a utilitarian basis. The civic or national consciousness was developed under the influence mainly of religious conceptions, and all that belonged either to the State in its relation to individuals or to the mutual rights and duties of members of the community was wrought out under this sacred control. The ethical and the social laws spring forth as offshoots from the relations of mortal men to supernatural beings, to their own ancestors, and to their families united to them in close ties of religious interdependence. The ceremonial law seeking to propitiate beings, whose nature may be variously conceived, acquires the intricacy of a purely artificial system, and its interpreters are invested with a sacred character on account of their association with awful thoughts, and their exclusive command of potent formulas. The priesthood shared—and could not but share—the chief emotions of the people, but they moulded these into forms consonant to their own ruling notions, by connecting every phase of moral or legal change with some doctrine or some phrase regarded as of divine authority. As inventiveness and constructive faculty were set to work by the prompting of new needs in altered circumstances, the expression of the result, whether wholly original or partly borrowed, was grafted on to the existing system, and if it corresponded to any permanent want or form of moral energy it was preserved by frequent recitation; and as in India the people, owing perhaps to physical conditions, were much less stirred to distinctly civic activity than in Greece or Rome, the purely religious element in their body of thought has maintained its early predominance down even to modern times. The source and the sanction of the "municipal" being thus in the religious law, it was natural that a severe discrimination of the one from the other should

would only be justified if the Smritis were really "codes" intended from the first to settle the law between man and man. At the same time it will appear that the statement of the modern Nibandhakâras and commentators that the various Smritis are intended to supplement each other is, at least to a certain extent, correct. As none of the Smritis is complete in itself, it is, of course, natural that the lawyer should, if one fails, resort to the others which, on the whole, are written in a kindred spirit. It would, however, be unwise

not be attempted. In the Mosaic law, as in the Hindû law, we find sacrificial ceremonies, family relations, the conditions of property, criminal laws, and legal procedure all put pretty much on the same level and all in some degree intermingled because all regarded mainly from the same stand-point of their supernatural origin. Thus viewed, many parts of the law have a certain harmony with one another which, from our modern stand-point, seem incongruous, otiose, or unmeaning. Amongst the Greeks and Romans, as amongst the Hindûs, the laws being regarded as of divine origin, were committed to the memory and the care of the priestly class. This class furnished the only jurists, and when laws were reduced to writing, their proper repositories were the temples of the gods. A council of priests, as of Levites or of Brahmans, could alone pronounce on the most important questions of the civil law, or give the requisite assent to some proposed deviation from established use and wont. It seems that in the early period the Greek laws were mostly, if not wholly, rhythmical.* The same form of the Roman laws is suggested by the word "Carmina," commonly applied to them. They were special to the Greeks and to the Romans as the Brahmanic law is special to Hindûs. Rights as existing beyond the pale of the religious connexion are hardly recognized except by a faint analogy. The Smritis therefore and the mental evolution which they embody may be regarded as a most natural product of the human mind at a particular stage of growth. An economical, or purely political aim not having been admitted except as subordinate, the conduct of men was not prescribed by reference to it as distinguished from the religious aim. The rhythmical form of the precepts has its analogue even in the English law, many rules of which and even the statutes were in early times converted into verse, as a convenient means of committing them to memory.

* Wachsmuth Hist. Ant. of Gr., Ch. V. § 39.

to use them indiscriminately, since they contain also a great many contradictory or conflicting statements. It will be necessary to examine in each case, whether the Smriti from which supplementary information is to be derived, agrees in its principles on the point in question with the book which serves as the fundamental authority. For in the latter case only will it be possible to use the additional information. A considerable caution in the use of unknown texts, said to belong to Dharmaśâstras, regarding which we possess no full information, is also advisable on account of the great number of forgeries and recasts of ancient works which exist at the present day. A full enquiry into the authenticity of such texts is very necessary.

The Vedas.

11. *The Vedas.*—The fountain-head of the whole law is, according to the Hindûs, the Veda, or Śruti. By the latter term they understand the four Vedas, the Rik, Yajus, Sâman and Atharvan in all their numerous Sâkhâs or recensions, all of which they believe to be eternal and inspired. Each Veda consists of two chief portions, the Mantras and the Brâhmanas. The former are passages in prose and verse which are recited or sung by the priests at the great sacrifices; the latter contain chiefly rules for the performance of the sacrifices and theological speculations on their symbolical meaning and their results, as well as, in the Âranyaka portion, discussions of philosophical problems. As may be expected, the Vedas include no continuous treatises on Dharma, but, incidentally, a good many statements of facts connected with all sections of the law are found. The authors of the Dharmasûtras frequently cite such passages as their authorities. But it is a remarkable fact that they by no means agree regarding their applicability. (*b*) For the practical lawyer of the present day the Veda has little importance as a source of the law. But a careful investigation of the state of the law, as it was in the Vedic age, will no doubt yield important results for the history of the Hindû law.

(*b*) Sacred Books II., p. XX.

# BOOK I.—INTRODUCTION.

## THE LAW OF INHERITANCE.

*General View of the Hindû Law of Inheritance, according to the authorities current in the Bombay Presidency.*

### § 1.—DEFINITION OF THE LAW OF INHERITANCE.

*The Law of Inheritance comprises the rules according to which property, on the civil or natural death of the owner, devolves upon other persons, solely on account of their relation to the former owner.*

REMARKS.

The title of the Hindû Law under which the law of inheritance falls is the Dâyavibhâga, *i.e.*, according to the usual translation, "the division of inheritance." Dâya, *lit.* a 'portion,' is defined by Vijñâneśvara as 'the wealth (property) which becomes the property of another solely (*a*) by reason of his relation to the owner,' and vibhâga, *lit.* 'division,' as 'the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate.'(*b*)

It thus appears that the Dâyavibhâga includes not only the law of inheritance, but the rules for the division of any estate, in which several persons have vested rights, arising out of their relation to the owner. Actually, however, the contents of the chapter called Dâyavibhâga are still more miscellaneous, as the Hindû lawyers were obliged to introduce into it discussions on the nature and the various kinds of property, on account of the want of a separate title for these matters in the system of the Smritis.

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(*a*) Colebrooke, Mit. Chapter I., Sec. I., para. 2.

(*b*) *Ibid.*, para. 4. *See* Book II., Introduction.

The civil death of a person results from his entering a religious order, or being expelled from his caste by means of the ceremony called Ghaṭasphoṭa, the smashing of the waterpot. (*a*)

The relation or connection (sambandha) which gives to a person a right to inherit another's property, may be of six kinds :—

*a*. Blood relationship.

*b*. The relation of adoptee to the adopter and his family.

*c*. Connexion by marriage.

*d*. Spiritual connexion.

*e*. Co-membership of a community or association.

*f*. Relationship of a ruler to his subjects.

