birth, but that interest is subject to the liability of that estate for the debts of his father and grandfather." (*a*) Some inquiry would seem to be necessary, and a reasonable assurance of benefit to the family to warrant a lender in advancing money at the father's instance on the whole family estate. (*b*) Subject to this the father's authority as manager is to be liberally construed, (*c*) and a recent ruling of the Judicial Committee makes ancestral estate assets in the hands of the heir for payment of the late owner's debts without distinction apparently of their character. (*d*)

It does not seem that by the Hindû Law a father can, during his life, directly charge the ancestral estate for his purely personal debts beyond his own interest so as to make the whole immediately available to the incumbrancer. That he could deal with his own undivided share so as to give to his vendee, or mortgagee, a right to call for a partition has become the established law of Bombay and Madras—"a broad and general rule defining the right of the creditor" in the language of the Privy Council. On the father's death a new obligation arises as against his sons, whose first duty it is to pay his debts, who are commanded to provide for their payment in making a partition, and even to alienate their own property to redeem their father from "Put,"(*e*) apart from "charges," which could operate only on his own share during his own life, though as founded on debts they now seem to bind the whole inheritance after his decease except when they are of profligate origin to the knowledge of the creditor. In the recent case, however, of *Ponnappa Pillai* v. *Pappuváyyanyár* (*f*) it has been held (*g*) by the

(*a*) *Nárâyanáchárya* v. *Narso Khrisna*, I. L. R. 1 Bom. at p. 266.
(*b*) *Saravana Tevan* v. *Muttaya Ammal*, 6 Mad. H. C. R. 371.
(*c*) *Bábáji Mahádáji* v. *Krishnáji Devji*, I. L. R. 2 Bom. 666; *Ratnam* v. *Govindarájulu*, I. L. R. 2 Mad. 339. *See* B. II. Partition.
(*d*) *Muttayan Chetiar* v. *Sangili Vira Pandia*, L. R. 9 I. A. 128.
(*e*) Nârada, Pt. I. Ch. III. Sl. 6.
(*f*) I. L. R. 4 Mad. 1. *See* too *Ram Narain's* case, I. L. R. 3 All. 443.
(*g*) By a majority against Innes and Muttusámi, J.J.

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High Court of Madras that a son's interest even during his father's life is bound by an execution sale on a decree against the father. This decision, resting on *Giridhari Lall* v. *Kantoo Lall* and *Muddun Thakoor's* cases (*a*) goes to make the interest of the son in a heritage altogether subordinate to that of the father, and to place it in all ordinary cases entirely at the father's disposal.

§ 8.—LIMITATIONS OF PROPERTY AND RESTRAINTS ON DISPOSAL UNDER THE HINDÛ LAW.

The power which a Hindû proprietor may exercise in disposing of the property he owns (*b*) varies according to his family relations, to the way in which the property has been obtained, as it is ancestral or self-acquired, as it is immoveable or moveable, as it supports or not a public service or object, and according also to the necessities to which the owner is subjected, and to the purposes he has in view. Thus the member of a united family can deal even with his own share only under exceptional rules.(*c*) The father may incumber the ancestral estate only for purposes of a respectable kind, or not distinctly the reverse; for immoral purposes it has been said that he cannot bind even his own share as against his son's survivorship. The managing member has special powers subject to special restrictions.(*d*) The son's right is born, and unless realized by division, dies with him. The daughter, wife, and widow are subject to limitations as to the estates they can confer and the

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(*a*) L. R. 1 I. A. 321.

(*b*) Devâṇḍa Bhaṭṭa insists on that being property which in itself is capable of alienation, whether or not in any particular case it can be alienated. Smṛiti Chandrika, Tr. p. 10.

(*c*) *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 24; *Vrandávandás Rámdás* v. *Yamunábái*, 12 Bom. H. C. R. 229; *Gangubái Kom Shidápá* v. *Ramanná bin Bhimanná*, 3 Bom. H. C. R. 66, A. C. J. and Note; *Chamaili Kuar* v. *Ram Prasad*, I. L. R. 2 All. 267; *Gangá Bisheshar* v. *Pirthi Pal*, *ib.* 635. *See* above, § 7, Introd. Burdens on Inheritance, pp. 167—169.

(*d*) *Kameshwar Pershad* v. *Run Bahadur Singh*, I. L. R. 6 Calc. 843.

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control under which they act. The general right of dealing with property acquired by oneself does not extend to ancestral estate. In the latter the birth-right of a son enables him, according to the law of the Mitâkshará, to claim partition at his own will. Again, the absolute necessities of a family may justify any member in selling so much as may be necessary to meet them, and in the case of a manager a family necessity is liberally construed. (*a*) The testamentary power depends on unity or severance of the family, and on the nature of the property.

The questions arising under these different heads are dealt with in the Introduction to Book II., and at other places where they occur; but it will be convenient to set forth here some of the principal powers and limitations which, according to the Hindû Law, may be regarded as inseparable from the notion of property enjoyed under the law.

As to the acquisition of ownership, this, Vijñáneśvara says, is a matter of secular cognizance. (*b*) It arises from Occupation, Finding, Purchase, Inheritance, and Partition, (*c*) as common to all castes and conditions. The peculiar relations of inheritance and partition as understood by the Hindû lawyers are discussed above p. 67*n*, and in the Introduction to Book II. Occupation or appropriation of waste lands is

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(*a*) *Bábáji Mahádáji* v. *Krushnáji Devji*, I. L. R. 2 Bom. 666.

(*b*) Mitâkshará, Ch. I. Sec. I. paras. 9, 10. There are many subtile disquisitions in the Hindû commentaries on the specially approved means of acquisition, as Gift for a Brahman, Conquest for a Kshatriya, and Gain for a Vaisya or Sûdra. The general result appears to be that though for sacrificial purpose the property offered should have been acquired in the authorized way, yet a mere deviation from what is specially approved does not deprive an acquisition of the character of property. The Smṛiti Chandrika, Tr. p. 11, seems to hold that the enumeration given in the Smṛitis is rather a statement of facts of experience than a rule in itself determining the essentials of property. *See* the Sarasvati Vilâsa, § 400 ss.

(*c*) *Ibid.* para. 12; *Bháskarápá* v. *The Collector of North Kánará*, I. L. R. 3 Bom. at p. 524.

regarded as a natural right, (*a*) but as one concurrent with a right in the sovereign to a rate or tax on the produce. (*b*) Hence naturally possession is the strongest proof. (*c*) The strength of the ownership thus attested is such that the rule has sometimes been recognized that the occupying owner of a field who has absconded may at any time return and recover it on terms equitable to the intermediate occupant, (*d*) as his ownership cannot be really destroyed without his distinct assent, (*e*) that for the same reason execution for debt against a man's land is a notion foreign to the pure Hindû

(*a*) *See* Vîramit. Ch. I. Sec. 13; Smriti Chandrika, Tr. p. 11; Comp. Imp. Gaz. vol. VII. p. 520; *Bhâskarâppâ* v. *The Collector of North Kánará*, I. L. R. 3 Bom. at p. 548, 563, &c.; *Vyakunta Bapuji* v. *Government of Bombay*, 12 B. H. C. R. App. 30 ss.; Comp. Panj. Cust. Law. vol. II. p. 21, 254, which shows in how many various ways, as between individuals, a proprietary right may be acquired in land not completely appropriated.

(*b*) *Ibid.*, and Col. Dig. Bk. II. Ch. II. T. 12, Comm.; T. 17, T. 22, Comm.; T. 24, Comm.; *Vásudev Sadáshiv Modak* v. *Collector of Ratnagiri*, L. R. 4 I. A. at p. 125.

(*c*) Vyav. May. Ch. II. Sec. II. Ch. IV. Sec. 1, para. 8; comp. Col. Dig. Bk. II. Ch. II. T. 10, Comm.; T. 12, Comm; Steele, L. C. 207; *Vishvanáth* v. *Mahádáji*, I. L. R. 3 Bom. 147. The cultivator is regarded as bound to maintain the land he holds in cultivable condition.—Manu VIII. 243, a duty which is recognized by the Mahomedan law also, and by other systems.

(*d*) Mitâk. in Macn. H. L. 202, 205, 207; *Bhâskarâppâ* v. *The Collector of North Kánará*, I. L. R. 3 Bom. at 525-6. *See* Nârada II. XI. 23 ss; *Piarey Lall* v. *Saliga*, I. L. R. 2 All. 394; *Harbhaj* v. *Gumani*, *ib.* 493; and comp. *Joti Bhimrav* v. *Bálu Bin Bápuji*, I. L. R. 1 Bom. 208; *ib.* cases referred to at p. 94; Co. Dig. Bk. II. Ch. II. T. 24 Comm. *sub fin*; Tod's Rájasthan, vol I. p. 526; M. E. Elphinstone in Rev. and Jud. Sel. vol. IV. p. 161; General Briggs, *ib.* p. 694.

(*e*) *Parbhudás Rávaji* v. *Motirám Kalyándás*, I. L. R. 1 Bom. 207; Co. Dig. Bk. II. Ch. II. T. 27, Comm.; T. 28, Comm.; T. 27, Comm. The consequences of this on the law of partition are traced in Bk. II. Introd. § 5 B and notes. In the latter references will be found to the rights of communities as still in some places asserted, and to the formerly inalienable character of the patrimony. *See* Mr. Chaplin's Report, Rev. and Jud. Sel. vol. IV. pp. 474-477.

law, (*a*) that a royal gift of occupied land is construed to mean only a gift of the revenue, (*b*) and that even a conqueror acquires only the rights of the vanquished ruler. The property in the land is thus rather allodial than feodal. Tenure in the English sense hardly exists (*c*) except in the case of estates granted by the sovereign for the support of particular services to the State, or for the furtherance of purposes recognized as beneficial to the community. Jahágirs for military service come the nearest in character to feudal holdings of the earlier type, the terminable beneficia which were succeeded by hereditary estates held by homage and military service. (*d*) They are usually grants of the revenues of a district as a means of supporting a body of troops, and are resumable at the pleasure of the sovereign power. (*e*) From their nature they are impartible, and so, too, are saranjáms granted either for life or hereditarily for services rendered or for maintaining the dignity of a family. (*f*) Vatans granted for the support of local hereditary offices are subject in a measure to disposal by the State. Subject to the support of the office-holder, they are usually partible and alienable amongst the group of co-sharers, but cannot be sold to strangers or burdened for more than the

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(*a*) Col. Dig. Bk. II. Ch. II. T. 28, Comm.; T. 24, Comm.; comp Hunter's Roman Law, p. 807.

(*b*) Vyav. May. Ch. IV. Sec. I. para. 8; comp. Co. Di. Bk. II. Ch. II. T. 10, Comm.; T. 12, Comm.; Steele, L. C. 207; *Vishvanáth* v. *Mahádáji*; I. L. R. 3 Bom. 147.

(*c*) Comp. Bom. Acts II. and VII. of 1863.

(*d*) *See* Hallam, Mid. Ages, Ch. II. Note IX; Freeman, Hist. of Norm. Conquest, vol. V. pp. 132, 379; Maine, Anc. Law, Ch. VII. pp. 230, 233 (3rd Ed.); Munro by Arbuthnot, vol. I. pp. 152, 154; vol. II. 307; *Rajah Nilmoni Singh* v. *Bakranath Singh*, L. R. 9 I. A. at p. 122; *Imperial Gazetteer of India*, vol. VII. p. 519.

(*e*) Bom. Reg. XVII. of 1827 § 38.

(*f*) See *Rámchandra Sakháram Vágh* v. *Sakhárám Gopal Vágh*, I. L. R. 2 Bom. 346; Bom. Govt. Selections No. XXXI. *passim*; Bom. Act. VII. of 1863 § 2; Act. II of 1863 1.

life of a sharer as to his own share. The appropriation of these estates to the public service is now secured and the competence of individual sharers is strictly limited by statute. (*a*)

They probably in many cases originated in an exemption, or a partial exemption, from the Government assessed land-tax of lands held as private property; but to these were generally added various haks or dues now abolished. (*b*) Lands held for various other public services, such as the jyotishi vatans of astrologers, and in general all religious endowments (*c*) are subject to restrictions as to the estates held in them, (*d*) and the conditions or accompanying obligations with which they are held by the successive

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(*a*) *See* Index Tit. Vatan; Bom. Act. III. of 1874.

(*b*) *See* Steele, L. C. 204 ss.

(*c*) The proportion of the land and of the public revenues dedicated to religious services is in some districts very considerable. It would have been much greater but for the indifference with which successive rulers resumed their predecessors' grants (*see* Sir. T. Munro's Minutes, vol. I. p. 136 ss.), and the encroachments which, very often by collusion with the mohants or trustees of the dewasthâns, were made upon the sacred estates and secured by prescription or an actual failure of evidence after a longer or shorter time (*see* Steele, L. C. 206). The large number of ancient grants for religious purposes which are from time to time discovered, show that the greater part of the land must thus have been placed *extra commercium*, but for the negligence and the revolutions by which the dedicated estates were restored to common use. The Peshwa used, like the kings of England, sometimes to resume religious endowments while he made up his mind who was best entitled to take them (*ibid.*), but an avowed resumption of such property was virtually unknown. (*The Collector of Thanna* v. *Hari Sitárám*, Bom. H. C. P. J. F. for 1882, p. 206; I. L. R. 6 Bo. 546.)

(*d*) These interests and all sources of a periodical income ("nibandh") are looked on by the Hindû law as of the character of immoveable property. See Col. Dig. Bk. II. Ch. IV. T. 27 Comm.; Yâjn. II. 122; Mit. Ch. I. Sec. V. para. 3, 4; *Vithal Krishna Joshi v. Anant Rámchundra*, 11 Bom. H. C. R. 6; *Diváker Vithal* v. *Harbhat*, Bom. H. C. P. J. F. for 1881, p. 106.

tenants which give them a special character. (*a*) The enforcement of the public duties in these cases was formerly secured by forfeiture, in the necessary cases, of the exemption from assessment, (*b*) but in the case of charitable endowments the ownership of the property itself was still recognized, and an opportunity was allowed to those interested to avoid the forfeiture (*i. e.* the imposition of the assessment) by a suit to compel performance of the duty. In the Bombay Presidency charitable endowments are now in an anomalous position. They are mostly of a religious or *quasi* religious kind, and the Government has withdrawn from all connection with religious endowments, (*c*) while the provisions for the security of the property extend in Bombay only to the district of Canará. (*d*) In the southern part of the Presidency it is expressly provided that charitable endowments held free from land-tax shall be inalienable.(*e*) Elsewhere, and as to all property not included in the provision, the statutable safeguard is wanting; but the generally inalienable character of endowments under the Hindû as under the Mahomedan law is recognized by the Courts.(*f*)

The sharers in Bhágdári and Narwadári villages are subject to special restrictions in dealing with their shares, of which custom, now ratified by statute, (*g*) forbids the

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(*a*) See *Ukoor Doss* v. *Chunder Sekhur Doss*, 3 C. W. R. 152; *Prosunno Koomari Debya* v. *Golab Chand Baboo*, L. R. 2 I. A. 145; *Nárâyan* v. *Chintáman*, I. L. R. 5 Bom. 393.

(*b*) Bom. Reg. XVII. of 1827 § 38.

(*c*) Act. XX. of 1863 § 22.

(*d*) Bom. Act. VII. of 1865.

(*e*) Bom. Act. II. of 1863 § 8; *Bhikáji Mahádev* v. *Bábushá*, Bom. H. C. P. J. F. for 1877, p. 297.

(*f*) *Khusálchund* v. *Mahádevgiri*, 12 B. H. C. R. 214; *Nárâyan* v. *Chintáman*, I. L. R. 5 Bom. 393; *The Collector of Thanna* v. *Hari Sitárám*, Bom. H. C. P. J. F. for 1882, p. 207. The Indian Trusts Act II. of 1882, § 1, does not apply to Bombay, nor does it anywhere affect charities.

(*g*) Bom. Act V. of 1862.

division. In these estates, too, there are special laws of succession ranking originally perhaps as rules of a family or a class as such. Where their prevalence is proved effect is given to them as customary law.(*a*) The exclusion of a daughter from succession may probably have originated in the fear that the share would in such a case through her marriage pass to heirs who were strangers to the "bhauband" or fraternity (*b*) constituting the village community, and jointly and severally responsible for the contribution of their village to the land-tax. Mirásdars were at one time, it would seem, subject to restrictions in favour of the village community. (*c*) They could reclaim their lands in theory after any lapse of time. (*d*) This was inconsistent with the laws of limitation and even with the prescription recognized by the Hindû law. (*e*) The joint

(*a*) *Pránjivan Dayárám* v. *Bái Revá*, I. L. R. 5 Bom. 482.

In the Panjâb there are many instances of restrictions imposed in the interest of the clan or group of co-proprietors descended from the original band of occupants of the waste, or conquerors of land already occupied, who held part in common and distributed the rest something after the fashion of the Corinthian Geomori in dealing with the territory of Syracuse. *See* the work quoted below.

(*b*) In the Panjâb women as they marry persons not members of the village community do not transmit a right to the village lands, which are thus preserved to the community. *See* Tupper, Panj. Cust. Law, vol. II. 58, 145, 175, 177. The prevention of similar mischiefs engaged the care of most ancient legislators or of the communities whose customs they embodied. *See* Numbers, Ch. XXVII. XXXVI. The Athenian law compelled the nearest male relation to marry the female *epikleros*, taking the estate with her. Isacus III. 64, Sir W. Jones' Works, vol. IX. p. 103; Smith's Dic. Antiq. *sub voce*. Comp. Ruth, Ch. IV.

(*c*) *See* on mirás generally, Steele, L. C. 207; Mr. Chaplin's Rep. para. 114 ss.; Rev. Sel. vol. IV.; Madras Mirási papers; *Vyakuntha Bápuji* v. *Government of Bombay*, 12 Bom. H. C. R. App. 68 ss.

(*d*) *Vyakuntha Bápuji* v. *Government of Bombay*, 12 Bom. H. C. R. App. 50.

(*e*) See *Bábáji and Nánáji* v. *Náráyan*, I. L. R. 3 Bom. 340; *Tárâchand Pirchand* v. *Lakshman Bhaváni*, I. L. R. 1 Bom. 91, and the cases referred to at p. 94.

mirási village community had generally broken up even under the native rule, and the mirásdar is, through the elevation of the class once below him, distinguishable only on Inám estates as a tenant at a quit rent or at a reasonable rent, (*a*) not subject to ejectment so long as he pays it.

Other special customs might be referred to, (*b*) but these not forming a part of the general Hindû law of the Bombay Presidency cannot be here treated in such detail as would be useful. We proceed to the remarks on the capacity of the owner to deal with his property apart from special circumstances which are of general application.

It is not competent to those interested in an estate to alter the course of devolution by any mutual arrangement. (*c*) *Ipso jure heres exsistit* (*d*) and an agreement which attempts to establish a new line of descent unknown to the law is inoperative. (*e*) So far as their own interests are concerned, the parties who share the ownership may generally deal with them at their pleasure,—even to parting with the whole or subjecting their enjoyment to any burdens consistent with public policy. (*f*) This rests on the recognition by the State of individual freedom in dealing with property, while the freedom is coupled with a present interest, and a capacity for varying the management according to

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(*a*) *Pratápráv Gujar* v. *Bayáji Nápáji*, I. L. R. 3 Bom. 141. The mirási holdings may be compared with the customary tenancies of the North of England; see *Burrell* v. *Dodd*, 3 Bo. and P. 378.

(*b*) As in *Bháu Nánáji* v. *Sundrábái*, 11 Bom. H. C. R. 249, and the cases there referred to.

(*c*) *Myna Boyee* v. *Ootárám*, 8 M. I. A. at p. 420; *Bálkrishna Trimbak* v. *Sávitribái*, I. L. R. 3 Bom. 54.

(*d*) Comp. Maine's Anc. Law, Ch. VI. p. 188. (3rd Ed.)

(*e*) *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Calc. at p. 115. Comp. Clark, Early Rom. Law, pp. 117 ss.

(*f*) But only such. Thus an agreement by which an adopted son resigned the bulk of the family property to his adoptive mother was pronounced void. Q. 15 MS.

circumstances. (*a*) But when these conditions fail it is only to a limited and prescribed extent that the State allows him, who is no longer able personally to exercise the power of appropriation and use of the property to impose terms on its enjoyment by others. (*b*) Thus by will the owner may make such dispositions only as the law (*c*) allows as consistent with the general welfare. (*d*) The Hindû law does not tolerate the abeyance of an estate. (*e*) It prescribes a certain mode of devolution, and from him in whom unqualified proprietary right has once become vested, it must, in the absence of a will made by him, not by a predecessor, devolve in that way. (*f*) The owner may make a gift or a will which, as to property fully at his disposal (*g*), will operate according to the analogy of the law of gifts, but having thus created rights in the beneficiaries, he cannot, except subject to strict limitations, cut down those rights by further dispositions. (*h*) The immediate beneficiary may be

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(*a*) *See* Col. Di. Bk. II. Ch. II. T. 12, Comm.; T. 24, Comm.

(*b*) "Quatenus juris ratio patitur." The general subordination of private property and its disposal to the discretion of the sovereign under whose protection it is enjoyed is insisted on by Jagannátha in Col. Di. Bk. II. Ch. IV. T. 15, Comm. Comp. Laboulaye, Hist. du Droit de Propriété Foncière, p. 62.

(*c*) Including the custom of his province, caste or class. *See* Co. Di. Bk. V. Ch. V. T. 365.

(*d*) *Kumara Asima Krishna Deb* v. *Kumara Kumar Krishna Deb*, 2 Beng. L. R. 11 O. C. J.

(*e*) *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R. 7 Calc. 178.

(*f*) "A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy," *per* Turner, L. J., in *Soorjimony Dossee* v. *Deenobundo Mullick*, 6 M. I. A. at p. 555. A mahant has no power to say who shall succeed his own successor, *Greedharee Doss* v. *Nundkishore Dutt*, 1 Marsh. 573; S. C. 11 M. I. A. 405.

(*g*) See *Lakshman* v. *Rámchandra*, I. L. R. 5 Bom. 49; *Haribhat* v. *Dámodarbhat*, I. L. R. 3 Bom. 171.

(*h*) *Máccundás* v. *Ganpatráo*, Perry's Or. Cases, 143; see *Annantha Tirtha Chariar* v. *Nágamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Mokoondo Lal Shaw* v. *Ganesh Chunder Shaw*, I. L. R. 1 Cal. 104.

limited to a life-interest if the remainder is given to a person in existence at the time of the gift; and a will speaks at the death of the testator, but as by the Hiudû law there must be some one in existence to take a gift (*a*) as well as to bestow it, a bounty to persons unborn or who may be born or unborn according to circumstances cannot take effect. (*b*) An attempt to provide for unborn grand-children of the donor by a gift for their benefit to a son-in-law was declared by the Śástri to be void on account of the partial reserve of the ownership which this involved. (*c*)

There is an exception in the case of public grants (*d*) of the nature of jahâgirs (*e*) or of watans for the support of a family or to maintain a public office, (*f*) but not one extending the power of private disposal. To these grants effect must

(*a*) Comp. the Transfer of Property Act IV. of 1882, Secs. 122, 129. A distinct change of physical possession, though generally necessary (*see* below, Bk II., Introd., Signs of Separation) is dispensed with in the case of a wife or an infant or other wholly dependent person who is obviously benefited, under circumstances in case of an absent person, and where the exercise of the right does not consist in or require possession. 2 Str. H. L. 26; *ib.* 7, 427; *Lalubhái Surchand* v. *Bái Amrit*, I. L. R. 2 Bom. 299, 326; *Bái Suraj* v. *Dalpatrám Dayáshankar*, I. L. R. 6 Bom. 380, 387. In Bengal, it is said, in *Narain Chunder Chuckerbutty* v. *Dataram Roy*, I. L. R. 8 Calc. at p. 611, that delivery of possession is not "necessary to give full validity and effect to a transfer for valuable consideration." Under the Transf. of Prop. Act IV. of 1882, Sec. 54, the mere concurrence of the will of the contracting parties does not create an interest in the property intended to be sold unless it is manifested by a registered instrument or in petty cases by a change of possession.

(*b*) See *Soorjee Mony Dossee* v. *Deenbundo Mullick*, 9 M. I. A. 123; *Tagore* v. *Tagore*, L. R. S. I. A. at pp. 67, 70, 74; *Rajendar Dutt* v. *Sham Chunder Mitter*, I. L. R. 6 Calc. 116.

(*c*) *See* Book I. Ch. II. Sec. 7, Q. 17.

(*d*) As to jurisdiction in such cases, *see* Act 23 of 1871 and *Maharavál Mohansingji Jeysingji* v. *The Government of Bombay*, L. R. 8 I. A. 77.

(*e*) As to these, see *Rámchandrarão Náráyan Mantri* v. *Venkatráo Mádhava Mantri*, Bom. H. C. P. J. F. 1882, p. 234, and the cases cited there.

(*f*) *See* now Act 23 of 1871, Bo. Act. III. of 1874.

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be given according to the intention of the Sovereign power in making the grant, which itself may make the estate impartible (*a*) and determine the mode of devolution.(*b*)

The same principle has been applied to a village astrologer or priest, and even to cases of private estates where the original grant was, or must be presumed to have been, made for the support of an hereditary line of performers of religious functions for which such succession was necessary or at least proper. The decision against a dealing by the officiating holder of a purohitta in 2 Str. H. L. 12, 13, and similar cases may be referred to this principle.

To ordinary private grants free from a sacred or public connexion a different rule applies; (*c*) they can operate only within the lines prescribed by the general law, as Government grants also do in the absence of special limitations expressed or implied in the nature of the grant. (*d*) This applies to a Todá Girás hak as distinguished from a pension, (*e*) as to all ordinary Inâms. (*f*)

It is thus, apparently, that we must understand and apply the decision of the Judicial Committee in *Surjeemonee Dossee's* case. (*g*) A Hindû may by settlement or by will dispose

(*a*) See *Rájá Lelánund Sing Bahádoor* v. *The Bengal Government*, 6 M. I. A. at p. 125.

(*b*) See *Rámchandrarão Nárayan Mantri* v. *Venkatrão Mádhava Mantri*, Bom. H. C. P. J. F. 1882 at p. 233; *Gulábdás Jagjivandás* v. *The Collector of Surat*, L. R. 6 I. A. 54; *Rájá Nilmony Singa* v. *Bakranath Sing*, decided by the P. C. on 10th March 1882; Ellis in 2 Str. H. L. 364, 366. Comp. Maine's Anc. Law, p. 230.

(*c*) *Gulábdás Jagjivandás* v. *The Collector of Surat*, L. R. 6 I. A. at p. 62.

(*d*) 1 Str. H. L. 209, 210; *Rámchandra Sakhárám Vágh* v. *Sakhárám Gopál Vágh*, I. L. R. 2 Bom. 346.

(*e*) *Ganeshgiri Gosávi* v. *Baba bin Ramapa Náik*, Bom. H. C. P. J. F. for 1881, p. 96.

(*f*) *See* below, Bk. I. Ch. II. Sec. 6 A, Q. 8; Steele, L. C. 206.

(*g*) 9 M. I. A. 123; see *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. 138; *Rám Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at p. 61.

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of "self-acquired property by way of remainder or executory devise upon an event which is to happen at the close of a life in being," (*a*) and for the Bombay Presidency the power of a Hindû to make a testamentary disposition of whatever is his absolute property is now clearly established.(*b*) So also in the North-West Provinces under the Mitâkshará (*c*) and in Madras.(*d*) But the nature and extent of the power are not to be "governed by any analogy to the law of England."(*e*) "The law of wills has grown up from a law which furnishes no analogy but that of gifts, (*f*) and it is the duty of tribunals dealing with a case new in the instance to be governed by the established principles and analogies that have prevailed in like cases." (*g*) Hence it was that in the *Tagore* case "the final decision, speaking generally, was that the limitation in tail and the subsequent limitations were contrary to the Hindû law, and void, and that upon the expiration of the first life-interest, the appellant, the testator's only son, was entitled as heir to the estate."(*h*) The allowance of wills was not really opposed to the principles

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(*a*) *Supra.* The executory devise is itself limited according to the principles laid down in the *Tagore* case, *see* L. R. S. I. A. pp. 70, 72, 76.

(*b*) *Bhagván Dulabh* v. *Kálá Shankar*, I. L. R. 1 Bom. 641; *Lakshmibái* v. *Gunpat Morobá*, 5 Bom. H. C. R. 135, 138, 139 O. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1, 37.

(*c*) *Nana Nurain Rao* v. *Huree Panth Bhao*, 9 M. I. A. 96; *Adjoodhia Gir* v. *Kashee Gir*, 4 N. W. P. H. C. R. 31.

(*d*) *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*, 6 M. I. A. 309; Colebrooke in 2 Str. H. L. 435 ss.

(*e*) *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*, 10 M. I. A. 279; per Turner, L. J., in *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 M. I. A. at p. 85.

(*f*) 2 Str. H. L. *loc. cit.*

(*g*) *Tagore* case, L. R. S. I. A. at p. 68.

(*h*) *Ganendro Mohun Tagore* v. *Rajah Juttendro Mohun Tagore*, L. R. 1 I. A. at p. 392.

of the Hindû law as will be shown hereafter. (*a*) It was merely a development of the principles already recognized, quite analogous to that which the English law of devise has undergone in the course of three centuries; but the Hindû law requiring a disposition to be in favour of some definite object existing when it is declared, many arrangements possible under the English law cannot be made.

In *Shoshi Shikhuressur Roy* v. *Tarokessur Roy* (*b*) it was held that a gift is bad in so far as it is limited to male descendants. The language used in that case relating to the gift over to the testator's surviving nephew or nephews was, however, deemed not inconsistent with an intention of the testator that the whole augmented share should pass to the plaintiff, the surviving nephew. This effect was given to it, but having regard to the doctrine frequently acted upon by courts in India, it was held he was only entitled to a life-estate.

As the law of wills follows the law of gifts, though with some differences, (*c*) it will be understood that a grant in favour, partly, of persons not in existence at the time of execution so far fails (*d*) with the estates dependent on it. When it is said "that a man cannot by gift *inter vivos* or by will give property absolutely to another, and yet control his mode of enjoyment in respect of partition or otherwise," (*e*)

(*a*) *See* below on the Testamentary Power.

(*b*) I. L. R. 6 Calc. 421.

(*c*) *Kherode Money Dossee* v. *Doorga Money Dossee*, I. L. R. 4 Calc. at p. 472; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, I. L. R. 5 Bom. 48; *Tarachand* v. *Reeb Ram*, 3 Mad. H. C. R. at p. 55.

(*d*) *Soudamineey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Calc. 262; *Kherodemoney Dossee* v. *Doorgamoney Dossee*, I. L. R. 4 Calc. 455; *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Calc. at p. 116; *Sir Mangaldas Nathubhoy* v. *Krishnábái*, I. L. R. 6 Bom. 38.

(*e*) *Rajender Dutt* v. *Shamchund Mitter*, I. L. R. 6 Calc. at p. 116. *See* also *Anantha Tirtha Chariar* v. *Nágamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, L. R. 6 I. A. 182.

what is meant is that such estates and interests and such only as the law recognizes can be conferred or created. (*a*) No one really intends to give an estate which shall at the same time be "absolute" and conditional or limited: what people try to do is to mould the interests they dispose of in ways unknown to the law, or which the law to which they are subject does not allow. "Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property." (*b*) The complication of rights that arises even under any existing system with its defined and limited interests is enough to show that an unlimited power of variation would lead to unlimited litigation and make land almost unmarketable; and this conviction arrived at by the rulers would of itself justify them according to the Hindû law in prescribing the necessary restraints (*c*) and refusing to give legal effect to any transaction not falling within the recognized limits. But as the law thus gives effect to only a certain range of intentions (*d*) the instruments creating rights, or having this for their purpose, are construed, if they can be reasonably construed, so as to express something which the law will carry out. (*e*) Thus where a grant to a sister contained the words "no other heirs of yours (than lineal descendants) shall have any right or interest," which it was said went to create an estate tail in the descendants contrary to the Hindû law, the grant was construed as one of the whole interest in the property subject to defeasance should the

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(*a*) *See* per Willes, J., in the *Tagore* case, L. R. S. I. A. at p. 65.

(*b*) Per Lord Brougham in *Keppell* v. *Bailey*, 2 Myl. and K. 517.

(*c*) *See* Nârada, quoted Macn. H. L. 152; and Col. Dig. Bk. III. Ch. II. T. 28.

(*d*) *Tagore* case, L. R. S. I. A. at p. 64. Domat's C. L. Sec. 2413.

(*e*) See *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 M. I. A. 1; *Sreemutty Soorjeemony Dossee* v. *Denobundo Mullick*, *ib.* at p. 550; *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380; *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. at p. 147.

grantee die without children.(*a*) Where a Hindû widow in Bengal takes her husband's share by arrangement with his brethren, the instrument will be construed with reference to the Hindû law in order to determine the estate she has obtained, (*b*) but in the case of *Musst. Bhagbutty Daee* v. *Chowdry Bholanath Thakoor* (*c*) the Judicial Committee construed a will as a family settlement, completed by a document executed by an adopted son, whereby the widow became entitled to use as she pleased and invest as she pleased, as her separate property all that she derived from the estate given to her for life.

The Courts refuse effect to an intended perpetuity in favour of mere private persons even though it is disguised as a religious endowment. (*d*) It is only in such a form

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(*a*) *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. 138. See *Krishnaráv Ganesh* v. *Rangráv*, 4 Bo. H. C. R. 1 A. C. J.; and *Bahirji Tannaji* v. *Oodatsing et al.*, Bo. H. C. P. J. F. 1872, No. 33; *Rajah Nursing Deb* v. *Roy Koylasnath*, 9 M. I. A. 55.

In the case of a grant to a Náḍgávḍá (a headman of a district) by Tippu Sultán, it was contended that the expression "aulád aflád" in the Persian implied and necessitated a descent different from what the Hindû law prescribed in a family subject to a rule of impartibility. It was ruled, however, that the words might be construed as meaning "hereditary not merely personal," and it was said "the precise devolution of the estate would nevertheless be governed by the law to which the grantee was subject so far as this was consistent with keeping the estate together so as to afford a means of support to the office to which it was attached." *Timangávdá* v. *Rangangávdá*, Bom. H. C. P. J. F. 1878 p. 240, at p. 242. Comp. *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at pp. 61-62; *Rajah Venkata Narasimha Appa Rao* v. *Raja Narayya Appa Row*, L. R. 7 I. A. pp. 38, 48, 49; and as to the preservation of the estate for the intended purpose, see *Raja Nilmoney Sing* v. *Bakranath Sing*, L. R. 9 I. A. 104.

(*b*) *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 M. I. A. 1.

(*c*) L. R. 2 I. A. 256.

(*d*) *Shookmoy Chunder Dass* v. *Monohari Dassi*, I. L. R. 7 Calc. 269. *See Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 Beng. L. R. 11 O. C. J.

perhaps that a perpetuity could be devised, as the creation of a right can be only in favour of a person in existence at the time of the declaration.(*a*) An idol does not expire, and the emoluments of its service may be limited to a family.(*b*)

(*a*) *Tagore* case, *supra*.

(*b*) *See* below. The ideal personality of the idol is recognized in many cases, as in *Kondo* v. *Babaji*, Printed Judgments for 1881, p. 337, and *Juggodumba Dossee* v. *Puddomoney Dossee*, 15 Ben. L. R. 318. Under the Roman law the *res sacrae* in the higher sense were dedicated to the public divinities, and this dedication required the concurrence of the public authority. When Christianity became the religion of the Empire the same principle was recognized, though the object of the dedication was changed, and it found its way into England as into other countries with an omission in great part of the condition of the assent of the sovereign authority, until at a later time the laws of mortmain reasserted the interest of the State in its territory. The sense of the dominant interest of the sovereign makes itself manifest even amongst the pious Hindûs in Nârada's rule, that "whoever gives his property away (*i. e.* makes a religious dedication, as gifts for merely secular purposes were discountenanced) must have a special permission to do so from the king. This is an eternal law" (Når. Transl. p. 115). *See* Vyav. May. Ch. IV. Sec. VII. para. 23. Besides the higher *res sacrae* the Romans had the *res sacrae* of each family descending as an integral part of its estate. These disappeared with the growth of Christianity, but traces of them are to be found still. In India these *sacrae privatae* are still intimately connected with the heritage. No legal restriction has been placed on the dedication of property to either public or private religious purposes; but in the latter case, though not in the former, the consensus of the whole family may annul the dedication. Per Sir M. E. Smith in *Koonwar Doorganath Roy* v. *Ramchunder Sen*, L. R. 4 I. A. at p. 58, and see *Rajendranath Dutt* v. *Shekh Mahomed Lal*, L. R. 8 I. A. 135; *Jaggut Mohini Dossee* v. *Mt. Sokheemoney Dossee*, 14 M. I. A. at p 302; *see* also *Maharanee Brojosoondery Debea* v. *Ranee Luchmee Koonwaree*, 20 C. W. R. 95; *Subbaraya Gurakal* v. *Chellappa Mudali*, I. L. R. 4 Mad. 315; *Venkateśwara Iyan* v. *Shekhari Varma*, L. R. 8 I. A. at p. 149; *Khusâlchand* v. *Máhádevgiri*, 12 B. H. C. R. 214; *Manohar Ganesh* v. *Keshavram Jebhai*, Bom. H. C. P. J. 1878 p. 252; *Dhadphale* v. *Gurav*, I. L. R. 6 Bom. 122. That a stranger, though a Brahman, cannot be intruded as the celebrant of private ceremonies, see *Ukoor Doss* v. *Chunder Sekhur Doss*, 3 C. W. R. 152. The inalienable

According to the Vîramitrodaya (*a*) a conditional gift is invalid (as under the Mitâkshará law). The instance adduced might be construed as one of conditional defeasance. It is that of ornaments bestowed on a woman subject to a condition against using them except at particular festivals. A gift so conditioned, Mitramiśra says, is void, but it seems rather that the gift is complete but subject to a conditional defeasance (*b*) or else that the condition or conditional revocation is void. It is a recognized principle that a mere licence, however liberal, to a woman and to her exclusively, to use ornaments on particular occasions (*c*) and on those only, does not constitute a gift. (*d*) The ownership remains with the husband or other licensor and forms part of the property to be divided in a partition. (*e*) A conditional gift is not as such reckoned amongst those which are essentially void by Nârada. (*f*) The word *upâdhi*, which Mitramiśra construes as "condition," usually implies fraud, (*g*) and every gift, it would seem, is by the strict Hindû law

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character of land consecrated to religious purposes has been generally recognized under the Roman, Christian, and Mahomedan systems as well as by the Hindû law, and under all has sometimes been felt as an embarrassment; *see* Ortolan Inst. v. II. p. 230 ss; Bowyer, Civ. Law, p. 69; Spelman De non Tem. Eccles. Ch. VI. Ham. Hed. B. XV. As to the respect due to sacred property under different circumstances *see* Grotius, De Jur. B. et. P. Lib. III. Cap. V. § II, compared with Vyav. May. Ch. IV. Sec. I. para. 8.

(*a*) Transl. p. 221.

(*b*) Comp. the Transf. of Prop. Act, IV. of 1882, Sec. 126.

(*c*) Vishnu VII. 22.

(*d*) *Kurnaram Dayaram* v. *Hinibhay Virbhan*, Bom. H. C. P. J. F. 1879, p. 8. *See* below on Strîdhana. Under the English law a gift by a husband to his wife of ornaments makes them part of her paraphernalia, of which she cannot dispose without his assent during his life. See *Graham* v. *Londonderry*, 3 Atk. 394.

(*e*) *Infra*, Bk. II. Introd. § 5 B. *ad fin.*; Vyav. May. Ch. IV. Sec. VII. para. 22; 2 Str. H. L. 424, 370.

(*f*) Transl. p. 59; Vyav. May. Ch. IX. 6. Comp. *Lachmi Narain* v. *Wilayti Begam*, I. L. R. 2 All. 433.

(*g*) *See* Col. Dig. Bk. II. Ch. IV. Sec. II. T. 54, Comm.

accompanied by a tacit condition of revocation if the intended purpose be not fulfilled.(*a*) Regard being had, then, to the principle that a decision in such cases must be governed by the reason of the law, (*b*) it seems that a condition subsequent does not invalidate a gift, though a condition precedent may do so through preventing any present change of ownership or of possession as owner, (*c*) while a condition subsequent which is repugnant to the estate granted, as recognized by the law, is to be deemed void. (*d*) Now

(*a*) Nârada, Transl. p. 60; Col. Di. Bk. II. Ch. IV. T. 53, 56, Comm.; Manu VIII. 212.

(*b*) Col. Dig. Bk. II. Ch. IV. T. 28, Comm. *sub fin.*

(*c*) *See* Book I. Ch. II. § 7, Q. 17.

(*d*) Under the Roman law there were transactions which did not admit of a condition or a term annexed to the generation of the proposed legal relation, *see* Maine's Anc. Law, Ch. VI. p. 206 (3rd ed.), Goud. Pand. 155, and the chief expressions of will as in marriage, divorce, adoption and partition repel as incongruous the suspensive effect of a postponement of the completion of the intended purpose which leaves the most weighty interests in uncertainty, and clogs intermediate acts of daily necessity with paralysing doubt. The principle, though not precisely formulated, is one which operates in the English law in cases not left to the unfettered volition of the parties. It extends even to the acceptance of a bill of exchange (*see* Act 26 of 1881, Secs. 86, 91). Here the promise is absolute, the right immediate, though the fulfilment is deferred.