## § 2.—SUBDIVISIONS OF THE LAW OF INHERITANCE.

*The Law of Inheritance may be arranged, according to the natural or legal status of the person by whom the property is left, under the following heads :—*

I. Rules regarding the Succession to a Male.

*A. To a householder (gṛihastha) who is a member of an undivided family (avibhakta).*

*B. To a temporary student (upakurvâṇa brahmachârin), to a separated householder (vibhakta gṛihastha), and to a united householder in respect of his separate property.*

*C. To a reunited coparcener (saṁsṛishṭin).*

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(*a*) The Vîramitrodaya, *f.* 221, p. 2, l. 7, states expressly that persons who are only *patita* may inherit on performing the penance prescribed to them, and it is said, *f.* 222, p. 1, l. 10, that the person solemnly expelled does not inherit. Bhâlchandra Śâstri, in Steele's Law of Castes, p. 55, says that a member of a family who has lost caste, is to receive his share after expiation, notwithstanding an intermediate partition.

*D. To a professed student (naishthika brahmachârin) and to an ascetic (Yati or Sannyâsin).*

II. Rules regarding the Succession to Females.

*A. To unmarried females.*

*B. To married females having issue.*

*C. To childless married females.*

III. Rules regarding Persons excluded from Inheritance.

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"Deus facit heredem," says Glanville: that is, heirship properly so called arises only from natural relation. In the Tagore case, Willes, J., says, "Inheritance does not depend upon the will of the individual; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy." (*a*)

Under the Roman Law inheritance was a devolution of the property and rights, with the obligations and duties of a deceased as an indivisible aggregate on the heir designated by the law or appointed by will. The heir might be bound to carry out bequests and discharge debts as directed, but the defining characteristic was that he essentially continued, for legal purposes, the persona of the deceased. The sacra were not conceived as divisible, nor consequently was the familia which sustained them. Thus it was said Nemo pro parte testatus, pro parte intestatus decedere potest. Under the Hindû Law also the heir or the group of heirs (wills not being contemplated), who in the undivided family take a succession, continue the person with which they have already been identified. (*b*) One joint owner of the common property having been removed, the others take it as an undivided aggregate, capable of partition, but subject to a primary obligation in favour of the family sacra (*c*) and of creditors of a father

(*a*) L. R. S. I. A., at p. 64.

(*b*) See Viramit. Trans. p. 2.

(*c*) Viramit. Trans. pages 133, 256.

whose claims have not arisen from transactions of an obviously profligate character, tending to defraud the manes and the children bound to sacrifice to the manes of past ancestors. It is in accordance with this theory that Vijñâneśvara construes the text on the origin of property (Mitâkshará ch. I., sec. I, para. 13). "Inheritance" as a source of property he conceives as pointing to a continuation of the legal person by the unobstructed heir as joint owner. "Partition" he refers to the case of property descending to obstructed heir as collaterals taking necessarily according to distinct and several shares, on rights arising to each severally at the owner's death. So too at chap. I., sec. I., para. 3, he carefully distinguishes between the cases of sons, whose the patrimony *becomes* immediately and indefeasibly on their birth, and of parents, &c., on whom the estate *devolves* only on the death of the owner, and who meanwhile have not like sons a share in the ownership, only an expectancy which may be defeated by the act of the owner unembarrassed by a joint ownership of sons or grandsons. (*a*)

The Teutonic laws preferring males to females divided the allodial holding equally. They distinguished inherited property from acquisitions and moveables from immoveables: the inheritance under them might pass by different rules to several successors. Then came the right of primogeniture and the other extensive modifications induced by the Feudal system. The historical development of the English, having been so widely different from that of the Hindû Law of Inheritance, great caution ought to be exercised in applying any analogy derived from the former to the solution of questions arising under the latter. The language of Willes, J., in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (*b*) rests on a principle of general application. He says: "The questions presented by this case must be

(*a*) Comp. Vîramit. Chap. I., p. 54, Transl. p. 39.
(*b*) L. R. S. I. A. at p. 64.

dealt with and decided according to the Hindû law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindû system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty, a distinction not known in Hindû law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property: *Dyke* v. *Walford*. (*a*) In the Hindû law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased."

Resting on this, he says:—"the will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritance inconsistent with the Hindû law." (*b*) But after rejecting these, His Lordship, from the principle that an owner may by contract bind himself to allow another the usufruct, deduces the consequence that a temporary possession and enjoyment may be given by will, to be followed by other interests simultaneously constituted. Here he follows the English as distinguished from the Roman Law.

Special care should be taken not to build on particular expressions in the English text books. In translating from

(*a*) 5 Moore P. C., 434. (*b*) L. R. S. I. A. at p. 74.

the Sanskrit law-books the most nearly equivalent words have to be used to render those of the original, but this is in many cases an equivalence only for the particular purpose and in the context where the words occur. For drawing inferences the original must in cases of any nicety be referred to with as much care as the Greek or Hebrew text of the Bible for the support of a theological doctrine, or the Pandects for determining the true sense of a Roman law.

"The law of inheritance amongst the Hindûs is regulated generally by the performance of funeral oblations" (*a*) in this sense that the duty of performing the obsequies and subsequent rites being regarded as of paramount importance, the determination of the person on whom it devolves and the nature of the ceremonies to be celebrated settles incidentally who in sequence are entitled to the estate. The interest in it of the deceased is supposed not to be wholly extinguished, and as the possession of property is essential to an effectual sacrifice, the proper performer of the Srâddh is endowed with the means of performing it. A rigid regulation of the right to succession by funeral oblations is however peculiar to Bengal, having been adopted as a general principle by Jîmûta Vahâna. (*b*) In other parts (*c*) of India the criterion is admitted only partly, (*d*) and the Mitâkshará and the Mayûkha make the duty and the right collateral, meeting usually in the same person but not connected necessarily as cause and consequence. Consanguinity has greater influence, and may be looked on as the foundation on which the rules as to succession on the one hand and as to inheritance on the other

(*a*) H. H. Wilson's Works, V., 11 *Soorendronath Roy* v. *Musst. Heeramonee Burmoneah*, 12 M. I. A., at p. 96; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, Ibid. at p. 541.

(*b*) Dayabh., Ch. XI., Sec. VI. para. 29, 2.

(*c*) Viramit. p. 39 Col. Dig., B. V. T. 420, Comm.