That a condition subsequent could not be annexed to marriage was held in *Seetaram* alias *Kerra Herra* v. *Musst. Aheeree Heeranee*, 20 C. W. R. 49 C. R. Whether a father giving his son in adoption can abandon the son's rights arising from the adoption, as ruled in *Chitko Raghunáth* v. *Jánaki* (11 Bom. H. C. R. 199) was questioned by the Privy Council in *Ramasawmi Aiyan* v. *Vencataramaiyan*, L. R. 6 I. A. at p. 208, and the High Court of Madras has declared that the adopted son on attaining his majority may get any such arrangement set aside. See *Lakshamana Ráu* v. *Lakshmi Ammál*, I. L. R. 4 Mad., at p. 163. An agreement was pronounced null by the Śástri whereby an adoptive mother obtained from the son she adopted a resignation to her of the bulk of the family property. Such an agreement could not, the Śástri thought, be annexed to sonship, and he assigned to the adopted son the full rights of an heir subject to the obligation of maintaining the adoptive mother. Adoption, Q. 15, MS.

ownership when it subsists singly is recognized as consisting in a right to deal with the object owned at pleasure, (*a*) and though some kinds of property cannot be freely disposed of by the representative owner either on account of other persons being interested or because of the necessary preservation of the corpus of the property for particular purposes, (*b*) yet generally the ownership implies a power of alienation (*c*) as well as of use and abuse, except so far as the public law may be infringed (*d*) by any proposed dealing with the property. A grant, therefore, of ownership or a will (*e*) with a condition against alienation or the other common uses of ownership operates while the condition is void as repugnant to the ownership created. (*f*) It must be assumed that the grantor rather intended his act to be effectual than ineffectual even though he should fail to secure the performance of some condition legally impossible or injurious; and the courts representing the State are not called on to give effect to commands or engagements which would violate their "dharm" or cause mischief to the community. (*g*) But the grantor may stipulate or provide for

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(*a*) *See* Vîramit., Transl. pp. 34, 138. Nârada, quoted Col. Dig. Bk. II. Ch. IV. T. 6.

(*b*) *Nárâyan* v. *Chintámon*, I. L. R. 5 Bom. 393. *See* above, p. 189.

(*c*) Nârada, *ut supra*; Col. Dig. Bk. II. Ch. IV. T. 30, Comm.; Vîramit. Transl. p. 138.

(*d*) Col. Dig. Bk. III. Ch. II. T. 28.

(*e*) *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. 378.

(*f*) In the case of a charitable endowment an opposite principle prevails. Property sold in execution of a decree against a Mahant who had mortgaged it was recovered by the Vairâgis associated with him as incumbered by a patent breach of trust which the Śâstri said entitled the Society to set the Mahant and his transactions aside. Q. 86, MS., Surat, 27th Feb. 1852.

(*g*) *See* Manu Ch. VIII. Sec. IV. para. 1; Col. Dig. Bk. III. Ch. II. T. 28.

various advantages to himself or to others(*a*) arising out of the property and so far diminish the advantages of the proprietor in it. Co-owners, too, may make similar arrangements *inter se* as to their common property, (*b*) reserving rights for instance to themselves in stated mutual relations during and after a life interest which they join in granting. (*c*) These stipulations the grantee personally must observe, and so must his heirs, as the Hindû law attaches a sacred value to a promise, (*d*) but how far precisely they adhere to the property in the hands of alienees, that is, to use the English phrase, "run with the land," can be determined only by degrees as actual cases arise. (*e*) The Hindû law emphatically bids the judge to prevent the success of a fraud, (*f*) and thus not only the doctrine of enforcing a representation which has been acted on (*g*) but of the obligation passing with the ownership (*h*) where public policy approves of the connexion, to a person who takes with notice of it, would be enforced in as full consistency with the Hindû law as with the English law. (*i*) The law of Registration now enables every one who reserves any part of the ownership in property

(*a*) *Cally Nath Naugh Chowdry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. at p. 388.

(*b*) *Nílkanth Ganesh* v. *Shivrám Nágesh*, Bom. H. C. P. J. F. 1878, p. 237.

(*c*) A stranger to such an arrangement or to an award, though a relative, cannot rely on admissions in it, or relating to it, as a ground for rights to which the law does not entitle him. *Ganga Sahai* v. *Hira Singh*, I. L. R. 2. All. 809.

(*d*) Nârada IV. 5, Transl. p. 59; Vyav. May. Ch. IX. Sec. II. ss.; Col. Dig. Bk. II. Ch. IV. T. 3, 4, 5.

(*e*) *See* Transf. of Prop. Act, IV. of 1882, § 40.

(*f*) Manu VIII. 165; Col. Dig. Bk. IV. T. 184; Vyav. May. IX. 10.

(*g*) *See* per Lord Cottenham in *Hammersley* v. *De Biel*, 12 C. F. 61 n.

(*h*) *Western* v. *MacDermott*, L. R. 2 Ch. Ap. 72; *Leech* v. *Schweder*, L. R. 9 Ch. A. 465, 475.

(*i*) *Juggutmohinee Dossee* v. *Sookhemoney Dossee*, 17 C. W. R. 41 C. R.

of which he is disposing to give virtual notice of this to every future purchaser.(*a*) The omission to register any material stipulation will, in general, except in insignificant cases, deprive it of effect as an interest in the land, and perhaps turn the presumption of apparent fraud against him who has failed to take an obvious precaution.(*b*)

The law of gift has been discussed with great subtlety by the Hindû lawyers on account of its close connexion with the law of sacrifices. The necessary concurrence at the same moment of the will of the donor and donee in passing some definite existing object from one to the other is usually insisted on (*c*) as a means of completing a gift; but Jagannâtha points out that a debtor releases himself by assigning something yet to come into existence, (*d*) and that an assignment of a periodical income operates necessarily through a past volition on each instalment as it falls due. (*e*) Hence, he says, the gift of property is valid though it be

(*a*) *See* Act III. of 1877; Transf. of Prop. Act, IV. of 1882, § 54, 59, 107, 123; *Ichhárám Kálidás* v. *Govindrám Bhowánishankar*, I. L. R. 5 Bom. 653; *Sobhágchand* v. *Khupchand Bháichand*, I. L. R. 6 Bom. 193; *Bápuji Balál* v. *Satyabhámábái*, I. L. R. 6 Bom. 490.

(*b*) Comp. *Tárachand* v *Lakshman*, I. L. R. 1 Bom. 91.

(*c*) *See* Vîramit. Tr. p. 31 ss; Dâyabh. Ch. I. paras. 21–24; 2 Str. H. L. 427; *Vithalrav Vasudev* v. *Chanaya*, Bom. H. C. P. J. F. 1877, p. 324. Comp. the Transf. of Prop. Act, IV. of 1882, § 122, 124.

(*d*) Col. Dig. Bk. II. Ch. IV. T. 43, Comm. The right in such a case passes immediately; it is the fruition of the right which is future. Comp. Savigny, Syst. § 385.

(*e*) See *Collector of Surat* v. *Pestonji Ruttonji*, 2 Morris 291, cited in *Maharaval Mohansingji Jeysingji* v. *The Government of Bombay*, L. R. 8 I. A. at p. 84. But in the case of *Babu Doolichand* v. *Babu Birj Bhookan* (decided 4th Feb. 1880) the Judicial Committee declined to affirm the principle that a merely expectant interest can be the subject of sale under the Hindû law. It is improbable, their Lordships say, that the principle of the English law which allows a subsequently acquired interest to feed the estoppel can be applied to Hindû conveyances. Where the Transfer of Property Act, IV. of 1882, is in force, its provisions and exceptions must be considered along with this and similar judgments. *See* Secs. 43, 54 of the Act.

accompanied by the donor's retention of a life interest, (*a*) and so in the case of *Muhalukmee* v. *Three grandsons of Kripashookul*, (*b*) it was said that a gift in Krishṇârpan (religious charity) was good though possession was retained by the owner.(*c*) In the case at 2 Macn. H. L. 207 it is said that a gift may be accompanied by the donor's retention for life; but then his subsequent gift accompanied by possession supersedes the deferred one. This would reduce the remainder arising on the donor's death to a mere equitable right,(*d*) but the creation of the deferred right is at any rate not inconsistent with the Hindû law; and now by means of registration having virtually the effect of possession (*e*) great safety may be given to rights which are to be enjoyed only in the future.(*f*) In the case of a near relation a mere gratuitous agreement thus becomes binding, though as between strangers void.(*g*) As to all persons, however, it is said "Nothing in this section shall affect the validity as between the donor and donee of any gift actually made."(*h*) When the "gift is actually made" is left apparently to be governed by the law of the parties, (*i*) and so amongst the Hindûs by principles already partly considered. (*j*)

(*a*) Col. Dig. Bk. II. Ch. II. T. 43, Comm.

(*b*) 2 Borr. R. at 561.

(*c*) *See* however *Lalubhái Surchand* v. *Bái Amrit*, I. L. R. 2 Bom. at p. 331.

(*d*) See *Lalubhái Surchand* v. *Bái Amrit*, I. L. R. 2 Bo. at p. 331.

(*e*) *Ib.*, pp. 319, 332.

(*f*) *Abadi Begam* v. *Asa Ram*, I. L. R. 2 All. 162. *See* Act III. of 1877 Sec. 50; Transfer of Property Act, IV. of 1882, Secs. 54, 58, with Sec. 5 where the Act is in force.

(*g*) Indian Contract Act, IX. of 1872, Sec. 25.

(*h*) No reference to the enactment is made in the case of *Nasir Husain* v. *Mata Prasad*, I. L. R. 2 All. 891.

(*i*) *See* the Transfer of Property Act, IV. of 1882, Secs. 122, 124.

(*j*) Under the English as under the Hindû law (*see* Col. Dig. Bk. V. T. 1, Comm. (vol. II. p. 514 Lond. Ed., vol. II. p. 191 Madr. Ed.) "It requires the assent of both minds to make a gift as it does to make a contract," per Mellish, L. J., in *Hill* v. *Wilson*, L. R. 8 C. A. 896. But *see* also per Lord Mansfield in *Taylor* v. *Horde*, 1 Burr. at p. 124.

Whether a gift valid as against the donor is to all intents valid as against his representatives and his coparceners in a joint estate, is a point also left to be determined by the law of the parties. (*a*) The distinction which the legislature had in view was probably one between the donor and his representatives on the one hand and his creditors or persons having claims on the property on the other. A Hindû husband, it has been held, cannot alienate by a deed of gift to his undivided sons by his first and second wives the whole of his immoveable property though self-acquired, without making for his third wife, who has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death, she is entitled to follow such property in the hands of her step-sons to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his lifetime. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and unless such right has been defined by partition or otherwise it cannot be released by her to her husband. (*b*)

By the Hindû law, sale of land to be effectual had formerly to take the shape of a gift. (*c*) The rule as to delivery and acceptance applies therefore equally to the one as to the other. But the Courts, in order to defeat fraud, will give an assistance to a purchaser for value which they will not to a

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(*a*) As to coparceners see *Pándurung* v *Náru*, Sel. Rep. 186; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, L. R. 7 I. A. 181; S. C. I. L. R. 5 Bom. 48; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 7 I. A, 88.

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

(*c*) *Lalubhái Surchand* v. *Bái Amrit*, I. L. R. 2 Bom. 299; 1 Str. H. L. 19. The exception of religious gifts from the general inalienability of the family estate under the early Hindû law had a close parallel in the Saxon and other Teutonic laws in Europe. Grants to the Church might be made without the concurrence of heirs, yet in Europe, exactly as in India, it was usual to obtain the signatures to a grant which might afterwards be disputed of all the persons

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mere gratuitous promisee (*a*) whose right, indeed, unless the transaction has been a "gift actually made," is, as we have seen, made null by the Indian Contract Act.

Though a proprietor cannot create interests of a kind unknown to the law, or give to his property an eccentric mode of devolution, and though his powers in these respects are more narrowly restricted by the Hindû than by the English law, (*b*) yet he can carve out of his ownership many interests which his successors must recognize. (*c*) Thus as to his self-acquired property he enjoys a virtual freedom of disposition as to the persons to be benefited by estates in themselves legal. (*d*) As to the inheritance, his son's equal rights do not prevent him from burdening it with debts not prodigally or profligately incurred. (*e*) If he dies with debts unsettled, but not secured by a specific lien, they do

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interested. *See* Lex Sax. XV; Laboulaye Histoire du Droit de Propriété Foncière en Occident, Lib. VIII., Ch. I. The first charters of *book-land* in England were granted to the Church, through which grants to laymen came in. See Stubbs, Const. Hist. I. 131; Elt. T. of Kent, pp. 15, 16; Mit. Ch. I. Sec. I. para. 32; Vyav. May. Ch. II. Sec. 1, para. 2; Col. Dig. Bk. II. Ch. IV. Text 33; Bk. V. Ch. VII. T. 390.

(*a*) *See* Coleb. in 2 Str. H. L. 433, 434.

(*b*) 1 Str. H. L. 25.

(*c*) See *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 I. A. at p. 104; *Jatha Náik* v. *Venkápá*, I. L. R. 5 Bom. at p. 21. The second proviso in Rule IV. Sec. 11 Madras Act 8 of 1865 does not apply to leases which are *bonâ fide* and valid under the general Hindû law;—only when they are a fraud upon the power of the grantor's successor as manager and to the prejudice of the successor.

(*d*) *See* Mit. Ch. I. Sec. I. para. 27; Vyav. May. Ch. IX. Sec. 5; Smṛiti Chand. Ch. II. Sec. I. paras. 22, 24, qualifying Ch. VIII. para. 25; Mádhavya, paras. 16, 5; Coleb. in 2 Str. H. L. 439, 441; Varadrája, pp. 5, 8; *infra*, Bk. II. Ch. I. Sec. 2, Q. 2 and Q. 8.

(*e*) Col. Dig. Bk. II. Ch. IV. T. 15, Comm.; *Hunooman Persaud Panday* v. *Musst. Babooee Munraj Koonweree*, 6 M. I. A. at p. 421.

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not form a charge on the estate itself, (*a*) though the heirs taking the estate are so far answerable. (*b*) It is assets for the discharge of the father's debts. (*c*) A gift within reasonable limits to any child must be given effect to, (*d*) and so must a provision for a wife, a concubine, or an illegitimate child. (*e*) These dependents are indeed entitled as of right to a provision even against the terms of a will (*f*) or a gift, (*g*)

(*a*) *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321; *Jamiyatrám* v. *Parbhudhás*, 9 Bom. H. C. R. 116.

(*b*) *Oolagappa Chetty* v. *Hon. D. Arbuthnot and others*, L. R. 1 I. A. 268.

(*c*) *Muttayan Chettiar* v. *Sangili*, L. R. 9 I. A. 128.

(*d*) Vîramit. Tr. p. 251; 1 Str. H. L. 24. A gift by a Joshi of a material part of his vatan to his daughter's children was pronounced void as against his adopted son who, however, it was said must make good a present of a reasonable portion, Q. 712 MS. The testamentary power under the Roman law seems to have received recognition on account of its enabling the testator to provide for his children in some measure according to his affection for them. *See* Maine, Anc. Law, Chap. VII. p. 218 (and this Section *sub fin*).

(*e*) *Sahu* v. *Hari*, Bom. H. C. P. J. F. 1877, p. 34; *Rákhi* v. *Govinda*, I. L. R. 1 Bom. 97. The mistress, it was said, must not alienate the house given to her by her patron, Q. 712 M. S.

(*f*) *Comulmoney Dossee* v. *Ramanath Bysack*, 1 Fult. 189.

(*g*) *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99; *Jamna* v. *Machul Sahu*, I. L. R. 2 All. 315.

The Hindû jurists who recognize the power of a father to make away with the patrimony, though he incurs sin in doing so, point to remedies analogous to those provided by the Roman law. The son has a right of interdiction to prevent improvident alienations. Mit. Ch. I. Sec. VI. paras. 9, 10; and this the Śâstri said applied equally to the adopted son and the brother, Q. 1735 MS. He may claim to have the gift or disposal set aside if he be thus impoverished as implying mental derangement on the part of the donor. Col. Dig. Bk. II. Ch. IV. Sec. 2, T. 53, 54. Comp. Vyav. May. Ch. IX. 3, 6, 7. For the Roman law *see* Voet ad Pand. Lib. XXVII. T. X. paras. 3, 6, 7; Inst. Lib. II. Tit. XVIII., and Voet ad Pand. Lib. XXXIX. Tit. V. paras. 36, 37; Ortolan ad Inst. § 787 ss. 799; Poste's Gaius, pp. 51, 205; Mommsen, Hist. of Rome, B. I. Ch. XI., Eng. Transl. vol. I. p. 161.

though not as against a sale for the payment of a family debt which it is the duty of the head of the family to pay.(*a*)

The general injunction to perform a father's promise must be regarded now rather as a moral than as a legal precept, and the obligation to pay the debts of the father does not extend to those of the other members of a family, even of a joint family, unless they have been contracted for the common good or under pressure of some severe necessity.(*b*) When there are no sons or grandsons holding a joint estate with the ancestor the line of succession is prescribed by law; but, subject to provisions for maintenance, the property is entirely at the disposal of the owner notwithstanding the existence of collateral heirs. (*c*)

There does not seem to be good authority for saying that the person giving property to the members of a Hindû family can impose on them such terms as that they shall become divided or remain undivided.(*d*) The decision in *Ganpat* v. *Moroba* (*e*) may have proceeded upon a misapprehension of Bâlambhaṭṭa's comment on the Mitâkharâ Ch. I., Sec. II., para. 1. (*f*) Sons cannot be made separate *inter se* against their will, since partition itself is defined as a particular kind of intention,(*g*) in the absence of which therefore it does not exist. So the declaration of such intention will constitute partition, and cannot be prevented. (*h*) The grantor may bestow separate interests on

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(*a*) *Natchiarammal* v. *Gopal Krishna*, I. L. R. 2 Mad. 126.

(*b*) Mitâk. Ch. I. Sec. I. paras. 28, 29; 2 Str. H. L. 342; Col. Dig. Bk. I. Ch. V. T. 180, 181.

(*c*) *See* Coleb. in 2 Str. H. L. 15; above, p. 139.

(*d*) See *Maccundás* v. *Ganpatrao*, Perry's O. Cases, 143.

(*e*) 4 Bom. H. C. R. 150 O. C. J.

(*f*) See *infra*, Book II. Introd. § 4 C.

(*g*) Vyav. May. Ch. IV. Sec. III. para. 2; *infra*, Book II. Ch. III. S. 3, Q. 6, and Book II. Ch. IV. Q. 8.

(*h*) *Mookoond Lall Sha* v. *Ganesh Chandra Sha*, I. L. R. 1 Calc. 104; *Rajender Datt* v. *Sham Chand Mitter*, I. L. R. 6 Calc. 106, 116.

members of a joint family, or a joint interest on separated members; but he cannot thus effect their status *inter se*. As separate properties may be held by members of a united family, (*a*) they may take an estate as tenants in common side by side with their inheritance and its accretions held in union, and separated members may take a property as joint tenants or as partners, (*b*) but their interests and mutual relations are in such a case and without a reunion, essentially different from those of a joint Hindû family. The sacrifices continue separate, and this makes a true unity of the family impossible. It follows that property given to Hindûs, though it may be subjected to charges as already shown, cannot be controlled in the hands of the donee by fantastic directions as to its enjoyment or devolution or by accompanying conditions on matters which the Hindû law intends to leave to the religious feeling (*c*) or the worldly wisdom of the owners for the time being. (*d*) The law itself prescribes many regulations for the preservation and welfare of the family which is its principal care. (*e*) It allows for the varying rules of custom, (*f*) and having done this gives but little scope to the caprices of individuals. It accepts indeed a theory more comprehensive even than Plato's (*g*) of the inherent nullity of acts which, on account of their eccentricity, implying injustice, may be ascribed to a disturbance or perversion of the faculties. (*h*)

The historical reason for the limited powers of disposition allowed to owners by the Hindû law is probably to be found

(*a*) See *Vásudev Bhat* v. *Venkatesh Sanbháv*, 10 Bom. H. C. R. at pp. 157, 158.

(*b*) See *Rampershad* v. *Sheo Churn Doss*, 10 M. I. A. 490.

(*c*) So under the Roman law, *see* Goudsmit, Pand. p. 168.

(*d*) See *Maccundds* v. *Ganpatrao*, Perry, Or. Cases, 143, and *Abdul Gannee* v. *Husen Miya*, 10 Bom. H. C. R. at p. 10.

(*e*) *See* 1 Str. H. L. 17.

(*f*) Col. Dig. Bk. V. Ch. V. T. 365.

(*g*) *See* Grote's Plato, III. 396.

(*h*) Col. Dig. Bk. II. Ch. IV. Sec. II. Art. III.; Vyav. May. Ch. IX. paras. 6, 8; Vivâda Chintámani, Tr. pp. 82, 83.

in the ancient idea of the inalienability of the patrimony. (*a*) This allowed mortgages but prevented sales. (*b*) The mortgages were usually accompanied with possession, and the lien by degrees became confused very often with ownership. Then gifts to religious uses were highly commended. (*c*) They were, in principle at least, inalienable and irrevocable (*d*) even by the sovereign, if the strongest imprecations on him who should resume a grant could make them so. (*e*) It was impossible that these should be attend-

(*a*) This may have been developed from the sacredness of the house and the curtilage at a stage in which the labour of clearing the land from trees formed the only appraisable element of the value of any holding. The lot was consecrated to those who had cleared it as a safeguard against invasion and alienation both. Comp. Grote's Plato III. 390. It has been found in some cases, as in the Canara Forest case, referred to in the next note, that persons who in remote places had consecrated shrines to the honour of the forest gods, supposed to be protective against tigers and miasma, and maintained a rude worship to these divinities, claimed on that account a lordship of the tract; which was acquiesced in by immigrants through superstitious fear. Continued enjoyment grew in time into a kind of ownership, which it was then attempted to assert with all the incidents belonging to it under an advanced system of individual and exclusive proprietary right. Comp. Lavel. Prim. Prop. 24, 104, 121.