(*d*) Ib. 14.

really rest.(a) Where there is a connexion of blood through males or females, there is, except in remote cases, a possibility of succession. A new connexion is established by marriage, and the family springing from this union is linked both to the father's and less closely to the mother's ancestors and their descendants. Except amongst those in whom there is really or by a fiction a sharing of identical blood, as derived from an identical source, there is no relationship giving rise to the ordinary rights of succession with which the law of inheritance is concerned, and the accompanying duties prescribed by the religious law. (b)

The law of inheritance is divided by the Hindûs, according to the nature of the rights of heirs, into unobstructed (apratibandha) succession, and succession liable to obstruction (sapratibandha). Unobstructed succession comprises the rights of sons, sons' sons, and their sons, to the inheritance of their fathers and ancestors, whether these were members of undivided or of divided families, and the succession in an undivided family in general. Succession liable to obstruction is subdivided into succession—(1) to a male who dies without sons, sons' sons, or great-grandsons in the male line, (2) to a reunited coparcener, (3) to an ascetic, and (4) to women. This arrangement of the subject-matter is necessary if, as is done by the Hindû lawyers, the laws of inheritance and of division are treated of under one title. But, as it is greatly wanting in clearness, especially in the first part, relating to unobstructed succession, it seems advisable to desert it when the Law of Inheritance is treated of by itself.

As the descent of property varies under the Hindû law, chiefly according to the natural and the legal status of the

(a) How far this is carried in favour of females by Bâlambhatta may be seen from the extracts given in the Tagore Lectures, 1880, Lec. X.

(b) The succession of one spiritually related, as of a teacher or pupil, may be ascribed to an imitative method of preserving religious ceremonies and the property dedicated to them. The Brahmin community and the king serve to complete the scheme. See below.

last possessor, it will be more convenient to divide the rules on this subject according to the latter principle. 'Succession' should therefore be first divided into succession to males and to females. Hindû males are divided according to their castes into Brâhmins, Kshatriyas, Vaiśyas, and Śûdras. (*a*) The members of the first three castes are divided according to the 'orders' (âśramas) into Brahmachârîs, "students," Gṛihasthas, "householders," and Yatis or Sannyâsîs, "ascetics." The Brahmachâris again are of two kinds, paying or temporary students, Upakurvâṇas, or else Naishṭhikas, 'professed students,' such as from the first renounce the world. Gṛihasthas, householders, also are of three kinds. They may be avibhakta, members of an undivided family, vibhakta, 'separate,' or saṁsṛishṭîn, 'reunited,' and lastly the avibhakta or united householder may be separate, in some respects, *i.e.*, he may hold property to which his coparceners have no right.

It is, however, unnecessary to take into account all these several varieties of status. Under the present law, especially as amended by the Acts of the Government of India, caste has little importance for the descent of property. In one instance only, that of the illegitimate son of the Śûdra, the old distinction holds good. Besides the separate property (*b*) of the united householder, the property of the Upakurvâṇa Brahmachârî, the temporary student, descends like that of the Vibhakta Gṛihastha, the divided householder. (*c*) The principles, at least, applicable to the succession to Naishṭhika Brahmachâris, professed students, are the same as in the case

(*a*) Śûdras are always considered Gṛihasthas, as the study of the Veda is forbidden to them.

(*b*) There are no particular rules regarding the descent of this kind of property. But the fact that it is exempted from the rules regarding the division of the property of united coparceners, shows that it must fall under the rules regarding the property of separate males. For the definition of such 'separate property' (avibhâjya), *see* Mit. Chap. I., Sec. V.; Vyav. May. Chap. IV., Sec. VII.; and Book II., Introduction.

(*c*) *See* Mit. Chap. II., Sec. VIII., para. 3.

of Sannyâsîs. We obtain therefore for the succession to males four subdivisions: (1) the succession to the Avibhakta Grihastha, a householder of an undivided family; (2) to the Upakurvâna Brahmachârî, a temporary student, and to a Vibhakta Grihastha, a separate householder; (3) to a Sansrishtî Grihastha, a reunited householder; (4) to Sannyâsîs or Yatis, ascetics, and to Naishthika Brahmachâris, professed students.

In the case of females, it is of importance whether they are unmarried or married, and whether, if married, they leave issue or not. The rules regarding the succession to their property may therefore be divided under three heads as above.

## § 3 *A*. SUCCESSION TO THE PROPERTY OF AN AVIBHAKTA GRIHASTHA.

(1) SONS, SONS' SONS, AND THEIR SONS.—*The property of a male member of a united family, Avibhakta Grihastha, descends,* per stirpes, *to his sons, son's sons, and son's son's sons, who were united with the deceased at the time of his death.*

*See* Book I., Chapter I., Section I., Question 1.

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"That under the law of the Mitâkshará each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable."(*a*)

"The ownership of the father and the son is the same in acquisitions made by the grandfather, whether of land, of a fixed income, or of moveables." (*b*)

The three descendants in the male line take the inheritance by virtue of the right which vests in them from their birth to the ancestral family estate, and to the immoveable property acquired by their father, grandfather, or great-grandfather (apratibandha dâya), and they *represent* these

(*a*) P. C. in *Suraj Bunsi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88, 99.

(*b*) Mitâkshará, Chap. I., Sec. 5, para. 3; Viramitrodaya, Tr. p. 68.

persons in the undivided family. (*a*) The ultimate reason for their preference to other coparceners must be sought in the importance attached by the Hindû to the continuation of his race, and to the regular and continuous presentation of the oblation to his manes (śrâddha). (*b*)

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(*a*) Mit., Chap. I., Sec. 5, and Sec. 1, para. 3; Vyav. May. IV., Sec. 1, para. 3.

(*b*) Gaius, Lib. II. § 55, points to the importance attached by the Romans in early times to the due performance of the sacra and the connexion of these with the inheritance. Compare the remarks at 11 B. H. C. R., 265.*

In § 152, et sqq., Gaius deals with heredes necessarii, sui et necessarii, aut extranei. Of the "sui et necessarii" he says § 157:—"Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente, quodam modo domini existimantur."

Against these joint owners, "Nihil pro herede posse usucapi suis heredibus existentibus, magis obtinuit.† This passage may perhaps indicate that the "sui" formed a fourth class."‡ Sons and daughters of the last proprietor or of his son were forced to take the inheritance with its burdens. They were thus "necessarii" as well as "sui."

The death of the son was necessary to bring in his children§ and they must have been still within the potestas of the grandfather at his death.

Paulus in the Digest describes the position of the son inheriting his own, "suus heres," in a way very analogous to that found in the Hindû treatises.

"In suis herdibus evidentius apparet continuationem domini eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur, unde etiam filiusfamilias appellatur sicut paterfamilias, sola nota hac adiecta, per quam distinguitur genitor ab eo qui genitus sit, itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur, hac ex causa licet non sint heredes instituti, domini sunt; nec obstat, quod licet eos exheredare, quod et occidere licebat."

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* *Bhâu Nânâji Utpât* v. *Sundrâbâi.*

† Cod. Lib. VII., 29; 2.

‡ Tomkins and Lemon's Gaius, p. 341.

§ Gaius, Lib. II. § 159.

Actual birth is necessary to the full constitution of right as son. The succession is not suspended for one not begotten. (*a*) *See* below Bk. II. Chap. I., Sec. 1, Q. 8, Remark 2.