(*b*) Mit. Ch. I. Sec. I. para. 32. *See* 5th Report on Indian Affairs, p. 130, as to the mortgages of Canara redeemable after any lapse of time, and *Bháskarápá* v. *The Collector of North Kánará*, I. L. R. 3 Bom. at p. 525, and comp. Tupper, Panj. Cust. Law, vol. II. pp. 89, 45.

(*c*) Mit. Ch. I. Sec. I. para. 32; Manu IV. 230, 235.

(*d*) Vyav. May. Ch. IX. 6; Ch. IV. Sec. VII. paras. 21, 23; Col. Dig. Bk. V. Ch. V. T. 365; *Náráyan* v. *Chintámon and another*, I. L. R. 5 Bom. 393; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 M. I. A. at p. 273; *The Collector of Thanna* v. *Hari Sitaram*, Bom. H. C. P. J. F. 1882, p. 204 S. C; I. L. R. 6 Bom. 546.

(*e*) It is interesting to compare with the familiar "60,000 years in ordure" in the Hindû grant the invocation of the fate of Dathan and of Judas on those who should resume an ecclesiastical grant in Europe. Annal. Bened. II. 702, "Veniam consequantur quando consecuturus diabolus." Marculf. Lib. II. Form. 1. *See* Lab. *op. cit.* p. 303, compared with Ind. Antiq. vol. XI. pp. 127, 162.

ed with the manifold limitations by which in dealing with purely secular property a settlor or testator might endeavour to mould the interests of successive generations and provide for the reversion of the property in particular events. Sales as they were introduced had to take the form of gifts, (*a*) and were thus made equally without qualification or reserve. The united family, however, providing by birth or by adoption a *heres necessarius* in almost every case, and making the assent of sons necessary for the disposal of immoveable property, (*b*) acted as a continual check on the ingenuity and even on the wishes of the class of proprietors. It would be almost impossible to obtain the acquiescence of the co-owners in any settlement to which they were not bound to submit, and the ancient lawyers unaided by powerful courts of conscience had not hit on the manifold applications of uses. The unchangeableness, too, of the political and social condition of the Hindûs during many centuries favoured the natural immobility of an essentially religious law. The manes had to be duly honoured, (*c*) the present and the coming generation provided for, (*d*) while little or nothing occurred to tempt proprietors from the worn track of past centuries. The widely-spread Mahomedan rule prevented for six or seven hundred years the growth and continuance of Hindû states on a great scale, and the development, if it were possible, of a progressive Hindû polity. Men were driven in upon their families and their traditions as their only available centres of interest, while externally none of the astounding changes of physical circumstances which have marked the period of British dominion, arose to break the shackles of custom, and to arouse dormant intelligence to new possibilities of making wealth

(*a*) *Lalubhái Surchand* v. *Bái Amrit*, I. L. R. 2 Bom. at p. 331; Col. Dig. Bk. V. Ch. VII. T. 390; Mit. Ch. I. Sec. I. para. 32.

(*b*) Mit. Ch. I. Sec. I. para. 27; *Rangama* v. *Atchama*, 4 M. I. A. at p. 103; *Pándurang* v. *Náru*, Sel. Rep. 186. *See* above, p. 192.

(*c*) Manu IX. 1858.

(*d*) Mit. Ch. I. Sec. I. para. 27.

and of dispensing it. Some little movement there was: the legislative and systematizing faculty showed itself in such works as those of Aparârka and of Rudra Deva, (*a*) the *mrityu patra* and the gift in trust, the mortgage and the lease in their manifold forms supplied a foundation on which a whole system of Hindû equity and of interests in estates, no less far reaching and complicated than those of England, might have been built up; but though the materials were at hand the circumstances were wanting in which they could be organized. It was not until the British rule prevailed that the Hindû found himself a living part of a great and progressive community, with endless incentives to mental activity and to the imitation of rules tending always to extension of the individual's plastic power over property. The subsequent history of the Hindû law, though it presents a development of several purely indigenous principles, has been enormously influenced by English notions. It is impossible, even were it desirable, that these should be wholly cast aside: they are most in harmony with the general mass of English thought which is leavening the native mind; and they practically afford the only common standard and source to which the Courts can resort, when the meagre resources of the primitive law fail. But the Judicial Committee in some of its more recent decisions has shown itself quite alive to the fact that the narrower peculiarities of the English law will not blend with the Hindû system, and has carefully dwelt on the points of distinction. (*b*) It has shown no favour to any extension to India of the endless "dissipations" of the ownership in minute and tangled

(*a*) The Sarasvati Vilâsa.

(*b*) See *Tagore* case *passim*, L. R. S. I. A. 47.

"The Hindu law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies." 13 M. I. A. at p. 390.

interests, or to the paralysing restrictions on the use and exchange of property which in England itself are now felt as a serious impediment to the general welfare. It seems likely, therefore, that in yielding to the new influences brought to bear upon it, the Hindû law will go forward in a few and simple steps to the point of adaptation to the actual needs of society without passing through those intermediate stages of nominal ownership united so often with a real helplessness of the proprietor, the rules regarding which form so large a portion of the present English law.

It will have been seen that the creation of a perpetuity by a private person in favour of private persons is impossible under the Hindû law. (*a*) The nearest approach to it perhaps is in the case of the purohits or hereditary family priests. Property given to the family of a purohit as such for ever is of the nature in part at least of a religious endowment. (*b*) In creating such an endowment there is a virtually unlimited power of disposal of property fully owned (*c*) provided only that the support of the family and its dependants be not impaired. (*d*) The founder may provide for successors to the immediate donee who have still to come into being, (*e*) and may in some measure prescribe the mode of

(*a*) In a case from Penang, where the English law prevails "as far as circumstances will admit," it was held that the rule against perpetuities was applicable as founded on considerations of public policy of a general character, but subject to an exception "in favour of gifts for purposes useful and beneficial to the public, and which in a wide sense of the term are called charitable uses." *Yeap Cheah Nev* v. *Ong Cheng Nev*, L. R. 6 P. C. A. at p. 394.

(*b*) *See* 2 Str. H. L. 12, 13; Col. Dig. Bk. II. Ch. III. T. 43, Comm.

(*c*) Col. Dig. Bk. II. Ch. IV. T. 56, Comm.; T. 3; T. 33; *Dwarkanath Bysack* v. *Burroda Persaud Bysack*, I. L. R. 4 Calc. 443; *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 24.

(*d*) *See* 2 Str. H. L. 12, 16, 342; Co. Di. Bk. II. Ch. IV. T. 10, 11 Comm.; T. 18 Comm.; *Radha Mohun Mundul* v. *Jadoomonee Dossee*, 23 C. W. R. 369; *Juggutmohinee Dossee* v. *Sookhemony Dossee*, 17 C. W. R. 41.

(*e*) *Khusálchand* v. *Mahádevgiri*, 12 Bom. H. C. R. 214.

succession or the qualifications of the successors.(*a*) The idol, deity, or the religious object is looked on as a kind of human entity, (*b*) and the successive officiators in worship as a corporation with rights of enjoyment but not generally of partition (*c*) or alienation except so far as this may be necessary to prevent greater injury.(*d*) Such endowments are frequently founded by subscriptions and are augmented by gifts and bequests simply to the institution. (*e*) No rules have, in a majority of these cases, been formally prescribed: the intention of the founders has to be gathered from the traditional practice, and the succession is thus determined by the custom of each particular institution, (*f*) though this may have become embraced in some more

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(*a*) "Where the founder has vested in a certain family the management of his endowment, each member.....succeeds.....*per formam doni*," so that execution proceedings against one do not affect his successor in the endowment. *Trimbak Bawa* v. *Narayan Bawa*, Bom. H. C. P. J. F. for 1882, p. 350. "If a person endows a college or religious institution the endower has a right to lay down the rule of succession." Pr. Co. in *Greedharee Doss* v. *Nundo Kissore Doss Mohunt*, 11 M. I. A. at p. 421; 1. Str. H. L. 210; 2 *ib.* 364; Comp. Maine, Anc. Law, Ch. VII., p. 230.

(*b*) *Maharanee Shibessuree Debia* v. *Mothooranath Acharj*, 13 C. W. R. 18, P. C. S. C. 13 M. I. A. 270; *Moonshee Mahomed Akbar* v. *Kalee Churn Geeree*, 25 C. W. R. 401.

(*c*) Viram. Tr. 249. *See* below Bk. II., Introd. Impartible Property and Rights, &c. arising on Partition; 1 Str. H. L. 210, 151; *Anund Moyee Chowdhrain* v. *Boykanthnath Roy*, 8 C. W. R. 193.

(*d*) See *Khusálchand* v. *Mahádevgiri*, 12 Bom. H. C. R. 214; *Manohar Ganesh* v. *Keshavram Jebhai*, Bom. H. C. P. J. F. 1878, p. 252; *Náráyan* v. *Chintaman*, I. L. R. 5 Bom. 393; *Juggernath Roy Chowdhry* v. *Kishen Pershad*, 7 C. W. R. 266; *Drobo Misser* v. *Srineebash Misser*, 14 C. W. R. 409; *Nimaye Churn Puteetundee* v. *Jogendro Nath Banerjee*, 21 C. W. R. 365; *Mohunt Burm Suroop Dass* v. *Kashee Jha*, 20 C. W. R. 471; *Prosunno Kumari Debya* v. *Goolab Chand*, 23 C. W. R. 253, S. C. L. R. 2 I. A. 145.

(*e*) *Sammantha Pandara* v. *Sellappa Chetti*, I. L. R. 2 Mad. 175.

(*f*) *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*, L. R. 4 I. A. at p. 83. *Greedharee Doss* v. *Nundo Kissore Doss*, 11 M. I. A. at p. 427.

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extensive custom.(*a*) And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another. (*b*) The endowment once made cannot be resumed, but performance of the duties may be enforced. (*c*)

Though a religious endowment is not necessarily confined to a single family, (*d*) this is a very common kind of estate, (*e*) and may be attended with the usual incidents subject only to providing for the performance of the religious functions. (*f*) In the case of other public or semi-public offices the exclusive right of a single family and a several enjoyment of shares (*g*) is usually accompanied by a rule of non-alienability beyond the limits of the family, as in the case of vatans, (*h*) and frequently of impartibility, the burden of proving which, however, rests on those who assert it. (*i*)

(*a*) Co. Di. Bk. III. Ch. II. T. 5; *Gossain Dowlut Geer* v. *Bissessur Geer*, 19 C. W. R. 215; 1 Str. H. L. 151; *Malhár Sakhárám* v. *Udegir Guru Champatgir*, Bom. H. C. P. J. F. 1881, p. 108, and the cases therein cited.

(*b*) Nor can the court prescribe such rules; *Burwaree Chand Thakoor* v. *Mudden Mohun Chuttoraj*, 21 C. W. R. 41. As to attempted restraint on choice of a successor; see *Greedharee Doss* v. *Nundokissore Doss*, 11 M. I. A. 405, 421.

(*c*) See *Juggut Mohinee Doss* v. *Musst. Sokhee Money Dossee*, 14 M. I. A. at p. 302; *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

(*d*) See *Sammantha Pandara* v. *Sellappa Chetti*, I. L. R. 2 Mad. 175.

(*e*) 2 Str. H. L. 368; *Vithal Krishna Joshi* v. *Anant Rámchandra* 11 Bom. H C. R. 6; *Divaker Vithal* v. *Harbhat*, Bom. H. C. R. P. J. F. 1881, p. 106; *Manchárám Bhagvánbhat* v. *Pránshankar*, Bom. H. C. P. J. F. 1882, p. 120.

(*f*) Co. Di. Bk. II., Ch. III., T. 43 Comm.; *Ganesh Moreshwar* v. *Prabhákara Sakhárám*, Bom. H. C. P. J. F. 1882, p. 181.

(*g*) 1 Str. H. L. 210, 2; *ib.* 363, per Colebrooke.

(*h*) See Index *sub voce*, and Bom. Act. III. of 1874.

(*i*) *Timungávda* v. *Rangangávda*, Bom. H. C. P. J. F. 1878, p. 240.

It has been thought that trusts were unknown to the Hindû Law.(*a*) Such a notion is quite erroneous, (*b*) though it is true there has been no such development of the first principles as has taken place under the Equity system in England. The endowments just spoken of, especially when founded by the members of a particular caste, are very frequently held by trustees, (*c*) either the mohants bound to a particular appropriation of the revenues (*d*) or the general punchâyat of the caste in the town or village or a body chosen *ad hoc*. (*e*) Trusts for the maintenance of a family idol are very commonly created and give to the trustee a valuable interest. The trust is dissoluble only by the assent of the whole family, (*f*) or of all concerned when the idol is open to public worship (*g*).

Other trusts of a quasi-religious character are such that effect can hardly be given to them (*h*) on account of the uncertainty of the purpose of the testator.

Property is not infrequently given to a husband in trust for his wife in which she consequently has a beneficial interest

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(*a*) *See* the *Tagore* case, L. R. S. I. A. 47.

(*b*) *Mussumut Thukrain Sookraj Koowar* v. *The Government*, 14 M. I. A. at p. 127; *Thakurâin Ramanund Koer* v. *Thakurain Raghunath Koer*, L. R. 9 I. A. at p. 50.

(*c*) *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380; *Ram Doss* v. *Mohesur Deb Missree*, 7 C. W. R. 446.

(*d*) *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy*, 17 C. W R. 444.

(*e*) *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380, 394; *Juggut Mohinee Dossee* v. *Msst. Sokheemoney Dossee*, 14 M. I. A. 289.

(*f*) *Konwur Doorganath Roy* v. *Ramchunder Sen*, L. R. 4. I. A. at p. 58. *See* above, pp. 184, 200.

(*g*) *Manohar Ganesh* v. *Keshavrâm Jebhai*, Bom. H. C. P. J., F. 1878, p. 252.

(*h*) *Mániklál Atmárám* v. *Manchershi Dinshá Coachman*, I. L. R. 1 Bom. 269. In *Promotho Dossee* v. *Radhika Prasad Datt*, 14 Ben. L. R. 175, a dedication by will was set aside as being in reality a settlement in perpetuity on the testator's descendants, and a new dedication was made with the assent of the parties.

quite distinct from her purely dependent joint ownership so called, in her husband's property. (*a*) Trusts for the benefit of widowed daughters and other helpless persons are not very uncommon. (*b*) The remedy in case of failure is a revocation of the gift or a defeasance of the estate given to the trustee (*c*) but the purpose being recognized as beneficial, effect may be given to it according to the law of reason, (*d*) and now it is recognized that the Courts should rather enforce a performance of the trustee's duty than allow the

(*a*) It is substantially the "dotal" estate of the French and other European continental systems. *See* Col. Di. Bk. II. Ch. IV. T. 28 Comm., T. 29 Comm., T. 30 Comm.

(*b*) *See* 2 Str. H. L. 234. A settlement may be found in the case of *Subedar Husseinshakhan Sayedshakhan*, Bom. H. C. P. J. F. 1882, p. 247, which, though in that case made by a Mahomedan, follows in form and substance a pattern common amongst Hindûs. The settlor being old gives to his son his whole property with a charge to maintain and shelter his step-mother, sister and other dependants. Provision is not made, probably through oversight, for the settlor's own subsistence. If this had been added we should have had the common form of a *Mrityu patra*, a settlement operating substantially as a will.

(*c*) Col. Di. Bk. II. Ch. IV. T. 53 Comm., T. 56 Comm. Similarly under the Roman law the *modus*, *i.e.* the charge or obligation accompanying a gift might be enforced by an action to that end or the donor could reclaim the gift. It was impossibility of performance only (including omission of any call for performance where a call was necessary) that excused the donee. This principle has been applied in India to many cases of lands granted for service in the sense that the service must be performed when required by the holders. See *Rajah Lelanund Singh Babadoor* v. *The Government of Bengal*, 6 M. I. A. 101; *Forbes* v. *Meer Mahomed Tuquee*, 13 M. I. A. at p. 463; *Rajah Lelanund Singh Bahadoor* v. *Thakoor Munoorunjun Singh*, L. R. S. I. A. 181; *Keval Kuber* v. *The Talukdari Settlement Officer*, I. L. R. 1 Bom. 586. Coke, L. 204, applies a more rigorous construction to royal grants than to those of private persons. This should be borne in mind in reading *Forbes* v. *Meer Mahomed Tuquee*, supra.

(*d*) *See* 1 Str. H. L. 151; *Mohesh Chunder Chuckerbatty* v. *Koylash Chunder*, 11 C. W. R. 449 C. R.; *Gopeenath Chowdry* v. *Gooroo Dass Surma*, 18 C. W. R. 472 C. R.; *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

founder or his representative to annul the trust or hand it over to a new trustee. The aid of the courts may be invoked and the High Courts can in such cases exercise the summary power conferred on them by the Indian Trustees' Act 27 of 1866; the substantive law forming the basis of the rights being the Hindû law, but the application of that law in cases falling within its principles but not its detailed rules being governed by the rules established in the English Courts of Equity.(*a*) The same principles are applied as those of good conscience to the determination of cases arising in the Mofussil: of this there are many instances. (*b*) Thus should a transaction be pronounced void or revocable by the Hindû law (*c*) and accordingly be rescinded by the Court, the determination of the legal relation would probably be governed, in the Mofussil at any rate, by the Śástras as modified by custom, but for dealing with the resulting trust in favour of the grantor recourse would almost necessarily be had to the English precedents, because the Hindû jurists have not furnished any.

Regard may properly be had to native usages and practices in determining whether in any disputed case a trust has been effectively created or not. (*d*) Effect will be given to it so far as it subserves a practicable (*e*) and legal purpose, (*f*) but an estate or mode of devolution or enjoyment not allowed by the Hindû law cannot be compassed by

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(*a*) In re *Káhándás Nárrandás*, I. L. R. 5 Bom. 154.

(*b*) See *Juggutmohinee Dossee* v. *Sookhemony Dossee*, 17 C. W. R. 41; per Sir M. Westropp, C. J., in *Wáman Rámchandra* v. *Dhondibá Krishnáji*, I. L. R. 4 Bom. at p. 154, referring to *Lalla Chunilal* v. *Savaichand*; 1 Morl. Dig. *Webbe* v. *Lester*, 2 B. H. C. R. 52, and *Gouree Kant Roy* v. *Girdhar Roy*, 4 Beng. L. R. 8 A. C.

(*c*) *See* Col. Di. Bk. II. Ch. IV. T. 58, Comm.

(*d*) *Merbái* v. *Perozbái*, I. L. R. 5 Bom. 268.

(*e*) *Mániklál Atmárám* v. *Manchershi Dinsha*, I. L. R. 1 Bom. 269.

(*f*) *Anath Nath Day* v. *A. B. Mackintosh*, 8 Beng. L. R. 60; *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Calc. at p. 117.

means of a trust. (*a*) The case at Bk. I. Ch. II. Sec. 7, Q. 17 below, was really one of an attempt to create a trust by a declaration subject to a suspensive condition, or by giving property to a son-in-law for the benefit first of his son and secondly of his daughter, should one or the other be born, and thirdly of his wife the grantor's daughter. The Śástri says that by thus deferring the complete abandonment of his ownership the grantor made the gift invalid.

Though the Hindû coparcener cannot in general dispose of the family estate, and the family lands are especially sacred, (*b*) so that the father desiring to dispose of land must obtain the assent of all his sons, (*c*) yet religious gifts within moderate limits may be made by a father (*d*) and his sons are bound to give effect even to his promise. (*e*) Property thus promised is indeed said to be inalienable, (*f*) but it must not exceed a certain reasonable proportion to the whole. (*g*) If this proportion is exceeded the father is presumed to be deranged, (*h*) though the presumption can be displaced. (*i*) As to mere promises, these, as has been said, are not now regarded as creating a legal obligation except when they have amounted to a contract supported by a consideration. The power of alienation for religious purposes (*j*) by the head of the family qualifies his general incapacity

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(*a*) *Tagore* case, L. R. S. I. A. at p. 72.

(*b*) Yâjñ. quoted Col. Di. Bk. II. Ch. IV. T. 13, 14.

(*c*) *See* above pp. 167, 168, and below, Bk. II. Introduction.

(*d*) Col. Di. Bk. II. Ch. IV. T. 2. See *Jaggat Mohinee's* case, 14 M. I. A. at pp. 301, 302; *see* also *supra*, pp. 192, 193.

(*e*) Col. Di. Bk. II. Ch. IV. T. 3.

(*f*) *Ib.* T. 4.

(*g*) *Ib.* T. 11, 12.

(*h*) *Ib.* T. 15, Comm.

(*i*) As to religious gifts by a woman, *see* on Stridhana below.