The rule extending the apratibandha dâya to three descendants conforms to the views of Nîlakaṇṭha, Bâlambhaṭṭa, Mitramiśra, and of the eastern lawyers.(*b*)

The Mitâkshará nowhere mentions the right of the son's son's son, and its commentator, Viśveśvara, states, in the Madanapárijáta, that the vested right to inherit

In the Hindû as in the Roman law the essential notion of what we call "Inheritance" was that of a continuity of the "persona" and of the "familia" over which headship was exercised, while in "Partition" the central idea is that of a break of continuity, of a substitution of new relations and of new rights, individualized or differently aggregated, for the group out of which they have been formed; and as a true union of the composite persona taking a family estate on the death of the former head implies, according to Hindû notions, a joint family united in domestic worship and in interests, we see how it is that the Mitâkshará chap. I., sec. 1, para. 13 says "dâya" is the unobstructed inheritance of the "sui heredes" taking fully and jointly what was partly theirs before, while "partition" intends "heritage subject to obstruction." In the latter case wholly new rights come into existence, the continuity is broken up; and the several collateral heirs, supposing there are more than one, take several shares by means of a parcelling inconsistent with the mere replacement of one head by another, the family corporation still preserving its personal and proprietary identity, as in inheritance not subject to obstruction. It is in this sense and in this only that the Mitâkshará* recognizes partition as a source of property; the several rights of those entitled cannot in some cases be made effectual without partition, though they come into existence simultaneously with the devolution of the estate; and thus they in a manner spring from the partition as a source of property, which the Smṛiti declares it may be, but which in ordinary cases Vijñáneśvara says it is not.

(*a*) *Koylasnath Doss* v. *Gyamonee Dossee*, C. W. R. for 1864, p. 314. *Musstt. Gowra Chowdhrain* v. *Chummun Chowdhry*, Ibid. 340.

(*b*) *See* Vyav. Mayûkha Ch. IV. Sec. IV.; Manu IX. 185; Col. Dig. B. v. T. 396, Comm.

* Chap. I., Sec. I., paras. 3, 7, 8, 13, 17, and 18.

does not extend further than the grandson. (*a*) Among the authors of the Dharmaśâstras a like difference of opinion seems to have existed. But at present the right of the great-grandson may be considered to be established, and the Śâstris assume that the word 'son' includes the son's son's son.

Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him, or were born after the separation. (*b*)

This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it, or who having been exceptions have since ceased to be so, are treated accordingly. Their rights of succession are, as to their mutual extent, their rights as they would be in a partition made immediately on the death of the propositus. This is brought out most clearly perhaps in the first Section of the Dâya Kramasangraha. It is in general rather assumed than propounded, as after providing for representation of sons by grandsons and great-grandsons, the discussions proceed on the basis of the deceased owner's having held separately, without which there would be no room for the several rules to operate, since in a partition on his death, the then joint owners with him would take the whole. Even "a widow cannot claim an undivided property." (*c*) And the widow comes first amongst the heirs on failure of male descendants. She and her daughter are entitled only to maintenance and residence (*d*) from the coparceners, (*e*) or successors to a separate owner. (*f*)

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(*a*) Madanapârijâta, *f* 228 p. 2, l. 7 (of Dr. Bühler's MS.). In the Subodhini, however, commenting on Mitâkshará Ch. I., S. 1, pl. 3, Viśveśvara Bhaṭṭa seems to recognize a representation extending to the great-grandson, if not even farther.

(*b*) Mit. Chap. I, Sec. 2, paras. 1 and 5; Vyav. May. Chap. IV., Sec. 4, paras. 16, 33, ss.

(*c*) *Rewan Pershad* v. *Mussst. Radha Beebee*, 4 M. I. A. 437.

(*d*) *Parvati* v. *Kisansing*, Bom. H. C. P. J. F. for 1882 p. 183.

(*e*) *Mankoomwur et al.* v. *Bhugoo et al.*, 2 Borr. 162.

(*f*) *Ramaji Huree* v. *Thakoo Bave*, Ibid. 497.

In *Chaudhri Ujagar Singh* v. *Chaudhri Pitam Singh* (*a*) the Privy Council say of a father whose son was a plaintiff on the ground that by an imposition the father had been allotted but a quarter instead of a half of an estate, "supposing that he was so imposed upon, and that there was some right in him to procure an alteration of the grant, that is not such an interest as a son would by his birth acquire a share in. Whatever the nature of the right might be—whether it could be enforced by a suit or by a representation to the Government—it does not come within the rule of the Mitâkshará law, which gives a son, upon his birth, a share in the ancestral estate of his father." Regarded as a bounty, the property could not be recovered by a suit, but if there was a right in the father to property enforceable by suit that right would not indeed be shared by the son except subordinately, the property not being ancestral, but it would be inherited by him on his father's death. The property recovered by one of several sons would be subject to the rules of Book II. Introd. § 5 *A*.

The ancient Hindû law presents many traces of a once subsisting law of primogeniture in this sense that on the father's death the eldest son succeeding as the paterfamilias, exercised the same or nearly the same functions of authority and protection as the previous head of the household. (*b*) This rule and the rule of absolute dependence of the junior members was gradually superseded by the present

(*a*) L. R. 8 I. A. at p. 196.

(*b*) Manu Chap. IX. 105; Nârada Pt. I. Chap. III. 2, 36, 39. The preference given by several texts to the first born, combined with the principle of representation, may in the case of an impartible estate form a ground for preferring the son of a deceased first-born son as heir before his uncle, the former owner's eldest surviving son.* Other

* See Manu Chap. IX. 124, 125; the Rámáyana quoted Col. Dig. B. II, Chap. IV. T. 15, Com.; Ait. Brahm. IV. 25, VII. 17, 18 quoted Tagore Lec. 1880, Lec. V.; *Ramalakshmi Ammal* v. *Sivanantha*, 14 M. I. A., at p. 591.

law of equal joint succession of all the sons standing in a like legal relation apart from priority of birth. The nature of

texts in some degree favour the son of the first married wife, though later born, in competition with the earlier born son of a second or third wife*; yet this may have originally rested on the taking of wives in the order of the classes.† Recourse must be had in practice to the custom of the family for a rule which cannot be gathered with absolute certainty from the texts.‡ At Madras it has been held that a junior brother, allowed by the others to take an impartible joint estate, transmitted it to his own descendants, the other members being entitled only to subsistence, but that on the extinction of his line an heir was to be sought in the descendants of the eldest of the original group of brothers. The rule of precedence by seniority of outgrowth from the parent stem and by representation was thought to apply to an estate which, though impartible, had all along been joint family property, and this though the eldest brother was apparently dead when the fourth one took the estate.§ In the Tipperah case‖ the Judicial Committee had ruled that the nearest in blood to the last holder was his heir, not the senior member of the whole group of agnates. This the Madras High Court thought inconsistent with the statement in the Shivaganga case,¶ that the succession to a ráj is governed by "the general Hindû Law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject," such character being consistent with a continued joint ownership, survivorship, and precedence by seniority of origin in the group; but it would seem that the Judicial Committee *did* think a rule of survivorship and of latent rights to succession of collaterals was excluded by the impartibility of the estate and the singular succession to it.** The view of the Madras High Court is indeed expressly rejected; as it had been by the High Court at Calcutta. The Madras decision therefore, however well reasoned, cannot be regarded as a safe precedent.

* Manu Chap. IX. 123, Col. Dig. B. IV. T. 51 and Com.

† Manu Chap. IX. 122, and Kulluka ad loc.; Manu III. 4, 12, 13.

‡ *Ramalakshmi Ammal* v. *Sivanantha Perumal*, 14 M. I. A. 570. *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523.

§ *Narayanti Achammagáru* v. *Venkatachalapati Nayaniváru*, I. L. R. 4 Mad. 250.

‖ *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523.

¶ *Katama Natchiar* v. *The Rájáh of Shivaganga*, 9 M. I. A. at p. 593.

** *See Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. at pp. 540, 541.

the transition may be gathered from the authorities referred to below. (a) See also § B (1).

§ 3 *A.* (2) ADOPTED SONS.—*On failure of legitimate issue of the body, adopted sons inherit. If sons be born to the adopter after he has adopted a son, the latter inherits a fourth share.*

EXAMPLES.

1. A, B, C form a united family. A adopts $A^1$. On A's decease, $A^1$ or his descendant $A^2$ or $A^3$ takes A's share.

2. A, B, C form a united family. A has a legitimate son, $A^1$. The latter adopts a son, $A^2$. If $A^2$ survives $A^1$ and A, he inherits A's share. The same would be the case if $A^2$ were a legitimate son of the body of $A^1$, and adopted $A^3$, and the latter survived $A^2$, $A^1$, and A.

3. A, B, C form a united family. A adopts $A^1$, and a son, $A^2$, is born to him afterwards. On the death of A, $A^1$ will inherit a fourth of a share, and $A^2$ the rest of A's share.

AUTHORITIES.

Book I., Chapter II., Sec. 2, Q. 1, 3, and 15; and Sec. 4, Q. 2.

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There are no special authorities mentioning the right of the adopted son of a son or grandson to inherit his adoptive grandfather's or great-grandfather's shares. But it may be inferred from the maxim that a person adopted occupies in every respect the position of a son of the body of the adopter. *See* Synopsis of the H. L. of Adopt., Head Fourth, Stokes's H. Law Books, p. 668.

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(a) Mit. Chap. I., Sec. I., para. 24, Chap. I., Sec. II., para. 6.; Vyav. May. Chap. IV., Sec. I., paras. 4-10; Âpast. II. VI.; 10, 14.; Gaut. Chap. XXVIII., paras. 5-16.; Manu Chap. IX. 105 *ff*, 112 *ff*; Vasishṭha XVII.; Nârada Chap. XIII., paras. 4, 5, cited Coleb. Dig. Bk. V. T. 32; Vishnu Chap. XVII. 1, 2.

§ 3 *A*. (3) ILLEGITIMATE SONS, GRANDSONS, AND GREAT-GRANDSONS.—*In the case of a Śûdra, being an avibhakta, his share, on failure of the three legitimate descendants, is inherited by his illegitimate sons, grandsons, or great-grandsons. If legitimate descendants are living, the illegitimate inherit half a share.*

AUTHORITIES.

Book I., Chap. II., Sec. 1, Q. 4; Sec. 3, Q. 1; Sec. 11, Q. 1, 2, 3; Vyav. May. Chap. IV., Sec. IV., para. 32; 2 Strange H. L. 70.

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The expression "half a share" must be interpreted in accordance with the principles laid down by Vijñâneśvara, Mit. Chap. I., Sec. 7, para. 7, regarding the "fourth of share" which a daughter inherits. Consequently, if A leaves a legitimate son, $A^1$, and an illegitimate son, $A^3$, A's property is divided first into two portions, and $A^3$ receives one-half of such a portion, and $A^1$ the rest. (*a*)

In the passage of the Mitâkshará referring to the rights of the illegitimate son, it is stated that the latter inherits the whole estate of his father only on failure of daughter's sons. But this can only refer to cases wherein the father is separated (vibhakta), as daughters' sons do not inherit from a member of an undivided family. On the other hand, the text states that the illegitimate son inherits on failure of legitimate brothers. Here it must be assumed that the author omitted to mention the sons and grandsons of legitimate brothers, as these take their fathers' and grandfathers' place by the law of representation (*see* p. 65), and it would be plainly anomalous that a daughter's son, but not a son's son, should exclude the illegitimate son of the propositus. *See* further below, § 3 *B*. (3).

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(*a*) This explanation is also expressly given in the Vîramitrodaya.

§ 3 *A.* (4) DESCENDANT OF EMIGRANT HEIR.—*In the case of coparceners who have emigrated, the descendants in the male line within six degrees inherit, on return, their forefather's share.*

AUTHORITIES.

Mayûkha, Chap. IV., Sec. 4, para. 24; so also the Vîramitrodaya. *See* the case of *Moroji Vishvanâth* v. *Ganesh Vithal*, 10 Bom. H. C. R. 444.

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No difference in the rule as to representation arises from the parcener's residing abroad. Mere non-possession does not bar until the seventh from the common ancestor in a branch settled abroad; but the failure at the same time of three intermediate links prevents a right from vesting in the fourth so as to be further transmissible as a ground for claiming a share from those who have meanwhile come into possession of the property. When they have resided in the same province, such a claim can be set up by the descendants as far as the fourth only from a common ancestor, who was sole owner of the property. *See* Coleb., Dig. B. V. T. 396 Comm.; *see* however Book II. Introduction, § 4 *D*, and Index, Limitation.

§ 3 *A.* (5) COPARCENERS OF THE DECEASED.—*The share of an undivided coparcener who leaves none of the abovementioned descendants goes to his undivided coparceners.*

*See* Book I., Chap. I., Sec. 2; Chap. II., Sec. 10, Q. 5; and for Authorities, *see* Chap. I., Sec. 2, Q. 3.

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The Mitâkshará (Chapter II., Sec. 1, p. 7 and 20) and Vyav. May. state distinctly that the rule, as given above, holds good in the case of brothers, but not that it touches the case of more remote relations. The Śâstris generally hold that the word "brothers" in the text in question is

intended more remotely to include coparceners; in fact that it contains a "dikpradarśana," or indication of the principle to be followed. There can be no doubt that they are right. For the law of representation secures also to remote relations the succession to their coparcener's share. Thus if A, B, C, and their descendants $B^1$, $B^2$, and $C^1$, live as a united family, and at the death of A, $B^2$, and $C^1$ only are alive, these will be the sharers of A's property, as they represent their grandfather and father respectively, and the latter, according to the authorities cited, would have inherited A's share.