(*j*) Religious and charitable purposes are coupled in the Hindû authorities, and the example given is "a reservoir of water or the like constructed for the public good." Viram. Tr. p. 250. Under this

to dispose of the immoveable estate, but Hindû ideas on this subject have been so much supplanted in the courts by those derived from the English law, that the general incapacity can hardly now be said to subsist when sons take the estate as assets for fulfilment of all the father's ordinary obligations. And he may sell the whole ancestral property or at any rate get it sold under a decree to pay his personal debts. (*a*) As a disposal of property even acquired by himself by a father which leaves his family unprovided for is by the Hindû law regarded as highly immoral and is absolutely prohibited, (*b*) it may be that the debts, the satisfaction of which out of the estate would almost exhaust it, may be treated as on that account not binding on the sons, should such a case be made for them. (*c*) The religious gift unless actually completed by delivery would now probably be regarded as void under Section 25 of the Indian Contract Act IX. of 1872, but a will necessarily operates without delivery, and dedications occur in almost every will of considerable property.

A gift to a wife by her husband is not invalidated by the joint interest of his sons in the property. This may be attributed either to the once complete dependence of the sons or to the father's administrative authority so long as it is not exercised to the obvious detriment of the family. But his discretion must not be exercised in a grossly partial manner:

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definition rest-houses for travellers, groves of trees, roads, conduits, and schools, as well as the distribution of alms have in various cases been held to come. And the courts have exercised a liberal discretion, as in the Dakore temple case, in moulding the application of founders, bounty to meet changed circumstances.

(*a*) See *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321, 334; *Muttayan Chettiar's* case, L. R. 9 I. A. at pp. 143, 144; *Ponappa Pillai* v. *Pappuváyangár*, I. L. R. 4 Mad. 1; *Veliyammál* v. *Katha*, I. L. R. 5 Mad. 61; above, p. 167.

(*b*) *See* Manu in Col. Dig. Bk. II. Ch. IV. T. 11; Yâjñ. *ib.* T. 16; Bṛihasp. T. 18.

(*c*) See the Section on Maintenance, and note (*h*) on next page.

his bounty to his wife must not exceed a reasonable proportion to the joint estate. (*a*) A promise of a provision is to be regarded by the sons as binding on them, (*b*) but a departure from reason and equity is not to be upheld. So in a case where a member of a united family dwelt apart and acquired property the Śástri said (*c*) he could not be allowed to convert it into Stridhana by making presents of costly ornaments to his wife in fraud of his cosharers, though a woman's jewels are usually excluded from partition. A gift from her husband is usually taken by a wife (or widow) on the terms discussed below under Stridhana, but when he is full owner he may give her a larger estate. (*d*)

A gift to a daughter is warranted by the same authorities as sanction one to a wife, (*e*) but the gift is for obvious reasons subject to a somewhat narrower limitation in the interest of the donor's family of which his daughter cannot in general remain a member. (*f*) A gift to a favourite son is to be respected though made out of the common property, (*g*) but no rank injustice is to be allowed, much less a donation by which one son is enriched while another is reduced to want. A man may not deal thus heartlessly even with his own acquisitions, (*h*) and as to the ancestral estate though according to the decisions he may go far towards

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(*a*) *See* Vyav. May. Ch. IV. Sec. X. paras. 5, 6; and comp. Mit. Ch. I. Sec. I. para. 25.

(*b*) *Ib.* para. 4; Vîram. Tr. p. 228.

(*c*) Q. 315 MS. Ahmednugger, 13th June 1853.

(*d*) See *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Calc. 684.

(*e*) *See* Coleb. Dig. Bk. V. T. 354; Dâya Bhâga, Ch. IV. Sec. 3, paras. 12, 15, 29.

(*f*) A gift in trust for a daughter out of ancestral property was annulled at the suit of the son. *Ganga Besheshar* v. *Pirthee Pál*, I. L. R. 2 All. 635.

(*g*) *See* note (*e*). As to an illegitimate, Bk. I. Ch. VI. Sec. 2, Q. 2.

(*h*) Co. Di. Bk. II. Ch. IV. T. 11, 12, 14, 16, 18, 19; Bk. V. T. 26, 27, 33; Vîram. Tr. p. 251; *Baboo Beer Pertab Singh* v. *Maharaja Rajender Pertab Sahee*, 12 M. I. A. 1.

dissipating it he cannot dispose of it unequally amongst his sons. (*a*)

The independent power of dealing with his self-acquired property assigned to the father by Mit., Ch. I., Sec. 5, pl. 10 (now established), seems to be intended to illustrate the incompetence of the sons to exact a partition of such property by bringing into prominence their incapacity to control the father's authority as manager, without contradicting the special rules governing a partition actually made by the father, prescribed in Ch. I., Sec. 2 (*b*). Nârada, Pt. 1, Ch. III., paras. 36, 40, would apparently be explained or limited in the same way as Bṛihaspati; and the Smṛiti Chandrika, Ch. VIII., paras. 21 *ff*, dwells on the difference between "Svâmya" and "Svatantratâ," *i. e.* between "ownership" and "independence." In the father's acquisitions, Devaṇḍa Bhaṭṭa says, the sons have "Svâmya," though the father alone has "Svatantratâ"; in ancestral property the sons have both. Kâtyâyana says that the son has not "Svâmya" in the father's acquisition, but this is explained (para. 22) as a mere looseness of expression; and that it was not considered by its author to justify an irregular distribution may be seen from the Vîramitrodaya, p. 55 compared with p. 74. In *Sital et al* v.

(*a*) *Durga Persad* v. *Keshopersad*, I. L. R. 8 Cal. 656, 663. See *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, I. L. R. 1 Bom. 561; S. C. L. R. 7 I. A. 181, and *infra*, Bk. II. Ch. I, § 2, Q. 5, and Introd.

(*b*) So also the Vyav. May. Ch. IV. Sec. 1, para. 14; Sec. 4, pl. 4-8 (Stokes, H. L. B. 48, 49); Vîram. Transl. pp. 65, 66.

The principle adopted by the Smṛiti Chandrika of a complete ownership arising immediately on birth accompanied by an exclusive power of administration in the father during his life is contested by Jimûtavâhana and Raghunandana, who argue that the ownership of the son arises only at the father's death. Mitramiśra refutes this contention. (Vîram. Transl. pp. 7-15). At p. 45 he insists on the distinction between ownership and independence in the disposal of property. The different senses of such words as *swamitwa* have caused as much controversy amongst Indian lawyers as those of *dominium* in Europe.

Madho, (*a*) it was held that a father might bestow a house acquired by himself on one son to the exclusion of the other. The learned judges were of opinion that the Mit. Ch. I. Sec. 1, pl. 27, (*b*) conveys only a moral prohibition against the alienation of self-acquired immoveable property. That passage, however, with which the exposition in the Vivâda Chintâmani, page 309, may be compared, declares the participation of sons, not only in the ancestral, but also in the paternal estate, and paragraphs 28-30, (*c*) show clearly, as it seems, that the father's power is there intended to be legally restricted, except in the particular cases specially provided for. (*d*) But for this, indeed, para. 33 (*e*) would be almost unmeaning; and the next paragraph (*f*) which Vijñâneśvara explains (Sec. 5, pl. 1, *ibid.* 392), as relating to self-acquired property, would be superfluous, if the father could give any share he pleased to any son. So too would the permission (Sec. 5, pl. 7) to the father to reserve two shares of such property for himself in making partition *suo motu*. Sec. 5, pl. 10 (*g*) restates the son's right in the father's as well as the ancestral property; and the object of the discussion at that place being to restrict the scope of the texts affirming the son's dependence, not to extend the father's power, it would not be reasonable to extract from it a contradiction to the principles in Sec. I., which it is plain, from para. 33 of that Section, that the author did not intend. (*h*) His view was apparently that which Devâṇḍa Bhaṭṭa adopt-

(*a*) I. L. R. 1 All. 394.

(*b*) Stokes, H. L. B. 375.

(*c*) Stokes, H. L. B. 376.

(*d*) In the Panjâb it appears that an owner cannot in some districts give away his immoveable property whether ancestral or self-acquired without the consent of his sons or male gotraja-sapiṇḍas. *See* Panj. Cust. L. Vol. II. pp. 164-166.

(*e*) *Ibid.* 377.

(*f*) Sec. 2, para. 1, *ibid.* 377.

(*g*) *Ibid.* p. 393.

(*h*) *See* the Smṛiti Chandrikâ, Ch. II., Sec. 1, para 22; Dâyakrama Sangraha, Ch. VI. para. 11, 14 (Stokes, H. L. B. 510, 511).

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ed,—a view illustrated by the cases of women and minors,—ownership with joint executive power as to ancestral, without it as to paternal property, vested in the sons in virtue of their sonship. (*a*) At the same time Nârada excludes a parent's gift from partition. Mit. Ch. I. Sec. 1, p. 19, (*b*) and Yâjñ. (II. 124), says "Whatever property may be given by the parents to any child shall belong to that child." So also Vyâsa in Coleb. Dig. Bk. V. T. 354. This is allowed by Vijñâneśvara to qualify the rights of other children (Mit. Ch. I. Sec. 6, pl. 13, (*c*) and would possibly, notwithstanding Ch. I. Sec. 2, pl. 13, 14(*d*) cover the cases of *Sital* v. *Madho*, and *Baldeo Das* v. *Sham Lal*. (*e*) These assign to the father a power of disposition even over the ancestral property, qualified only by the son's right to call for partition, which does not seem reconcileable with Mit. Ch. I. Sec. 1, pl. 29 (*f*) or with Sec. 5, pl. 9 (*ibid.* 393). (*g*) The passage quoted from Coleb. Dig. Bk. V. T. 433, Comm.: "They (the sons) have not independent dominion, although they have a proprietary right," is a statement of the supposed doctrine of Vâchaspati Miśra as to self-acquired property, in an argument which construes the text, Yâjñ. II. 121, Coleb. Dig. Bk. V. T. 92, in a sense different from that insisted on in the Mit. Ch. I. Sec. 5. (*h*)

Prof H. H. Wilson observes on this subject, in Vol. V. of his Works, at p. 74—"We cannot admit either, that the owner has more than a contingent right to make a very

(*a*) *See* Colebrooke at 2 Str. H. L. 436.

(*b*) Stokes, H. L. B. 373.

(*c*) Stokes, H. L. B. 396; comp. *supra*, p. 194.

(*d*) Stokes, H. L. B. 380.

(*e*) I. L. R. 1 All. 394 and 77.

(*f*) Stokes, H. L. B. 376.

(*g*) *See* 1 Str. H. L. 122; 1 Macn. H. L. 14.

(*h*) Stokes, H. L. B. 391. *See* Coleb. Dig. Bk. II. T. 15, Comm.; Vivâda Chin. pp. 225, 72, 76, 79, 250, 309; *B. Beer Pertab Sahee* v. *M. Rajender Pertab Sahee*, 12 M. I. A. 1; *Bhujangrâv* v. *Mâlojirâv*, 5 Bom. H. C. R. 161, A. C. J.; *Lakshman Dâdâ Nâik* v. *Râmchandra Dâdâ Nâik*, I. L. R. 1 Bom. 561; 2 Macn. H. L. 210; *Mahasookh* v. *Budree*, 1 N. W. P. R. 57. As to care for a son unborn, *see* 6 M. I. A. at p. 320.

unequal distribution of any description of his property, without satisfactory cause. The onus of disproving such cause, it is true, rests with the plaintiff, and unless the proof were too glaring to be deniable, it would not of course be allowed to operate. We only mean to aver that it is at the discretion of the Court to determine whether an unequal distribution has been attended with such circumstances of caprice or injustice as shall authorise its revisal. It should never be forgotten in this investigation, that wills, as we understand them, are foreign to Hindû law."

As to the attempted validation of such a distribution on the principle of *factum valet*, he says, *ibid.* p. 71—"It is therefore worth while to examine this doctrine of the validity of illegal acts. In the first place, then, where is the distinction found? In the most recent commentators, and those of a peculiar province only, those of Bengal, whose explanation is founded on a general position laid down by Jîmûtavâhana; 'therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one: but the gift or transfer is not null, for a fact cannot be altered by a hundred texts,' Dâyabhâga, p. 60. (*a*) This remark refers, however, to the alienation of property, of which the alienor is undoubted proprietor, as a father, of immoveable property if self-acquired, or a coparcener of his own share before partition: but he himself concludes that a father cannot dispose of the ancestral property, because he is not sole master of it. 'Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.' Nothing can be more clear than Jîmûtavâhana's assertion of this doctrine, and the doubt cast upon it by its expounders, Raghunandana, Śri Krishna Tarkâlankâra, and Jagannâtha is wholly gratuitous. In fact

(*a*) Stokes, H. L. B. 207.

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the latter is chiefly to blame for the distinction between illegal and invalid acts."

§ 9.—THE TESTAMENTARY POWER.

"In Hindû Law," as Sir H. S. Maine says, (*a*) "there is no such thing as a true will. The place filled by Wills is occupied by Adoption." The learned author shows that a will when invented by the Romans "was at first not a mode of distributing a dead man's goods, but one amongst several ways of transferring the representation of the household to a new Chief." (*b*) The subordinate position to which amongst the Romans the Religious was reduced, as compared with the Civil, law, distinguishes it from the Hindû system. In the latter, too, the *patria potestas* has never perhaps been allowed to go the extravagant lengths which were long tolerated by the Romans. (*c*) A man's wife and his child are his "own," but in a sense, as Jagannâtha explains, quite different from that in which property is his own. (*d*) The equal right of sons in the patrimony being recognized, and the right to

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(*a*) Anc. L. Ch. VI. p. 193 (3rd Ed.). *See* Col. Di. Bk. V. Ch. I. Art I. Note. *See* above, p. 181, and the remark of H. H. Wilson, p. 212.

(*b*) *Op. cit.* 194. In England the estate seems in early times to have been completely represented by the heir. The system of tenures made a universal succession impossible when different feuds were held from different lords, but the executors still take a qualified "universitas" in the personal estate.

(*c*) *See* Nârada, Pt. I. Ch. III. 36 ss. Ownership of property was at least very early distinguished by the Hindûs from the relation of a father to a son. *See* Vyav. May. Ch. IV. Sec. I. paras. 11, 12; Ch. IX. para. 2. The destruction or exposure of infants, especially of females, was disapproved perhaps, but tolerated without severe censure in both Greece and Rome. The sacredness of the human being as such is a Christian doctrine; but mere humanity has in this respect given to the Hindû ethical system a great advantage over classical paganism or the defective civilization of China. *See* Terence, Heaut, IV. I. 22; Schoeman, Ant. Gr. p. 501, 104; Manu IX. 8, 45; Coleb. Dig. Bk. I. Ch. V. T. 188, 219.

(*d*) Col. Dig. Bk. III. Ch. IV. T. 6, 7, Comm.; Vya. May. *loc. cit.*

subsistence of all at any rate who are under the *potestas* or lordship of the head of a family, (*a*) he is not allowed as he was at Rome and at Athens, too, to reduce them to want by selling or otherwise disposing of the estate. (*b*)

The first intention of wills at Rome was probably to provide successors when natural heirs failed, then to provide for members of the family excluded by the rigorous provisions of the law of inheritance from their due share in a testator's property; it was only as a corrupt abuse that they were employed to disinherit the heirs, a purpose considered so unnatural and unlikely that it had to be expressed explicitly in order to obtain effect. (*c*) At Athens there seems to have been full power of alienation by a householder *inter vivos*; (*d*) but he could not by will disinherit his heirs—not even his daughter as heiress—though he could practically bequeath her and the estate together to some one who would take her as wife. The English law, a century after the Conquest, disallowed a will or a death-bed gift of the patrimony without assent of the heir, (*e*) and regarded it as inseparably united to the

(*a*) Col. Dig. Bk. II. Ch. IV. T. 11, 12, 15, 18, 19, Comm.; 26 Comm.; Yâjñ, II. 175; 2 Str. H. L. 16. For the case law, *see* Bk. II. Introd.

(*b*) In Attica the older law seems like the older Hindû law to have allowed mortgage, or rather a *vivum vadium*, but not sale, and in general "a remarkable recognition was shown of the necessity of guarding against the sub-division of property, of maintaining each family in possession of its ancestral estates." *See* Schoeman, Ant. Greece, pp. 323, 104. Under the earlier English as under the Hindû law an interest of the son even in purchased lands was recognized so that the father could not wholly disinherit him. *See* Glanv. p. 142 (Beames's Transl.); Mit. Ch. I. Sec. I. para. 27; 2 Str. H. L. 10, 12.

(*c*) Maynz, Cours de Droit Romain, III. 236 ss. Comp. Vyav. May. Ch. IX. paras. 6, 7; Col. Di. Bk. II. Ch. IV. T. 15 Comm. Perhaps, as under some of the Barbarian Codes, no mode could be devised for the alienation of the patrimony which did not take the guise of an heirship replacing the real one.

(*d*) *See* Smith's Dict. of Ant. Tit. Heres.

(*e*) Glanville, pp. 140, 141, 165. Blackstone approved the restrictions, 2 Comm. 373.

family. "Si bocland habeat quam ei parentes dederint, non mittat eam extra cognitionem suam." (*a*) The earlier ideas still prevail amongst the Hindûs. They still regard with horror the disinheritance of a son unless he has proved himself an enemy of his father, from whose celebration of the Śrádhs no spiritual benefit is likely to arise. (*b*) Failing a son by birth the simple expedient of adoption provides one who can equally rescue his adoptive ancestors from the vexations of "Put." Even in the absence of a son there is an elaborate and far-reaching scheme of succession provided by the law which disposes of the estate, and at the same time provides for the sacrifices which it was the part of the deceased owner in his life to maintain, and which after his death he is entitled to share. The need for a universal successor created by appointment having thus not been seriously felt, ingenuity has not been stimulated to furnish the appropriate remedy. It would be seldom indeed that an heir would not be forthcoming; the duties and obligations of the deceased are attached by the law to his representatives and to those who actually take his property, (*c*) and a system of free testamentary disposition tends to lessen those pious grants for religious and charitable purposes to which a proprietor resorts rather than leave his estate quite ownerless, and by which he at once improves his own chances of comfort in the other world and the means of comfort in this world for some members of the most revered and influential caste. (*d*)

(*a*) Ll. Hen. I. Cap. 70.

(*b*) Col. Dig. Bk. V. T. 318, 320, Comm.

(*c*) *See* Nárada, Pt. I. Ch. III. 22, 25; Vyav May. Ch. V. Sec. IV. para. 12—17; and Comp. Glanv. Ch. VIII.; Bract. 61 a.

(*d*) Col. Dig. Bk. II. Ch. IV. T. 35, 36, 41, 42, 64.

The English law as to superstitious uses is not in force amongst Hindûs. See *The Advocate General* v. *Vishvanáth Átmárám*, 1 Bom. H. C. R. IX. App., where this subject is elaborately discussed. Several cases of the enforcement of Hindû charitable trusts are referred to in the preceding article. Reference may be made to *Fátmábibi* v. *Adv. Gen.*, I. L. R. 6 Bom. 42, 50, for the principles governing this

The system of partition at the will of a son or other co-sharer must be admitted as another reason in the pretty wide region in which it was accepted why the necessity for wills did not become pressing. The emancipated son amongst the Romans was wholly severed from the family, was as an utter stranger to his father and his estate. In India the separating son must be endowed with a real or at least a fictitious share of the property accepted by him as his fair portion. If a general partition has been made he retains a right of inheritance. Inheriting or not inheriting property he must offer sacrifices and pay his father's debts. (*a*) The looser and less tyrannical constitution of the family which the humaner spirit of the Hindûs has framed as compared with that of the fierce Roman spearmen has thus made most of the arrangements possible *inter vivos*, or provided for them after death, which would strike the householder as desirable. Custom, immensely influential even when not consecrated as a law, disapproves contrivances which would set aside its own sufficient rules ; and while the nearest successors cannot be excluded from the patrimony and its accretions, (*b*) the imposition of conditions and limitations

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class of cases. The Hindû law, like the Mahomedan law, instead of regarding religious grants with jealousy treats them with special favour, *see* above pp. 99, 197; Co. Di. Bk. II. Ch. IV. T. 35 ss.; though they are not to be used as a mere cloak for private perpetuities (above, p. 184, 200); nor must they be made a means of reducing the family to want (above p. 194; Co. Di. B. II. Ch. IV. T. 10, 19, Comm). The interest of the State in religious endowments is asserted (Nârada, Transl. p. 115), but no limitation as to time has been imposed on grants by the Hindû law analogous to the English statute 9 Geo. II. Cap. 36, or the Mahomedan law restricting the "marz ul mawat."

(*a*) Nârada, Pt. I. Ch. III. 11. *See* now *supra*, p. 80.