The rule of survivorship in an undivided family was recognized by the Privy Council in *Katama Natchiar* v. *Rajah of Shivaganga*, (*a*) but in a subsequent case it has been made subordinate to that of nearness of kin to the late Raja. (*b*) In another case (*c*) reference having been made in argument to Mit. Chap. II., S. 4, their Lordships seem (*see* Rep. p. 504) to have thought that the plaintiff, one of four brothers once co-existing as a united family, in claiming one-fourth only, instead of one-half, of a share in a joint estate, had made a needless concession to his nephews, who would be excluded by him and his brother from succession to a third brother their uncle deceased, but the Mitâkshará in the place referred to is treating of separate property. So too the Vîramitrodaya, Tr. p. 194. In the same treatise, p. 72, it is laid down that a son dying is replaced by his son or sons in a united family with reference to uncles or cousins, each group taking their own father's share. Vijñâneśvara, Mit. Ch. I., S. 5, insists on the equal rights of father and son to the ancestral estate; so also Vishnu, XVII., 17, quoted below; and by the exclusion of nephews in favour of brothers, the case would frequently arise of a united family, in which the whole of the property

(*a*) 9 M. I. A. 539.

(*b*) *See* above p. 70.

(*c*) *Ramprasad Tewarry* v. *Sheochurn Doss*, 10 M. I. A. 490.

belonged to one member. The law of partition gives to the nephew the same right as his uncle, and requires that a division of the common property be deferred until the delivery of the pregnant widow of a deceased coparcener.(*a*) The case of *Debi Parshâd* v. *Thakur Dial* (*b*) supports the views just stated.

In a Bengal case (*c*) the Privy Council have held that even in an undivided family the uterine brother inherits, to the exclusion of the half-brother, his deceased brother's share. After proving in opposition to Śrikara that while Yâjñavalkya's text (II., 135, 136) in favour of brothers, includes both those of the full blood and those of the half-blood, the subsequent texts, as to connexion by blood and by association, give equal rights to the reunited half-brother and the separated whole-brother. Jîmûta Vâhana in the Dâya Bhâga quotes Yama to show that the rule applies only to divided immoveable property, since the undivided property appertains to all the brethren. This has apparently been understood by their Lordships as in the case of half-brothers, meaning only *reunited* brethren, so as to leave to the uterine brother a superiority in a family wherein no division has taken place; but the true sense seems to be that the divided half-brother has no rights of inheritance, if a whole brother survive, until he becomes re-associated, while the whole brother on account of his connexion by blood retains a right of inheritance in spite of separation. The half-brother is restored to a place by reunion. (*d*) The whole brother has not quite forfeited his place by division; though in competition with another whole brother, unseparated or reunited, his single connexion does not avail

(*a*) Mitâkshará Chap. I., Sec. VI., pl. 11, 12; Chap. II., Sec. I., pl. 30; Vishnu, Chap. XVII., Śloka 23; Yâjñ. II., 120, 135.

(*b*) In. L. R. 1 All. 105.

(*c*) *Sheo Soondary* v. *Pirtha Singh*, L. R. 4, In. A. 147.

(*d*) See *Prankishen Paul Chowdry* v. *Mathooramohan Paul Chowdry*, 10 M. I. A. 403; and Manu IX. 212.

against the double connexion of the latter; and on his return, having a double connexion with his own whole brothers, he succeeds to them.

However the case may be in Bengal, the Mitâkshará says of the application of the Ślokas (Yâjñ. II. 134, 139) that "partition had been premised (to the general text on succession) and reunion will be subsequently considered," so that in Bombay no preferential inheritance of brothers in a united family can arise from the texts. It is the same in Vishnu, Chap. XVII., Sût. 17. The joint property being traced back to the single original owner the rights of partition amongst descendants, and of inheritance, so far as inheritance can subsist, are derived from the same source *per stirpes* without distinction of mothers, these being now all of equal caste. (*a*) In *Neelkisto Deb* v. *Beerchunder Thakur* (*b*) title by survivorship is said to be a rule alternative to that founded on efficacy of oblations, and it is on this latter that the decision of the Calcutta High Court is founded (*c*) which has been followed by the Privy Council in *Sheo Soondary's* case. The Bengal case indeed admits a difference of doctrine under the Mitâkshará. (*d*)

A grant to united brethren without discrimination of their shares constitutes a joint tenancy with the same consequences as in the case of a joint inheritance. (*e*)

As to charges on the inheritance, undivided property is not generally in the hands of survivors answerable for the separate debt of a coparcener deceased. (*f*) A son's

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(*a*) *See* Mit. Chap. II., Sec. 1, pl. 30; and Chap. I., Sec. 5, pl. 2; Yâjñ. II. 120, 121; *Moro Vishvanath* v. *Ganesh Vithal*, 10 Bom. H. C. R. 444.

(*b*) 12 M. I. A. 523.

(*c*) See *Rajkishore* v. *Govind Chunder*, L. R. 1 Calc. 27.

(*d*) Loc. cit.

(*e*) *Rádhábái* v. *Nánáráo*, I. L. R. 3 Bom. 151.

(*f*) *Udárám Sitárám* v. *Ránu Pánduji et al.*, 11 Bom. H. C. R. 76, 85. *Goor Pershed* v. *Sheodin*, 4 N. W. P. R. 137.

obligation to pay his father's debt depends on the nature of the debt, not on the nature of the property that he has inherited. (*a*) And the property, even where a son is liable, is not so hypothecated for the father's debts as to prevent a clear title from passing to a purchaser from the son in good faith and for value. (*b*) Securities created by a father, unless they are of a profligate character, bind his sons as heirs. (*c*) The widows of deceased cosharers are entitled to maintenance and residence. (*d*) *See* below § 3 *B* (1).

## § 3 *B*.—HEIRS TO THE SEPARATE GRIHASTHA, UPAKURVÂNA BRAHMACHÂRÎ, AND TO THE SEPARATE PROPERTY OF AN UNDIVIDED COPARCENER.

The separated householder being father of a family becomes the origin of a new line of succession within that family. (*e*) His sons are by their birth joint owners with him of the ancestral estate in his hands, but he has no other cosharers in it, and in the absence of son or after separation from them he is free to dispose of it. (*f*) Should he fail to

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(*a*) *Ibid.* and *Laljee Sahoy* v. *Fakeer Chand*, I. L. R. 6 Cal. 135.

(*b*) *Jamiyatrám* v. *Parbhudás*, 9 Bom. H. C. R. 116.

(*c*) *Girdhari* v. *Kanto Lall*, L. R. 1 I. A. 321; *Suraj Bunsee Koer* v. *Sheo Prasád*, L. R. 6 I. A. 104; *Jetha Naik* v. *Venkiappá*, I. L. R. 5 Bom. at 21; *Ponnappa* v. *Pappuváyyangar*, I. L. R. 4 Ma. 1.

(*d*) Mit. Ch. II., § 1, para. 7, ss. Viram. p. 153 transl., *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353, referring to *Gauri* v. *Chaudramani*, I. L. R. 1 All. 262, and *Mangala Debi* v. *Dinanath Bose*, 4 B. L. R. 72 O. C. G.

(*e*) See *Rájáh Rám Náráin Singh* v. *Pertwin Singh*, 20 C. W. R. 189.

(*f*) *Bhíká* v. *Bháná*, 9 Harr. 446; *Narottam Jayjivan* v. *Narsandás Harikisandás*, 3 Bom. H. C. R. 6 A. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. at p. 39; *Tuljárám Morárji* v. *Mathurádás Dayárám*, Bom. H. C. P. J. for 1881 p. 260.

dispose of his estate, and die separated, his sons (*a*) take equally, and failing sons, others take in the order following:—

§ 3 *B.* (1) Sons, Son's Sons and Son's Son's Sons.—*The three first descendants of a separate Grihastha in the male line inherit* per stirpes.

*See* Book I., Chap. II., Secs. 1 and 4, and for Authorities, *see* above § 3 *A* (1).

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The householder, though unseparated generally, may have acquired property which ranks as his separate estate. The conditions of such an acquisition are discussed under the head of Partition. The succession to such property is governed generally by the same rules as if the acquisition had been wholly separate estate. When there has not been a general separation of interests, the presumption is in favour of acquisitions by the several members uniting with the joint estate, a presumption which has to be met by evidence directly proving a separate acquisition or from which it can be reasonably inferred. (*b*) But under circumstances the usual presumption will not be raised as ruled by the Judicial Committee in *Musst. Bannoo* v. *Kasharam.* (*c*)

Seniority in marriage of their mothers gives no advantage to the sons over their seniors in birth by another wife; (*d*) and the wives being equal in class, seniority by birth

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(*a*) *Mt. Anunda Koonwur* v. *Khedoo Lal*, 14 M. I. A. 412. (Mithila law agreeing here with that of the Mitâkharâ.)

(*b*) *See Dhurm Das Pandey* v. *Mussumat Shama Sundri Debea*, 3 M. I. A. 229, 240; *Vêdavalli* v. *Nârâyan*, I. L. R. 2 Mad. 19.

*Prankishen Paul Chowdhry* v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403.

(*c*) *Musst. Bannoo* v. *Kasharam*, 7th December 1877.

(*d*) *Ramalaksmi* v. *Shivanantha*, 14 M. I. A. 570.

gives superiority of right, (*a*) where the property is impartible. (*b*) *See* above p. 69.

The widow of the late owner is entitled to residence in the family house; (*c*) so in a united family it is the widow's duty to reside in her late husband's house under the care of his brother, (*d*) and she cannot be deprived of this right by a sale of the house. (*e*)

The widow has a right to an adequate maintenance (*f*) out of the estate and in proportion to it. (*g*) She need not be maintained exactly as her husband would have maintained her; (*h*) but she must be supported in the family. (*i*) She cannot be deprived of her right by an agreement taken from her by her husband and a gift of all his property to his sons. (*j*) A sum may be invested to produce the maintenance or other

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(*a*) Manu Chap. IX., paras. 122, 125.

(*b*) *Ib.* and *Bhujangrâv* v. *Mâlojirâv*, 5 Bom H. C. R. 161, A. C. J.; *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru*, L. R. 8 I. A. 1.

The partition of lands in descent between all the sons, and failing them between the daughters, was the universal law of socage descents in England until comparatively late times; nor was it peculiar to England being found in the lands of the roturiers of France as well as in other parts of Europe. *Elton, Tenures of Kent*, 41. There are frequent instances in Domesday of males holding in coparcenery, or, as it is there expressed, in paragio. Ib. 58.

(*c*) *Prankoonwar et al.* v. *Deokoonwar*, 1 Borr. R. 404.

(*d*) *Kumla et al.* v. *Muneshankur*, 2 Borr. R. 746.

(*e*) *Mangala Debi et al.* v. *Dinanath Bose*, 4 B. L. R. 72 O. C. J. *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353. *See* Book I., Ch. I., § 2, Q. 9.

(*f*) Macn. Cons. Hindû Law, 60.

(*g*) 2 Str. H. L. 290, 299; *Sakvárbái* v. *Bhavánji*, 1 Bom. H. C. R. at p. 198.

(*h*) *Kalleopersaud Singh* v. *Kupoor Koonwaree*, 4 C. W. R. 65.

(*i*) *See* Bk. II. Introd. § 7 A; *M. Venkata Kristna et al.* v. *M. Venkataruinamah*, Mad. S. D. A. R. for 1849, p. 5; Viváda Chintámani, p. 261.

(*j*) *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99.

arrangements made to secure it.(*a*) Purchasers from the successor are bound or not, as they have or have not notice of the widow's claim according to *Srimati Bhagavati Dasi* v. *Kanailal et al.*;(*b*) a Bengal case. (*c*) As to the nature of the widow's right as an indefeasible charge on the estate, opinions have differed. (*d*) In *Lakshman Rámchandra* v. *Satyabhámábái* (*e*) it was held that notice was not conclusive against the purchaser of property held by a surviving coparcener subject to a widow's claim. The subject is in that case fully discussed.

Even a concubine and her offspring are entitled to support. *See* below.

The son is bound to pay his father's debts and even those of his grandfather. (*f*) The contracts and obligations of his father in connexion with the estate pass to the heir

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(*a*) *Sakvárbái* v. *Bhavánji*, 1 Bom. H. C. R., at p. 198; *Vrandávandás* v. *Yamunábái*, 12 Bom. H. C. R. 229.

(*b*) 8 B. L. R. 225 A. C. J.

(*c*) See *Adhiranee Narain Coomary et al.* v. *Shona Mallee Pat Mahadai et al.*, I. L. R. 1 Cal. 365; *Baboo Goluck Chunder* v. *Ranee Ohilla Dayee*, 25 C. W. R. 100. *See* also *Rámlál Thákursidás* v. *Lakshmichand Munirám et al.*, 1 Bom. H. C. R. 71 App.; and *Johurra Bibee* v. *Sreegopal Misser et al*, I. L. R. 1 Cal. 470.

(*d*) See *Rámchandra* v *Sávitribái*, 4 Bom. H. C. R. 73 A. C. J.; *Heeralall* v. *Musst. Konsillah*, 2 Agra R. 42; *Musst. Lallkuar* v. *Ganga Bishan et al.*, 7 N. W. P. R. 261; *Baijun Doobey et al.* v. *Brij Bhookun Lall*, L. R. 2 I. A. 279; *Koomaree Debia* v. *Roy Luchmeeput Singh et al.*, 23 C. W. R. 33; *Adhiranee Narain Coomary et al.* v. *Shona Mallee Pat Mahadai et al.*, I. L. R. 1 Cal. 365; Mitákshará Ch. I. Sec. VII. 1, 2; Sec. I. 27.