(*b*) The Mitâkshará, Ch. I. Sec. I. para. 27, disenables a father from alienating even his own acquisitions of immoveable property without the sons' concurrence, as they have a right by birth in both the ancestral and in the paternal estate. See *Tara Chand* v. *Reeb Ram*, 3 M. H. C. R. at p. 55; though this doctrine has not been accepted in Bombay. For the present law, *see* p. 208, and Bk. II. Introd. § 7 A, 1 *a*, with the cases there cited.

creating rights in favour of persons who do not exist to take them is opposed to Hindû conception. (*a*) The now common direction that a property given or devised shall not be divided or alienated cannot be stronger than the ancient law to the same effect(*b*); and as the one is over-ridden by the conjoint volition of those interested, so too is the other. The immediate passing of a right from the creator of it to the beneficiary is as essential to its passing at all by force of the intention, (*c*) as under the English law the absence of any interval between a preceding estate and a remainder was requisite to make the latter good. The estate under the Hindû law like an English freehold at Common Law cannot be made to commence *in futuro*, but neither can it be conferred save on some existing subject of the right for whose benefit the entry or acceptance of the taker of the immediate particular estate may enure. (*d*) Conditions suspending the completion of a gift on a contingency make it inoperative save as a promise. (*e*)

These considerations as they show that an executory devise as distinguished from a remainder could not properly be received into the Hindû system, may serve to account for the absence of any general craving for a testamentary power. Such a power is looked on not as a part of the order of nature, as speculative jurists in Europe have regarded it, but rather as opposed to the order of nature; (*f*) and the great

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(*a*) *See* above, p. 179; and *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8, I. A. at p. 61.

(*b*) *See* Col. Dig. Bk. V. Ch. I. Art. I.

(*c*) Datt. Mim. Sec. IV. para. 3.

(*d*) Jagannâtha strives to make out that there can be a present gift of property not taking effect until after the donor's death. He employs two arguments for this purpose; but he does not deal with the question as even a possible one, of whether a bounty can be conferred on a non-existent person. *See* Col. Dig. Bk. II. Ch. IV. T. 43, 56, Comm.

(*e*) *See* above, p. 179.

(*f*) Comp. Plato, Laws, XI., and Grote's Plato, III. 434.

accumulations of separate property on which a will could safely be made to operate were until recently almost unknown. Unless, too, the testator could mould the estate more freely than by a mere remainder of the property acquired by himself, it would but insufficiently serve the purposes which in modern times people try to effect by means of executory devises. He might choose amongst the living the objects of his bounty, but could not, as English equity allowed, create rights opposed to his Common law.(*a*) Such a limited power not substantially exceeding what he could do by gift, with or without a reserve in his own favour, was hardly worth striving for.

The Roman law allowed a paterfamilias to name the continuator of his own civil personality. The English law now allows the creation of an estate without actual change of possession. Both are opposed to Hindû notions; the religious law prescribes who shall perform the sacrifices, who shall be heir or joint-heirs; it recognizes no actual transfer of an ownership of material objects without a change of the possession in the enjoyment of which the exercise of the right consists. Without this change there is an equitable right, but it avails not against actual delivery to one accepting without fraud.(*b*) But in the case of a will there can be no delivery to make the gift effectual. (*c*) An entry by a devisee is not the counterpart of a resignation by the preceding holder in which his volition to give up his right is

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(*a*) *See* above, pp. 178, 180, 184.

(*b*) *Lallubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. 299. *See* Index, Possession; Yâjn. II, 27; and Mit. *ad loc.*

(*c*) Jagannâtha argues for a sort of *constitutum possessorium* (*see* Savigny, Possession § 27) as being sufficient to complete a gift. *See* Col. Dig. Bk. II. Ch. IV. T. 13, Comm.; T. 56, Comm. But the right in these cases passes by a consentaneous volition of both parties which extends to a mental transfer and retransfer of the actual possession impossible in the case of a true testament, though effectual in the case of a *Mṛityu Patra*, as will be seen below. *See* Col. Dig. Bk. V. Ch. I. Art. I. Text cited from Dhaumya, and Commentary.

simultaneous with his releasing of the physical detention to the donee. There is hardly even a moral right, as the utterance of the volition has been deferred until it could not amount to a promise or engagement. A will therefore in the modern English sense could no more take effect than a gift without delivery. Piety might induce the heirs to conform to it, but there would not be any right *in rem* enforcible against them. (*a*) As a will therefore could neither serve its earlier purpose under the Roman law, nor its modern purpose arrived at by gradual development from that earlier one, it is not surprising that it should not have been invented or developed from the somewhat analogous instruments which were effectual because they conformed to the spirit of the Hindû law. A *donatio mortis causa* is recognized, and on this Jîmûtavâhana has attempted to found heritage as an implied gift by the owner; (*b*) but, as Jagannâtha observes, the comparison fails in as much as in heritage there is no surrender with a corresponding acceptance of the owner's property.

At present, as we have seen, a Hindû's power to dispose by will of whatever property was absolutely his own must be considered as finally established. (*c*) It is only necessary to bear in mind that he cannot defeat by will the rights which subsist independently of his wishes, (*d*) and that he cannot

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(*a*) Seisin being requisite to an effectual gift of land under the early English law, a testamentary disposition of it was invalid without the consent of the heir. Glanv. p. 140, 141. It will be remembered that Tacitus observes on the absence of wills amongst the Germans. Family and tribal rights took instant effect on the death of the late owner.

(*b*) Col. Dig. Bk. V. Ch. I. Sec. I. Art. I.

(*c*) *See* above, p. 181. This excludes a testamentary disposal of property held by others in common with the testator. *Vásudeo Bhat* v. *Venktesh Sanbhav*, 10 Bo. H. C. R. 139, 157; *see* also *Vrandávandás* v. *Yamunabái*, 12 Bo. H. C. R. 229, referring to *Gangabái* v. *Rámanná*, 3 Bo. H. C. R. 66 A. C. J.

(*d*) See *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*, L. R. 7 I. A. at p. 194; *Vitla Butten* v. *Yamenamma*, 8 M. H. C. R. 6.

create interests or impose restrictions which the Hindû law does not recognize. Nor can the Hindû testator get rid of those claims to subsistence (*a*) as to which he is allowed a large discretion so long as he satisfies them at all, but which may be turned into defined charges when there is an attempt to evade them altogether. (*b*)

Though wills are unknown to the Hindû law, mrityu patras are common. These are of the nature of a conveyance to operate after the death of the grantor, (*c*) or immediately subject to a trust in his favour for his life. (*d*) Devises of land under the Statute of Wills, 32 Hen. VIII., c. 1, were formerly regarded as of a similar character. The will was of the nature of "a conveyance passing the freehold according to the intent or declaring the uses to which the land should be subject." (*e*) Similarly under the Roman law "the mancipatory testament," as it may be called, differed in its principles from a modern will. As it amounted to a conveyance out and out of the testator's estate it was not revocable. There could be no

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(*a*) *See* Col. Dig. Bk. II. Ch. IV. T. 7; H. H. Wilson, Works, V. 68.

(*b*) *See* pp. 79, 80, and the Section on Maintenance; *Narbadabâi* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99, and the references.

(*c*) *See* Col. Dig. Bk. II. Ch. IV. T. 43, Comm.; 2 Macn. H. L. 207.

(*d*) The one quoted in *Rágho Govind Parájpe* v. *Balvant Amrit Gole*, P. J. for 1882, p. 341, provides for payment of the grantor's debts, and sets forth a provision for his declining years as a purpose in view, but does not explicitly impose this as an obligation on the grantee. In the one quoted in *Rámbhat* v. *Lakshman Chintaman*, I. L. R. 5 Bo. 630, there is a conveyance to the donee coupled with the reservation, "As long as I live I will take the profits and you should maintain me as if I were a member of your family." It was held that this was a conveyance subject to a trust. The grantor afterwards sought to get the deed set aside. He adopted a son *pendente lite*, and the son was allowed to sue the grandson of the donee who had obtained a decree in his favour and possession in the suit brought by the donor. It was held, however, that the gift, as the deed contained no power of revocation, could not be recalled.

(*e*) Spence, Equity Jurisp. vol. I. p. 469; 6 Cr. Dig. 6.

new exercise of a power which had been exhausted. (*a*) Wills were allowed by the XII. Tables; and the essential ceremonies were gradually modified by the exercise of the praetorian equitable jurisdiction, as in England the Court of Chancery showed "unbounded indulgence to the ignorance, unskilfulness, and negligence of testators." (*b*) It is probable that the mṛityu patra of the Hindûs would under the influence of equitable doctrines have received a corresponding development from the English courts. Thus though Jagannâtha insists on a transfer of possession, or at least the semblance of a transfer to make the donation good, yet means would no doubt have been found to give effect to the transfer without an entry. That a devise should "import a consideration in itself," would not be necessary according to Hindû notions, (*c*) but a change of possession is essential to a valid gift, (*d*) and this has to be dispensed with in giving effect to an ordinary will as now construed. But he who takes possession may conformably to Hindû principles take it for himself and as agent for another, or in trust for another as by way of remainder; and in this way estates for any life in being, as they could be created by ordinary grant and acceptance, could be created by mṛityu patra. (*e*) In the Presidency towns the ready-made system of England has in a great measure superseded the indigenous instru-

(*a*) Maine, Anc. Law, Ch. VI. p. 205. (3rd Ed.). *See* Clark, Early Rom. Law, p. 117 ss.; Mommsen, Hist. of Rome, Ch. XI. Engl. Transl. vol. I. p. 164.

(*b*) Spence, *op. cit.*

(*c*) Still an undivided co-sharer cannot dispose of his share by gift or bequest. See *Lakshmishankar* v. *Vaijnâth*, I. L. R. 6 Bom. 25; *Râmbhat* v. *Lakshman*, I. L. R. 5 Bom. 630. But that is on account of the inefficacy of his single will in dealing with what is not his sole property. *See* Mitâksharâ, Ch. I. Sec. II. para. 30; Coleb. Dig. Bk. II. Ch. IV. T. 28, Comm.

(*d*) Yâjñ. II. 27; Nârada, I. Ch. IV. paras. 4, 18; *see* Transl. pp. 23, 25, and Corrigenda; Coleb. Dig. Bk. II. Ch. IV. T. 32, and Comm.

(*e*) Comp. *Ram Lall Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at p. 61.

ment. Still even there mrityu patras occur, at least in the city of Bombay, and in the mofussil they are common. Many which come into the courts are of an age that negatives the supposition of their being a mere adoption or imitation of the English will. (*a*) They are construed with as little regard as may be to technical rules, but the trust or use created by such an instrument is not now deemed void or revocable on a failure of the trustee to fulfil his duty: (*b*) he is instead made to do the duty he has accepted. (*c*) The greater power and expertness of the courts under the British rule make a complete satisfaction of justice possible in this way, or at least a greater approximation to it than by the strictly Hindû method of taking back the property when the promise or alleged promise upon which it was given and taken has been falsified. (*d*)

As to the form, a nuncupative will is effectual; (*e*) and so is a parol revocation. (*f*) But as a will is a unilateral document

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(*a*) As some have accounted for the testament used in Bengal. See Maine, Anc. Law, p. 197 (3rd Ed.). Wills became common in Bengal really because of the view held there that each parcener in a united family had a distinct though undivided portion and could dispose of it by gift and consequently by will. *See* Coleb. in 2 Str. H. L. 431; Dâyakrama Sangraha, Ch. XI.

(*b*) This is not in any way inconsistent with the principles of the Hindû law. *See* the distinction drawn by Jagannâtha between the property held by a husband in trust for his wife and the subordinate dependent property of the wife in her husband's ordinary estate. Col. Dig. Bk. II. Ch. IV. T. 28, Comm.; T. 30.

(*c*) *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

(*d*) Nârada, II. IV. 10; Col. Dig. Bk. II. Ch. IV. T. 53 Comm., T. 56 Comm., T. 65 Comm.; Vivâda Chintâmani, pp. 83, 84; Vyav. May. Ch. IX. 6.

(*e*) *Bhagvân Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641; *Mancharji Pestonji* v. *Narayan Lakshumanji*, 1 Bom. H. C. R. 77 (2nd Ed.) and the cases there referred to.

(*f*) *Maharaj Partab Narain Singh* v. *Maharanee Soobha Kooer et al*, L. R. 4 I. A. 228. For the statute law, *see* below.

According to the English Common Law lands devisable by custom might by custom be devised orally, Co. Lit. 111 A., and this continued

operating on the principle of a gift, it would seem that where the statute law has not prescribed a mode of authentication the mode followed in analogous cases ought to be followed. In *Rádhábái* v. *Ganesh* (*a*) it was ruled that the common direction given in the Vyav. May. Ch. II. § 1, para. 5, does not apply to a Hindû's will as that is a document not recognized by the Hindû law. That direction is that a document recording a purchase, gift, partition, or the like should either be a holograph of the person to be bound by it, or else signed by him and by witnesses including the writer, who are intended to attest not merely the signature of the party but the transaction and the writing itself which is usually, though not always, read out to them. (*b*) This was formerly the case in Europe also. (*c*) Custom, however, is recognized as governing the mode of proof, (*d*) and by mutual assent of the parties a document may be proved by a single attesting witness. (*e*)

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until by the Statute of Frauds (29 Car. II. Ch. 3) writing attested was made necessary. For personal property a nuncupative will sufficed till long afterwards. The law now regulating English wills is 7 Wm. 4 and 1 Vic. c. 26.

(*a*) I. L. R. 3 Bom. 7.

(*b*) Col. Dig. Bk. II. Ch. IV. T. 33, Comm. *See* Mit. in Macn. H. L. 269 ss.

(*c*) *See* Laboulaye, Hist. du Dr. de Prop. p. 381; Bracton, 38, 396; Co. Lit. 6 A. In Canciani's "Leges Barbarorum," vol. II. p. 475, are two Lombard formulas, one showing that land could not be sold except under absolute necessity, and the other that a conveyance was established by reading it out in Court and calling on the by-standers to witness the transaction.

(*d*) *See* Col. Dig. Bk. I. Ch. I. T. XIII. ss.; Bk. II. Ch. IV. T. 33, Comm.; and the Śâstri's response in *Doe* v. *Ganpat*, Perry's Or. Ca. at p. 137.

(*e*) Vyav. May. Ch. II. § III. para. 3.

The Roman *testamentum Comitiis Calatis*, even when oral, as it seems at first to have often been, was a very ceremonious proceeding, checked by the presence of priests and tribesmen. Wills being now recognized it may be expected that the forms attending them will ere long become uniform, as the statutes intend. *See* the case cited note (*b*) next page.

In the Presidency of Bengal and in the cities of Madras and Bombay, Act XXI. of 1870, by making Sec. 100 of the Succession Act, X. of 1865, applicable to the Wills of Hindûs, has rendered a bequest invalid "whereby the vesting..... may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age the thing bequeathed is to belong." This contemplates a power of disposition extending further in time than the Hindû law allows, as by that some one in existence at the testator's own death must be the ultimate legatee.(*a*) Section 102 of the Succession Act makes inoperative a bequest to a class which may be not finally completed within the prescribed time, and Section 103 annuls a bequest made to take effect after or on failure of a prior bequest which the Act declares void. (*b*) These are not rules of the Hindû law, and are rather opposed to its principles, which, once its conditions have been satisfied, point rather to those who are capable of benefiting by the intended bounty being taken as the class intended rather than to its failing altogether, and to a remoter bounty being accelerated rather than destroyed by the nullity of an intermediate one, as the delivery in a gift to any other than the donee is conceived as made to him as agent for the donee conceived as existing; but the rules must be all the more carefully borne in mind by the student. It has been held (*c*) that the effect of Act XXI. of 1871 is to make the rule of construction laid down in the *Tagore* case inapplicable to Hindû Wills made subsequently to the Act, but this has been reversed. By Sec. 3 of Act XXI. of 1870 it is said "that nothing herein contained shall authorize

(*a*) *See* the *Tagore* Case, L. R. S I. A. 47; S. C. 9 Beng. L. R. 377; *Sir Mangaldás Nathubhoy* v. *Krishnábái*, I. L. R. 6 Bom. 38.

(*b*) Comp. the observations of Pontifex, J., in *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Calc. at pp. 388 ss., and in *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Calc. 262, with *Alangamonjori Dabee* v. *Sonamoni Dabee*, I. L. R. 8 Calc. 157.

(*c*) *Alangamonjori Dabee* v. *Sonamoni Dabee*, I. L. R. 8 Calc. 157, 637.

a testator to bequeath property which he could not have alienated *inter vivos* or to deprive any person of any right of maintenance.....And that nothing herein contained shall vest in the executor or administrator.....any property which such (deceased) person could not have alienated *inter vivos*." "And that nothing herein contained shall authorize any Hindû .....to create in property any interest which he could not have created before the 1st September 1870." (*a*) By Sec. 4 of Act V. of 1881, however, "all the property" of a person deceased vests in his executor or administrator, "but nothing herein contained" it is said, "shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person." (*b*) Instead of the power of alienation *inter vivos*, therefore, we must now look to survivorship for determining whether an executor takes the property of a testator. By Sec. 4 coupled with Secs. 2 and 3 it appears that the estate may be vested in an executor who at the same time cannot obtain probate. The will, too, if made outside the cities of Madras and Bombay and disposing of property outside those cities, may be truly such within the definition given in the Act, at the same time that none of the provisions of Act X. of 1865 apply to it, which under Act. XXI. of 1870 apply to wills made in those cities or disposing of immoveable property within them. It will hence be necessary in the mofussil to consider what under the Hindû Law amounts to "a legal declaration of the intentions of the testator with respect to his property," without regard to the provisions of Act. X. of 1865, and apparently to recognize all his property as vesting in the

(*a*) These provisions govern Secs. 98, 99, 101 of the Succession Act. *See* the cases note (*b*) p. 224.

(*b*) Previously it was said (for the Presidency Towns) "The Statute 21 Geo. III. C. 70, puts an end to the title of the administrator, as such, when set in competition with the right of the heir by Hindû law, and when it is in proof that all the parties are Hindûs." *Doe dem Goculkissore Seat* v. *Ramkissno Hazarah*, 1 Morl. Dig. p. 246; and see *ibid.* 245; 1 Taylor and Bell 10.

executor (*a*) except such as goes to his co-members of a united family or others taking by survivorship.

Within the presidency towns or under a will made within them it would seem that the creation of a perpetuity for any purpose whatever is prevented by Sec. 101 of Act X. of 1865, while in the mofussil a will made there may create for religious or charitable purposes a perpetuity subject only to the conditions already noticed. (*b*) The statute law on the points just discussed is, however, so complicated and contradictory in principle that it is not possible to say with confidence what view may be taken by the Courts after argument. Under these circumstances it is perhaps fortunate that as lately ruled, (*c*) the law does not oblige a person claiming under a will in the mofussil to obtain probate or to establish his right as executor, administrator or legatee before he can sue in respect of any property which he claims under the will in the mofussil.

The effect of a will on the mutual relations of those taking under it has already been partly considered. (*d*) In *Tara Chund* v. *Reeb Ram*, (*e*) an illegitimate half-caste, devised property which his European father had given to him, to his three sons, who took their several shares as separate estates. On this Holloway, J., says "We can see no ground whatever for doubting that the property which came to the first defendant

(*a*) *i. e.* where there is one; and where there is not, in him who obtains administration. Act V. of 1881, Secs. 4, 14.

(*b*) *Tagore* Case, L. R. S. I. A. at p. 71.

(*c*) *Bhagvánsang Bhárájí* v. *Bechardás Harjivandás*, I. L. R. 6 Bom. 73. If he sues as executor or administrator he must of course set forth his qualification. *See* Civ. Pro. Cod. Sec. 50. As a legatee where probate is possible he will apparently be bound by the condition in Section 187 of the Succession Act, as probate and administration operate from the moment of the testator's death to vest the property in his representative thus constituted. *See* Act V. of 1881, § 4, 12, 14.

(*d*) Above, pp. 195, 196.

(*e*) 3 Mad. H. C. R. 50.

from his father is, as he himself treats it, ancestral property. It seems to us that there is no reason whatever in the contention that its quality was changed by his choosing to accept it apparently under the terms of his father's will. Still less ground would there be for the contention that his acquiescence in that mode of receiving it would vest in himself a larger estate than he would have taken by descent. On what principle can he be conceived capable, by any act of his, of depriving his children of a right given to them by the doctrines of the Mitâkshará at the very moment of their birth? The argument, therefore that this property is unsusceptible of partition, because self-acquired, seems to us to fail entirely."

The property, however, if the Hindû law was properly applicable, as being a gift, ranked as self-acquired property of the half-caste father. It was only as such that he could dispose of it; but as such he could and did dispose of it, and the three sons taking separately instead of jointly took by the will, that is according to the Hindû law by a gift recognized by the Courts as effectual though wanting one of the ordinary requisites. There was no partition amongst the three brothers; that would have indicated inheritance, and their shares would have been inherited property; its absence shows that they took under the will only, and held their shares as property devised or given. Such property ranks for the purposes of the Law of Partition as self-acquired, and it would seem that although the father (defendant) could not dissipate it so as to leave his son (the plaintiff) destitute, he could not be called on to divide it against his will. On his death his sons would inherit equally, and an attempt to disinherit one of them without good cause would expose the will to a risk of being set aside as inofficious according to the recognized principles of Hindû law.(*a*) In the case of *Vináyak Wásoodev* v. *Parmánundás* (*b*) Sir C. Sargent, J., held that where two brothers took equal shares in

(*a*) *See* Mit. Ch. I. Sec. II. para. 14.

(*b*) Unreported.

property under their father's will, they constituting with their father an undivided family, there would be great difficulty in holding that they took as heirs an estate different from what in the ordinary course would have descended to them in that character. The father had been one of three brothers carrying on business in partnership, and two of the three had died after making wills, by which their shares came to the third. They were held to have been separate in estate, and the survivor of the three to have taken the whole as self-acquired property. He could therefore deal with it at pleasure, and his bequest of a lakh of rupees in charity was upheld. This judgment was affirmed in appeal, and an appeal to Her Majesty in Council has been dismissed.