(*e*) I. L. R. 1 Bom. 262; 2 *Ib.* 494; I. L. R. 2 Mad. 339.

(*f*) The obligation is made dependent on his taking property from the ancestor, and limited by its amount by Bombay Act VII. of 1866. A similar limitation is provided by the same Act in the case of family debts incurred during the minority of a member afterwards sued for them. The protection extends to obligations incurred before a member attains 21 years of age. The general age of majority is now 18. See Act IX. of 1875.

taking it, except when improperly incurred. (*a*) The Judicial Committee indeed have laid down in the case of an estate expressly held not to have been self-acquired by a father that "all the right and interest of the defendant in the zamindâri which descended to him from his father, became assets in his hands" "liable for the debts due from his father." (*b*)

§ 3 *B.* (2) ADOPTED SONS.—*An adopted son and his descendants inherit in the same manner as natural sons and their descendants. In case, after an adoption has been made, of the adopter having a legitimate son of his body, the adopted son receives a fourth of a share.*

*See* Book I., Chap. II., Sec. 2, and Sec. 4, Q. 2, and for Authorities, *see* above § 3 *A.* (2) (3).

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If a widow adopts a son in her husband's name, the adopted son immediately inherits the deceased's property. *See* Book I., Chap. II., Sec. 2, Q. 8, ss.

Regarding the interpretation of the expression "a fourth of a share," *see* § 3 *A.* (3) page 72.

Adopted sons of son's sons, or son's son's sons, likewise, take the places of their adoptive fathers. *See* above, § 3 *A.* (2), page 71.

§ 3 *B.* (3) ŚÛDRAS' ILLEGITIMATE SONS.—*On failure of legitimate sons of the body, son's sons, or son's son's sons, the illegitimate son of a Śúdra and his descendants in the male line inherit the ancestor's property. If legitimate children be living, the illegitimate son takes half a share.*

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(*a*) *See* Nârada Pt. I. Chap. III., 2, 4, 18; *Ponnappa Pillai* v. *Pappuváyyangár*, I. L. R. 4 Mad. 1. *Gopál Krishna Śástri* v. *Rámayyangár*, I. L. R. 4 Mad. 236. As to the contract of tenancy see *Venkatesh Náráyan Pai* v. *Krishnáji Arjun*, Bom. H. C. Print. Judg. 1875, p. 361; *Bálaji Śitárám Náik* v. *Bhikáji Soyare Prabhu*, Bom. H. C. P. J. 1881, p. 181.

(*b*) *Muttayan Chettiar* v. *Sangili Vira Pandia*, decided 10th May 1882, reversing I. L. R. 3 Mad. 370.

*See* Book I., Chap. II., Sec. 3, and for Authorities *see* above, § 3 *A.* (3).

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*See* § 3 *A.* (3) above, page 72. That illegitimates of the higher castes can claim maintenance only, while those of the Śûdra caste are not outcastes but inherit, is laid down in *Pandaiyâ* v. *Puli et al.* (*a*) *See* also *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn.* (*b*)

According to Book I., Chap. II., Sec. 5, Q. 1, the legitimate son of an illegitimate son inherits his father's share, though the latter has died before his grandfather. There is no express authority for this opinion. But still it appears to be in accordance with the general principles of the law of inheritance. For the claim of the Śûdra's illegitimate son to his father's property, or, at least, to a part of it, is not contingent, but absolute, since, even if he has legitimate half-brothers or half-sisters, half a share must be given to him. The Śûdra's illegitimate son is therefore in a position more analogous to that of a legitimate son, than to

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(*a*) 1 M. H. C. R. 478.

(*b*) 7 M. I. A. 48, 50.

The Vîramitrodaya, following the Mitâkharâ Ch. I., Sec. XI., paras. 40–43, in contemplating unequal marriages as possible though reprehensible, assigns to the sons born from them a one-third or a half-share of the paternal property, admitting of augmentation, except in the case of a Brahman's son by a Śûdra wife, to a full share at the father's discretion. Vîram., Tr. 98, 129. An exception is, in the case of Brahmans, made of land; that a son by a Brahmani wife may take back from the donee, his half-brother of inferior grade. *Ib.* 98.

According to the Celtic laws of Ireland and Wales bastards might inherit, taking with the legitimate sons a share regulated by the will of the head of the clan. *See* Co. Lit. 176 *a* and Hargrave's Note. The laws were connected as amongst the Śûdras with the general looseness of the marriage tie, which the husband could dissolve at will. *See* Ancient Laws of Wales, p. 46 § 54. According to the Lombard law the illegitimate was excluded from succession, but the legitimate son had to give him a provision in money.

that of relations who inherit by a right liable to obstruction. Hence it would seem a correct doctrine that those laws which apply to the succession of sons and grandsons of legitimate sons, should also be applied to his sons, *i. e.* that his sons should be considered to represent him, and to take, in case he dies before his father, the share which would have fallen to him.

In favour of this view we may adduce also the fact, that the rules treating of the rights of the illegitimate son are given by Vijñâneśvara at the end of the chapter on the 'apratibandha dâya,' inheritance by indefeasible right, and form as it were an appendix to it. Hence it may be inferred that Vijñâneśvara intended all the rules, previously given, regarding sons in general, to apply also to him, except as far as they were apparently modified by the text of Yâjñavalkya. According to this, the failure of daughters and their sons is necessary before the illegitimate son can inherit the whole property: (*a*) *See* Mit. Chap. I., Sec. 12, and Chap. II., Sec. 2, pl. 6; and also above § 3 *A.* (3) page 72.

The illegitimate offspring of a casual connexion may inherit, if duly recognized, (*b*) but a son born in sin (adultery or incest) is not entitled to a share of the inheritance. (*c*) He can claim only maintenance. (*d*)

Illegitimates inherit collaterally only by caste custom. *See* Book I., Ch. II., Sec. 13, Q. 9; 2 Macn. H. L. 15; Mit. Ch. I., Sec. 11, pl. 31. (*e*) *Inter se* the sons of the same concubine are regarded as brothers of the whole blood.

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(*a*) See *Múttúswamy Jagavera* v. *Venkataswara*, 12 M. I. A. 220.

(*b*) *Thukoo Baee* v. *Ruma Baee*, 2 Borr. R. 499; *Rákí* v. *Govind*, In. L. R. 1 Bom. 97.

(*c*) S. A. No. 124 of 1877, *Nárayanbhárthi* v. *Lavingbhárthi*; Bom. H. C. P. J. F. for 1877, p. 173; S. C. I. L. R. 2 Bom. 141.

(*d*) *Ibid.* and 2 Str. H. L. 68.

(*e*) *Nissar Murtojah* v. *Kowar Dhunwunt Roy*, I. Marsh. R. 609.