The extent to which a control of the devolution and of the enjoyment of property bequeathed by will is permitted, has been already discussed. (*a*) The construction of testamentary instruments executed by Hindûs is governed by the Hindû law, and on this point the Judicial Committee have said "The Hindû law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, (*b*) and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the

(*a*) *See* above, pp. 178, 181.

(*b*) See *Barlow* v. *Orde*, 13 M. I. A. 277; *Moulvie Mahomed* v. *Shavukram*, L. R. 2 I. A. 7; and comp. *Maniklal* v. *Manikshа*, I. L. R. 1 Bom. 269.

testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."(*a*)

Similar principles are laid down in the *Tagore* case (*b*) in which it is further said (*c*) "The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances, to be conferred." As a will on the principle of furthering a bountiful intention of the testator receives a benignant construction as compared with the narrower construction of a document in which benevolence has had no part, (*d*) words primarily importing male lineal succession may be interpreted as conferring an estate of general inheritance, and when it is consistent with the language employed, a time will be chosen for the commencement of a future estate which will give effect to it, rather than frustrate the apparent intention. (*e*) Effect cannot be given to a devise merely to "dharm," that term being too vague, (*f*) but a bequest for specific chari-

(*a*) *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 M. I. A. 550–551. A will expressed in English must be construed according to the intention as gathered from the English words, not according to the possible sense of the Vernacular words that may have been used in the instructions. See *Gangbai* v. *Thavar Mulla*, 1 Bom. H. C. R. at p. 75. English expressions are, it would seem, to be construed according to the English law. See *Martin* v. *Lee*, 14 M. P. C. 142. But regard must be had in the case of immoveable property to the rule that the language is to be applied according to the law of its place.

(*b*) *Tagore* case, L. R. S. I. A. at pp. 64, 65, ss.

(*c*) *Ibid*, p. 79.

(*d*) *Doe dem Cooper* v. *Collis*, 4 T. R. 294.

(*e*) See *Ram Lall Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. 46, 62; S. C. I. L. R. 7 Calc. 304.

(*f*) *Gangbai* v. *Thávar Mulla Mulla*, 1 B. H. C. R. 71.

table purposes recognized as beneficial by the Hindû law will be maintained, as *ex. gr.* "for the performance of ceremonies and giving feasts to Brahmans." (*a*) The words "putra pautrádi krame" include female heirs as well as male descendants of a female. A bequest, however, which has for its object to tie up the corpus and give the profits to male descendants is invalid. (*b*)

§ 10.—MAINTENANCE.

In the frequent changes of fortune which occur under the British rule in India giving a new and wider field to individual activity, the claims of destitute dependants of families become more numerous and pressing, at the same time that the general prosperity is advancing. The loosening of old ties makes some members of the Hindû community less ready than formerly to provide for their indigent relatives, while the latter, advised by persons having some acquaintance with the law and the decisions of the Courts, are led to prefer their claims in a more peremptory and inconvenient form than would at one time have been thought of. The family obligation resting on sacred and affectionate associations could not be shaken or too rigidly defined without a good deal of undue harshness and encroachment being attempted on one side or the other. Hence the litigation arising out of claims for maintenance has become frequent as well as troublesome—troublesome chiefly because of the want of any exact boundary in this province between the duties enforced by the law and those imposed only by positive morality. Widows are the most frequent suitors for maintenance, owing to their helpless position during coverture and the restrictions to which they are subjected in

(*a*) *Lakshmishankar* v. *Vaijnáth*, I. L. R. 6 Bom. 24; *Dwárkanáth Bysack* v. *Burroda Persad Bysack*, I. L. R. 4 Cal. 443; a *cy près* disposal of a fund bequeathed for charity would be quite in accordance with the Hindû law. Comp. *Mayor of Lyons* v. *Adv. Gen. of Bengal*, L. R. 3 I. A. 32; and the case I. L. R. 4 Calc. 508.

(*b*) *Shookmoy Chunder Dass* v. *Monohari Dassi*, I. L. R. 7 Calc. 269.

their widowhood, but claims of children on parents as well as of parents on children, and other members of families on their co-members are becoming common enough to make it desirable to bring the principal decisions together and compare them with what can be gathered from the acknowledged sources of the Hindû law on the same class of subjects.

On the subject of the maintenance of widows, three questions have been judicially discussed since the last edition of this work was published:—(1) Whether the right to maintenance can be asserted by a widow of a separated member. (2) Whether in a united family the right is dependent on the possession by those from whom maintenance is sought of ancestral property or of property inherited from the deceased husband. (3) Whether, when the right exists, the members of the husband's family can in ordinary cases satisfy it by affording board and residence to the widow as a member of their household, or must at her option provide her with a separate income.

As to the first of these questions it is to be observed that a partition does not effect such a total severance amongst the members of a Hindû family that they stand thenceforth in the relation of mere strangers to each other. They may reunite again: they have mutual rights of succession in which fuller blood relationship between severed brethren counterbalances the effect of reunion between those of the half-blood; (*a*) the obstacles to marriage still subsist between their families; in obsequies, mourning and the ceremonial impurity arising from death, they are still relatives as they were before the partition. A woman by marriage leaves her own gotra of birth to enter that of her husband. Her closest connexion thenceforward is with his family, (*b*) whose sacrifices she shares and who succeed ultimately to

(*a*) Yâjñ. II. 139, and Vijñâneśvara's Commentary; Mit. Ch. II. Sec. IX. *See* Col. Dig. Bk. V. T. 433, Comm., and *Ramappa Naicken* v. *Sithamál*, I. L. R. 2 Mad. 182.

(*b*) *See* Vasishtha, IV. 19.

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any property which she as a widow may inherit. With her own family her connexion is altogether of a remote and secondary character. It is not destroyed, as the humane spirit of the Hindûs fordids an entire renunciation of the ties of blood, and in practice, at least amongst the lower castes, the strong mutual affection of the wife and her parents is a source of much trouble to husbands, but in the law an inexorable logic supported by sacred sanctions transfers with her person her duties and her protection to the family of marriage. In *Sri Viráda Pratáp Raghunanda Deb* v. *Sri Brozo Kishno Putta Deb* (*a*) the Privy Council say "The Hindû wife upon her marriage passes into and becomes a member of that (the husband's) family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to reside." (*b*) Her brothers therefore must "support her till her marriage, afterwards her husband shall keep her. When the husband is dead his kin are the guardians of his childless widow: in disposing of her, in protecting and maintaining her they have full power." (*c*) The word "iśvarah," here translated "power," implies an attribute of superiority which is most conspicuous in the form of active authority, but which has a more comprehensive sense. It sometimes means husband and sometimes the Supreme Being. To say "they are to control, protect and support her as her lords" obviously imposes all these functions as duties on the kindred, (*d*) and the duties are in themselves unconditional. All these ideas indeed are involved in guardianship. The perpetual dependence assigned to a woman (*e*) is accom-

(*a*) I. L. R. 1 Mad. at p. 81; S. C. L. R. 3 I. A. 154.

(*b*) *See* also per Loch, J., in *Khetramani Dasi* v. *Kashinath Das*, 2 Beng. L. R. at p. 20, A. C. J.; Col. Dig. Bk. IV. Ch. I. T. 39; Bk. V. 499 and Comm.; and comp. Maine, Anc. Law, Ch. V. pp. 153, 184.

(*c*) Nârada, XIII. 27, 28. *See* also Nârada as quoted by Devâṇḍa Bhaṭṭa below.

(*d*) So in *Ruvee Bhudr* v. *Roopshankar*, 2 Borr. at p. 725.

(*e*) Manu, V. 148 ss.; IX. 2, 3; VIII. 416; Vyav. May. Ch. XX. para. 2.

panied by an indefeasible claim to nurture, shelter, and gentle usage. (*a*) Who are to satisfy this claim? Primarily the family she has joined, not the family she has quitted. (*b*) The latter comes next in responsibility before the burden arising from utter destitution is thrown upon the caste and the community.

The general right of a widow to support according to the means of her husband's family is asserted by Newton and Janárdana, JJ., in *Sakvárbái* v. *Bhaváni Ráje Ghátge Zanjárráv Deshmukh*. (*c*) In that case the family property had been transferred by the Satárá Government from an improvident father to his son, subject to a charge for the father's maintenance. In extreme age the father married a second wife who on becoming a widow sued her step-son for maintenance. He offered to support her in his house. The Principal Sudder Amin thinking that the parties could not properly be forced to live together and that it would be equally wrong to allow the young widow to reside where she pleased, ordered the step-son to provide her with a separate apartment in his house or in his village and to pay her a monthly allowance for her support. The widow appealed against the amount of the allowance and the order as to her residence, but the District Judge affirmed the decree on the ground that she must be regarded as "living on enforced charity" and entitled only to "what will keep her." This view the learned Judges of the High Court rejected. They approved Sir T. Strange's statement that a widow is entitled to a maintenance proportioned to the circumstances

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(*a*) Manu, III. 55 ss.; Mit. Ch. II. § 1, paras. 7, 27, 28, 37; § 10, p. 14, 15; Vyav. May. Ch. IV. § 11, para. 12; Col. Di. Bk. V. T. 409; Str. H. L., I. 171, 173, 175; II. 291, 297, 299.

(*b*) *Ramien* v. *Condummal*, M. S. D. A. R. for 1858, p. 154; Pr. Co. in *Sri Virada Pratap Raghunanda Deb* v. *Sri Brozo Kishno Putta Deb*, I. L. R. 1 Mad. at p. 81; Vivádа Chintámani, 261, 262, 265.

(*c*) 1 Bom. H. C. R. 194.

of the family, (*a*) and sent down for determination the following issue, viz.: "Are the circumstances of the case such as require that a separate residence or an equivalent in money should be awarded to her (the widow) or should she be required to reside with the defendant?"

Here though the father as a prodigal had been deprived of the patrimony, and his second marriage had, it was alleged, been brought about by a trick in order to injure his son, yet the notion of the son's repudiating the step-mother's claim to maintenance seems not to have occurred to any one. The only question was as to how the maintenance was to be afforded. In the absence of exceptional circumstances the learned judges thought that it must be given and accepted in the household of the step-son. Step-mothers may perhaps be regarded as having distinct rights resting on special texts, (*b*) but their rights at any rate are recognized by the Śâstras, (*c*) as on the other hand the step-son's succession to his step-mother's strîdhana is also admitted. (*d*)

In *Chandrabhágábai* v. *Kásinâth Vithal* (*e*) the widow's husband had separated from his father and brethren. On his death she had received his property and had expended it, as also her mother's property. The Joint Judge in Regular Appeal held that the separation of her husband from his family had deprived the widow of a right to maintenance; but on Special Appeal the High Court rejected this view, reversed the judgment, and remanded the case for trial on these issues—"(1) Are the widow's present circumstances such as to give her a claim to maintenance? (2) If she is possessed of any property, what portion of it is her strîdhana?"

(*a*) So *Buljor Rai* v. *Mt. Brinja*, N. W. P. S. D. A. R. 1862, Pt. II. p. 96. There however the family was united, and had ancestral property.

(*b*) Bk. I. Ch. II. S. 14, I. A. 3, Q. 1, footnote.

(*c*) 2 Str. H. L. 316.

(*d*) Bk. I. Ch. II. S. 14, I. A. 3, Q. 1.

(*e*) 2 Bom. H. C. R. 323.

By strîdhana the learned Judges probably meant such as was not productive of an income, such as to relieve the widow from indigence, and so far free the defendant from his obligation. For the rest that obligation in spite of the partition which had taken place is recognized as binding.

In *Timappá Bhat* v. *Parameshriammá* (*a*) it was held that the right of the indigent widow to support is not affected by a partition, though the award of a separate maintenance rests in the discretion of the Court. Reference was made to *Bái Lakshmi* v. *Lakhmidás* (*b*) and to *Mula* v. *Girdharilal*. (*c*) In the District Court the case had been relied on of *Mamedala Vencutkrishna* v. *Mamedala Vencutratnama*, (*d*) and to local decisions which had shown the law in Canará, where the case arose, to be that the widow of a separated parcener was entitled to subsistence though her husband had died without ancestral property, and though the ex-parceners sued by her had none. The Madras case had ruled that maintenance could under such circumstances be claimed only in the house of the persons liable, but the District Judge had treated this condition as one that the Court in its discretion might dispense with.

The Bombay cases just referred to were reviewed in *Sávitribái* v. *Luximbái*. (*e*) The question is stated (*f*) to be: "Can the plaintiff, not finding it agreeable to live in the house of her husband's uncle, sustain this suit for a money allowance by way of maintenance against him who has separated in estate so far back as 1853, from the branch of the family to which her husband and his father (Sadasiv's brothers) belonged, and who had no paternal estate in his hands at the institution of this suit, and did not, and could

(*a*) 5 Bom. H. C. R. 130 A. C. J.
(*b*) 1 Bom. H. C. R. 13.
(*c*) S. A. 3937, decided 6th July 1853.
(*d*) M. S. D. A. R. for 1849, p. 5.
(*e*) I. L. R. 2 Bom. 573. See *Apaji* v *Gangabai*, ib 632.
(*f*) p. 581. See *Madhavrao* v. *Gangabai*, ib. 639.

not, so long as the plaintiff lived, inherit any property from her husband upon whom the estate (if any) of his father Balcrustna would have devolved?" The judgment proceeds on the two grounds, (1) that the plaintiff's husband and his father were separated from the brother of the latter sued as liable for the plaintiff's maintenance, and (2) that the defendant had not, when the suit was instituted, any ancestral estate or estate of the plaintiff's husband or his father. "Either one of these reasons, the Court say, independently of the other, is we think fatal to the plaintiff's claim to a money allowance."

Though the decision is thus limited to the denial of a right to a money allowance the reasoning extends to the denial of any claim at all by the widow of a separated member upon the other members of his family. Against the *dictum* in *Timappa's* case that "the whole policy of the Hindû law is not to allow even a distantly related widow to starve" (*a*) the learned Chief Justice urges that "for that proposition no other authority than the above cases (dissented from in his judgment) was mentioned by the Court." It would seem, therefore, that so far as any legal obligation goes the preservation of a widow from starvation in the case supposed is not now to be recognized as a duty incumbent on any one. Strange's humane interpretation of the Hindû law (*b*) must be received with this restriction. His observations at p. 171 being limited to the maintenance of a widow as a charge on the inheritance (*c*) taken by other heirs, a thing that would not occur in a divided family as to an estate which in the absence of a son she must inherit herself, are not applicable to the point now under consideration. Should the estate prove deficient the learned author says the family of the husband are notwithstanding liable,

(*a*) *See* 1 Str. H. L. 175. (*b*) Strange's H. L. 67, 68.

(*c*) As to this see *Lakshman Ramchandra* v. *Satyabhámábái*, I. L. R. 2 Bom. 494; and *Nátchiarammál* v. *Gopal Krishna*, I. L. R. 2 Mad. 126.

but he is still contemplating the case of a possible inheritance by the husband's brethren, not that of their postponement to the widow as heirs as in a case of separation.

The rules as to maintenance were probably formulated without any distinct contemplation of the case of partition. In the Bengal case of *Khetramani Dasi* v. *Kashinath Das*, (*a*) Loch, J. says "as the law originally stood it appears to me from some of the texts quoted above that no separation was ever contemplated, but that the widow entitled to maintenance was expected to remain in her husband's house and among his relations." This is quite true. "The family is the cherished institution of the Hindûs" (*b*) and the "associated aggregate community of the family" (*c*) is as such the principal care of the Hindû law. Property is regarded mainly as a means for fulfilling the duties to the past and present members imposed by the family law. Its characteristics are regarded from the point of view of its capacity or incapacity to subserve the purposes of the perpetual corporate group. Thus though it is moveable and immoveable, sacred and secular, with powers of disposal or management which vary accordingly, the land itself is not "free" or "unfree" subject to gavelkind or other peculiar tenure. All depends in the private law on personal status and personal relations. These are determined by birth and by the second birth of marriage. They impose according to Hindû ideas duties not as springing from or annexed to property but as inseparably united to the person, though property is the medium through which in many cases they must be made effectual and the means by which they must be fulfilled. As the mutual obligations of the family therefore spring from a blood relationship, real or fictitious, and a sacred connexion in sacrifices which is its complement, (*d*) so the

(*a*) 2 Beng. L. R. at p. 30 A. C. J.

(*b*) *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 M. I. A. at p. 391.

(*c*) Comp. Sir H. Maine, Anc. Law, Ch. I., and Ch. V. p. 126.

(*d*) *See* Maine, *op. cit*, Ch. VI. p. 191.

laws which govern them rest far less on property save as a modal circumstance than on relationship. This is not abolished by partition though partition modifies the duties arising from it. It is a modern notion to refer these duties, as Devánḍa Bhaṭṭa refers them, merely to cases in which property has been inherited or rather taken by right of participation and survival.(*a*) The passage which he quotes says nothing of that kind: it imposes the duty of providing food and raiment for a widow in succession on the deceased husband's brother, on his father, on a gotraja, and any other person (amongst the husband's relatives). It is plain that the last two would not in general take the inheritance of the deceased husband, or where partition prevailed be united with him. The duty is prescribed absolutely, and as Devánḍa Bhaṭṭa quotes the rule with approval, the proper sense of his own remark which immediately follows may possibly be explanatory, not limiting, and imply that when in a family the person immediately responsible resigns to the widow the portion on which her husband and she previously subsisted he needs not provide her maintenance too. The treatise being on Inheritance implies generally that there is an estate to inherit, and to this the author's observations are naturally directed, not to the cases of no estate, and of indigence as in itself a ground of right and obligation in a family. The disposition of the property and the provisions for maintenance out of the property would necessarily be the topics to be dealt with directly, others only incidentally, just as in an English treatise dower and equity to a settlement would be considered in their relation to property, without prejudice to the right to protection and sustenance subsisting apart from the possession of

(*a*) Smṛiti Chand. Transl. p. 158. Participation by birth is the typical form of dáya. It is obvious therefore that the sphere of dáyá and of inheritance by which it is translated lie outside each other in the most important cases. Hence to deal with dáya according to notions exclusively proper to inheritance in the English sense, must needs lead to error and confusion.

property, and from rules which merely determine its form, and how it is to be satisfied in particular cases.

Much has been said in several of the cases on a distinction between the rules of the Hindû law which are mandatory, as contrasted with those which are simply hortative or preceptive. When the distinction is rested on the imposition of a fine in one of two cases and not in the other, it should rather be regarded as assigning the one to the province of the criminal and the other to that of the civil law; but these departments were by no means clearly demarcated in the early jurisprudence. Still less was any exact boundary drawn between the field of moral and that of strictly legal duties. "Amongst the Hindûs the religious element in the law has acquired a complete predominance," (*a*) and Jagannâtha, arguing from the absence of any fine annexed to unequal partition by a father, that he may distribute his property of every kind as he pleases amongst his sons, (*b*) is landed in a direct contradiction of the Mitâkharâ and other received authorities.

In Yâjñavalkya's laws of civil judicature the subject of a judicial process is said to be a "complaint of being aggrieved contrary to law or usage;" but "law" translates "Smṛiti," the sacred scripture, as "áchár," may be rendered "ordinance" as well as "practice." The rules in the Smṛitis, as for instance in Yâjñavalkya's, are set forth in immediate connexion and with constant reference to this idea, and so expounded by commentators like Vijñâneśvara in the Mitâkharâ. (*c*) In chapter VIII. of Manu, "On Judicature and on Law," the connexion is very obvious. The rules for the constitution and government of the Courts are followed by the rules of evidence, and then come those

(*a*) Maine, Anc. Law, Ch. VI. p. 192.

(*b*) Coleb. Dig. Bk. V. Ch. II. *ad init.* and T. 77, Comm.

(*c*) *See* Macn. H. L. p. 141, and Roer and Montriou's Yâjñ. vol. II. 5, 12, 21, I. 7; and Stenzler's Text, pp. 4, 45.

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of the substantive law. The 24th distich is identical in sense with the one in Yâjñavalkya; disputes are to be determined by a consideration of what is expedient in the view of public policy, but always in subjection specially to the law of "dharm" or religion. Śloka 164 of the same chapter says that no declaration, however well authenticated and supported, can be effectual if opposed to "dharm," or to recognized usage, and śloka 8 that the king is to adjudicate according to the "eternal dharm." So in Nárada, Bk. II. Ch. X. para. 7, it is said "If wicked acts unauthorized by (= contrary to) the moral law are actually attempted let a king who desires prosperity repress them." Whatever precept of the Smritis therefore had been violated to the injury of a complainant, whether expressed in terms hortative or prohibitory, and whether a penalty was annexed to the rule or not, the alleged injury might, if the prince or the judges so willed, be remedied or punished without an "excess of jurisdiction." (*a*) No Hindû Austin had written a "Province of Jurisprudence determined" for the lawyers of India; the rules of the substantive law were, as usual in but partly developed systems, not disengaged from the commands of religion. They were but scantily formulated as aids or supplements to the rules of procedure, while the contents of the Vedas were assumed generally to be well known to the learned and to need no statement. The distinction therefore on which English judges have relied so much was for the Hindû judges hardly a distinction at all. (*b*) They exercised conformably to the Śâstras and to custom a jurisdiction as indeterminate as that of the early Chancellors in England, (*c*) and would enforce any duty enjoined by a Smriti which either in the class or in the instance seemed of sufficient importance to warrant the exercise of their power.

(*a*) *See* Yâjñ. I. 360; *Muttayan Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad. at p. 380.

(*b*) Comp. Maine's Anc. Law, p. 16, 23, 192.

(*c*) *See* Spence, Equit. Jurisd. I. 367 ss. and references.

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One class of propositions received an early and comparatively full exposition from the commentators and was applied with strictness by the native courts—that relating to ownership, its acquisition, devolution and partition. The needs of society imposed this duty on the Nyáyádhish, but for the Brahman commentator the chief attraction of the subject consisted perhaps in its connexion with the law of sacrifices. In what cases property is constituted or extinguished, gained or lost, is minutely discussed. Possession too as a source or element of property has received a pretty full treatment. But the rights and obligations arising from family relations have been but meagrely dealt with in proportion to their importance, great as this is recognized to be. Positive law is incompetent to enforce a complete fulfilment of duty in such cases, and rules of mutual regard, concession and generosity, supersede or blend with those which can be imposed by external authority. Thus the boundary line between moral and legal obligations being in its nature vaguely drawn and not having been arbitrarily defined, precepts of the Hindû jurists in this sphere take every form from stern command and denunciation to mere suggestion or assumption that a law of kindness is to prevail. Whether in any instance a precept construable as a mere counsel or a proposition of moral beauty was to be enforced by a sanction as a law was left to the judges on a consideration of all the circumstances. In discussing the doctrine of *factum valet* put forward to justify a father's alienation of ancestral property, H. H. Wilson says,(*a*) "It is absurd to say that the judge is to acknowledge as valid or to permit the validity of that which sacred institutes and universal feeling denounce as immoral and illegal.....The only argument of any weight adduced has been this: the law certainly prohibits the practice, but it has not provided for its prevention or

(*a*) Works, V. 73. A husband's alienation depriving his widow of subsistence is invalid. *Jamna* v. *Muchal Sahu*, I. L. R. 2 All. 315.

punishment, and therefore being done it must be recognized. But this is a very incorrect view of the case and would, as observed by Sir F. Macnaghten, authorize the perpetration of a vast variety of crimes. The law has not been so improvident. It has stated what ought and what ought not to be done; and has left the enforcement of its prescriptions to the discretion of the executive power. We are confident that the question between illegality and validity would never have been agitated under a Hindû administration."

Itis plain that under a law thus flexible and discretional, the claims of a widow in a family from which her husband had been separated in estate might be subjected to a rather severer scrutiny than where there had been no partition. A wasting of his substance by the separated brother might be looked on as a kind of fraud which the judges ought to prevent. They would recognize too that the tie of consanguinity was less binding as the relationship was more remote. (*a*) The changed conditions of life in modern as compared with ancient days might also be fairly taken into

(*a*) The recognition of distant relationships in the law treatises has been founded on texts in themselves of much narrower import. Thus Manu's Text, IX. 185, gives the succession to the father on failure of the son, and failing the father gives it to the brothers. Yâjñavalkya's text is the widest. Devala, quoted in Col. Dig. Bk. V. T. 80-82, would seem to have limited the connexion which gave rights of inheritance to four degrees (counting inclusively) in the ascending and descending lines. Thus the seventh degree, the relationship between two second cousins, would be the extreme point of recognized close family connexion. The seven degrees were then transferred to a single ascending line as a source of Gotrajasapiṇḍas, and beyond these were placed seven degrees more of origin for Samânodakas. The want of uniformity amongst the different schools of doctrine as to the remoter successions points to their comparatively recent recognition, and the analogy of the bandhu relation, limited to five degrees—first, instead of second, cousinship either to the propositus or to one of his parents—points the same way. So also does the limitation of responsibility for debt to the grandson. The recognition of a right of maintenance arising from family connexion as far as the sixth degree (second cousins), and the lapsing at that point of the nearer relationship into the clan connexion

account in applying the rule of expediency. Native Courts could not have found a direct warrant perhaps for leaving any widow of the family to absolute starvation, but they might hold that the rules as laid down contemplated a different state of things from the divided family of the nineteenth century. Without saying therefore that the earlier judgments were wrong on the point in question, (*a*) it may be admitted that the learned Chief Justice of Bombay has not, in denying the claims of the widow of a separated parcener, transgressed the latitude of construction which the Hindû law itself approves. That law certainly ascribes extraordinary authority to a Court in which three judges of ordinary attainments sit with a chief judge specially appointed for eminent learning by the king. (*b*)

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of superior and inferior, is shown to have been common amongst the European branches of the Aryan family by Dr. Hearn (The Aryan Household, Ch. X. § 3). In the Canon Law the seventh degree, as the nearest within which marriage was allowed, became identified at one time with seventh in the ascending line and those descending collaterally from that point, as the Canonists counted the degrees only on the longer of the two lines diverging from the common source (*see* Jus. Can. by Reiffenstuell, vol. II. p. 493-5). But the fourth degree was afterwards resumed as the limit of prohibition, and this, taken exclusively not inclusively, would, according to the Roman reckoning, generally count as the seventh degree reckoned inclusively. The recognized names of relationship amongst the Romans extended only to second cousins, *i. e.* to the sixth, or according to the inclusive mode of reckoning the seventh degree (*see* Poste's Gaius, B. I. § 58), and it seems not unlikely that the range of recognized relationship under the Canon Law and of Gotraja-sapindaship under the Hindû law (*see* above, p. 121) was extended by a somewhat analogous process. The genealogies preserved by the hereditary purohits readily lent themselves to any desired extension of gentile connexion. As to the variations of the Christian ecclesiastical law, *see* Zachariae Jus. Graeco-Rom. Li. I. Tit. I. § 4.

(*a*) *See* also 2 Str. H. L. 16.

(*b*) Manu, VIII. 11. Comp. Mit. on the Adm. of Justice, Ch. I. § 1.

Personal inquiries made since the judgment in *Sávitribái's* case in several districts of the Bombay presidency seem to establish that though a moral claim of every widow to support is recognized even in a divided family, a legal right is hardly admitted. Widows of separated relatives are to be found in the households of many Hindû gentlemen, but it would be a wrong assumption that amongst people thus closely connected no more is conceded than could be enforced. The presence of these ladies whose lot excites pity even in a stranger is, it would seem, to be ascribed to a rule of kindness or at most of positive morality, rather than to one of compulsive customary law. Similar inquiries as to the case of united families led to the conclusion that the right of widows of deceased members to maintenance is almost invariably recognized, though as to the incidence and apportionment of the burden no exact consensus of opinion could be obtained. Here the passages of Nârada already referred to, seem to be applicable, and to make the support of the widow a duty independent of the possession or existence of any estate in which the deceased husband was a sharer, though where this state of things existed he who takes the share is specially liable and the share itself may be allotted to the widow whose relatives are unwilling to receive her. (*a*) The expression used by Nârada is the same in stating the right of widows as in stating the right to subsistence of members of a family disqualified for inheritance. The Vyavahâra Mayûkha limits the text of Nârada (*b*) to the case of an undivided family, but in such a family it does not make the widow's right to subsistence depend on the possession of ancestral wealth. In the passage from Kâtyâyana (*c*) which Nîlakaṇṭha quotes immediately afterwards, the particle "tu," translated "or," includes the sense of "but"; so that the sense is "The

(*a*) Smṛiti Chand. Ch. XI. Sec. I. paras. 34, 35, Transl. p. 158, 159.

(*b*) Stokes, H. L. Books, p. 85.

(*c*) Stokes, H. L. Books, p. 85.

widow receives food and raiment but (where there is property) may (also) be assigned a share of it for life." The Śástris have uniformly accepted the rule in this sense so far as can be gathered from their omission to set forth the possession of ancestral property as essential; and it is established by authenticated usage as the law of many castes. This is shown below.

That the recognition of the share of a parcener as primarily liable for his widow's maintenance does not imply that she has no right when there was no property, may be gathered from Jagannâtha's comment on Yâjñavalkya's text providing for the daughters and the childless wives of disqualified members of the family, "since it is directed that daughters must be supported so long as they be not disposed of in marriage, it appears that the nuptial (expenses) shall be defrayed, and that (= that is) if no share be received by a son; but if the son do take a share his sister must be supported and her nuptials defrayed by him alone as is done in common cases by a son whose father is dead." (*a*) The Mitâkshará cites a passage from Hârîta. "If a woman becoming a widow in her youth be headstrong (still) a maintenance must in that case be given to her for the support of life." The Vivâda Chintâmani quotes this as "A woman is headstrong, but a maintenance must even = still) be given to her." (*b*) The right to support is not contemplated as dependent on property, though should there be property it may be satisfied out of it. If the right as Vijñâneśvara possibly thinks belongs to a widow of a separated parcener, that affords an *à fortiori* reason for recognizing it in the case of a widow of one who has died a member

(*a*) Col. Dig. Bk. V. T. 334, Comm. This is in fact a portion of the father's obligations falling on the son subject to his exoneration only when the misappropriation of property actually existing transfers the duty to him who has taken it. *See* Vyav. May. Ch. IV. Sec. V. para. 16.

(*b*) Mit. Ch. II. Sec. I. para. 37.

of a joint family. While that family subsists and is capable she must look to it alone for maintenance. The Vîramitrodaya lays down this rule for widows and daughters in a reunited family. (*a*) The duty of the Hindû householder therefore seems not to have been exaggerated by Sir T. Strange when he described it as "co-extensive with his family," (*b*) or when he said of the widow in a united family "where her husband's property proves deficient the duty of providing for her is cast upon his relations." (*c*) Yâjñavalkya, like Nârada, assigns the protection of a woman unconditionally to her father, her husband and her son successively, and then "on failure of these, let their kinsmen protect her." (*d*)

Jagannatha, resting on the familiar text of Manu, declares: "The father is bound to support the family of his son, and it is not true that those to the support of whom the master (*i. e.* the son) is entitled from a certain person (the father) are not (themselves) entitled to maintenance from the same person." (*e*) This is said of the family of a student who has not then acquired property. Consistently with this Colebrooke says, (*f*) in a case where the son must have died without property, that the father "would have been liable for the reasonable charges of his daughter-in-law's maintenance, had he refused or neglected to support her." Nothing is said of the father's having ancestral property. In a similar case where the father may have had ancestral property, but the son distinctly had no separate estate, the son's widow was pronounced entitled to maintenance from her father-in-law. In this opinion Colebrooke and

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(*a*) Vîramit. Trans. p. 219.

(*b*) 1 Str. H. L. 67. (*c*) *Op. cit.* 172.

(*d*) Col. Dig. Bk. IV. Ch. I. Sec. I. T. 6.

(*e*) Col. Dig. Bk. V. T. 379, Comm. *See* also per Sir M. Sausse, C. J., in *Ramchandra* v. *Dádá Náik*, 1 Bom. H. C. R. lxxxiv. Appendix, and Macn. H. L. vol. II. Ch. II. Case 8.

(*f*) *Op. cit.* vol. II. 412.

Sutherland concur, (*a*) as Sutherland did in a similar claim by the son's widow against the father's widow. (*b*) In another case (*c*) Colebrooke says that the half-brothers of a widow's deceased husband are bound to maintain her. (*d*) It is not even said that the deceased and his brothers were members of a joint family, much less that there was property of the deceased or ancestral property. If there had been separate property Colebrooke must have said that the widow was entitled to it, and if the possession of ancestral property were essential in his view to the existence of the widow's right, he must have mentioned that too.

The same remark occurs as to the opinions of the Śâstris given below at Bk. I. Ch. II. Sec. 1. Q. 17; Sec. 6. A. Q. 27; Sec. 7, Q. 10. In the first of these cases the family was undivided, but whether there was ancestral property is not stated. It would seem that the deceased son left no property solely his own, as there is no reference to it. In the second case the family was undivided or was understood to be so by the Śâstri, but it does not appear that there was ancestral property held by the father. In the third case the predeceased son may or may not have been separated from his father. There is no suggestion that he left any property, nor is there any limitation of the widow's right to the amount of his share. The Śâstri evidently regarded the property left by the father as having been solely his own, but the obligation of maintaining the son's widow as one that had been binding on the father and after his death passed to the mother along with the means of satisfying it. In ancestral property the son's right to a share comes into

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(*a*) 2 Str. H. L. 233. So in *Rai Sham Ballubh* v. *Prankishen Ghose*, 3 C. S. D. A. R. 33; *Musst. Himulta Chowdrayn* v. *Musst. Pudoo Munee Chowdrayn*, 4 *ib.* 19.

(*b*) *Op. cit.* II. 235.

(*c*) *Op. cit.* II. 297; Macn. H. L. vol. II. Ch. II. Case 4.

(*d*) So 2 Str. H. L. 12, 16; Macn. H. L. vol. II. Ch. II. Case 7.

existence and dies along with him, (*a*) so that it could not be as annexed to an inheritance in the English sense that the father's obligation attached to him. The father and son having been joint tenants if not tenants by entireties, the son could not even charge the common estate according to the principle *jus accrescendi praefertur oneribus*, except under circumstances specially provided for. (*b*)

In the case of a disqualified person no ownership generally comes into existence at all over the ancestral estate. (*c*) He is entitled merely to maintenance which is accorded to him by the texts in the same terms as to wives and widows. His right is a charge or an equity to a settlement on the property when there is property, (*d*) but the duty of maintaining him is not therefore limited to what but for his incapacity would have been his share.(*e*) It is on relationship that the right is founded, and the right of the widow of a member, herself a member of the family, rests equally on relationship, not on property once shared by the deceased, though should such a share have passed into the hands of any particular member of the family the obligation will primarily rest there too. (*f*) In the cases at pp. 83 and 90 of vol. 2 Strange's Hindû Law, the widow left destitute by her husband is recognized as having a right to maintenance from her brother's widows. Her brother

(*a*) *Udárám Sitáram* v. *Ránu Pánduji*, 11 Bom. H. C. R. at p. 86.

(*b*) Mit. Ch. I. Sec. I. paras. 28, 29; *infra*, Bk. I. Ch. II. Sec. 6 B.; *Rádhábái* v. *Nánáráv*, I. L. R. 3 Bom. 151.

(*c*) *See* Bk. I. Ch. VI. Sec. 1.

(*d*) *Khetramani Dasi* v. *Kashinath Das*, 2 Beng. L. R. at p. 52 A. C. J.

(*e*) Bk. I. Ch. VI. Sec. 1. Q. 5.

(*f*) In the MS. Collection of Caste Laws gathered by Mr. Borradaile there are many instances in which the caste declare that the helpless person is entitled to his share on a partition; and others in which it is said that he is entitled to maintenance out of his share, or alternatively, his proper share; but along with this it is stated in some instances that his brethren must support him where there is no estate. This shows that a mere reference to the property

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could not have held ancestral property along with her husband, or inherited from him, and the obligation arising as against a brother only on the incapacity of the husband's family cannot, it would seem, be made absolutely dependent as to the latter any more than as against the former on any conditions of property taken by inheritance.

The Smṛiti Chandrikâ, true to the principle "To him that hath shall be given," says that even in the case of helpless kinsmen the duty of supporting them rests only on those who have taken the patrimony of the disqualified member's father. (*a*) For this Devâṇḍa Bhaṭṭa cites a passage of Kâtyâyana ending:—"The kinsmen shall not be compelled to give the wealth received by them not being his patrimony." Here there is nothing about subsistence. The rule given is that the person in question shall not obtain property not his patrimony. But the passage is not quoted by either the Mitâksharâ or the Mayûkha, though many other passages of Kâtyâyana are quoted by both; and the reason is obvious. The whole of it is given at Ch. V. para. 16 of the Dâya Bhâga; and it is plain that it refers to a case which does not now occur, that of a competition between the offspring of persons of different castes. "He," Kâtyâyana says, "is not heir to the estate.....except.....on failure of the kinsmen. They shall not be compelled to give him the wealth [it] not being his patrimony." There is a various reading "svapitryam" (= it being their patrimony) which leaves the result unaltered. On the point for which Devâṇḍa uses it, the text

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where there is property does not imply an absence of right where there is no property, or none chargeable with the maintenance. The questions as to widows were put with reference to property, but still some answers, as in Bk. G sheet 25, state an unqualified duty to support the widow in the family house, her resort to her pulla even being (*ib.* 32, 49, 55) * necessary only in the absence of relatives of her husband.

(*a*) Smṛiti Chan. Ch. V. paras. 23–25.

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* *Ib.* Koombars 8, Machee Gudrya 25, Vaghree 30, Khalpa Khumbarta 48.

says nothing. In *Mamedála Venkutkrishna* v. *Mamedála Venkutratnamah* (*a*) the Sudder Court of Madras set aside Devânda's rule in the province where his authority is highest by pronouncing in favour of the widow's right to maintenance by her husband's brothers where there was no proof of their possession of paternal estate; and it cannot be considered as of any great weight in Bombay.

In a case at Allahabad the High Court ruled that a daughter-in-law had no right to maintenance from her father-in-law when he had sold the ancestral property. (*b*) If the right of the son's widow to maintenance depends on the bare fact of the retention of the ancestral property, this decision must be accepted, and a father can get rid of the burden properly incumbent on him by merely selling the patrimony though he may keep the proceeds, or obtain the fruits of his unprincipled conduct in some other form; but this would so obviously be a fraud on the dependants that the Hindû law would interfere to prevent its success. (*c*) The case is discussed in *Luximan Ramchandra* v. *Satyabhámábái*, (*d*) and the authorities there quoted seem conclusive of the daughter-in-law's right, and by implication of the right of every coparcener's widow. The passage of the Viramitrodaya quoted by the Allahabad Court seems to be the one at p. 154 of Mr. Golapchandra's translation. It says, "By reason (= force) of the text 'The heir to the estate of a person shall liquidate his debts'—he alone who takes the estate is declared liable to discharge the debts." This is said by Mitramiśra to illustrate the proposition that if any one improperly deprives the grandson of the estate, such person shall pay the grandfather's debts, and yet in the absence of all estate the grandson's liability is not disputed. (*e*) So

(*a*) Mad. S. D. A. R. for 1849, p. 5.
(*b*) *Gangábái* v. *Sitárám*, I. L. R. 1 All. 170.
(*c*) Bk. II. Introd. § 4 F.
(*d*) I. L. R. 2 Bom. at p. 579.
(*e*) *See* Vyav. May. Ch. V. Sec. IV. para. 14.

also as to the passage of Nârada and the comment on it given at p. 174. Mitramiśra indeed takes the command to support the widows as specially applicable to those of a separated coparcener of a rank lower than the "patnî," and says that "whoever takes the estate" must afford them maintenance "by reason of succession to the estate." Such is the rule, he says, when there is an estate to succeed to: he who takes the benefit must take the burden. But where there is no estate the precept remains unqualified by anything which can transfer the obligation from those immediately subjected to it, just as in the case of the father's debt.

Looking then to the constitution of the Hindû family, to the restrictions placed on a woman's activity, to the prohibition in a united family against her making a hoard, and the maledictions pronounced on those who fail to provide for the helpless members of their family, the conclusion may be hazarded that Colebrooke and others had sufficient grounds for opinions to which the actual practice of the people generally conforms in the Bombay presidency. In a united family it would seem that in some form maintenance may be claimed by the widow of a deceased member as a right not dependent on property though in a measure regulated by it, (*a*) but on the capacity only of her relatives in the order of nearness to her husband. It must be admitted however that the decisions in recent times go rather to limit the responsibility for maintenance, to the property taken by succession to the deceased husband. Where the widow had made away with her husband's property and then sought maintenance from his two brothers solely dependent on their profession as schoolmasters, the rejection of the claim (*b*) might be referred to the principle of the repression of fraud in the comprehensive sense given

(*a*) See *Narhar Singh* v. *Dirgnath Kuar*, I. L. R. 2 All. 407.

(*b*) *Ganesh* v. *Yamunábái*, Bom. H. C. P. J. 1878, p. 130.

to it in the Hindu law, (*a*) but in other cases (*b*) it has been said that a widow's claim extends only to the interest of her deceased husband in the undivided property.

In close connexion with the right to maintenance, forming part of it indeed, stands the widow's right to a residence in the family house. That such residence must be afforded to her when there is a family dwelling has been uniformly held by the Śástris. (*c*) Should her residence in the family dwelling be extremely inconvenient she may be lodged elsewhere, (*d*) but the obligation cannot be shaken off by a sale of the dwelling. (*e*) The head of the family is still bound, and the property itself (*f*) unless taken by a circumspect purchaser without notice of the widow's right. (*g*) Her general right to sustenance is guarded against fraud in one taking

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(*a*) Comp. *Paro Bibi* v. *Guddadhar Banerjee*, 6 C. W. R. 198. In he case of *Bái Lakshmi* v. *Lakhmidás*, 1 Bom. H. C. R. 13, the widow had taken a share of her deceased husband's estate, but when after thirty-four years she became destitute the Śâstri and the Court pronounced her step-son and his sons liable for her maintenance. In that case there had been no fraud. Comp. Bo. H. C. P. J. 1878, p. 139.

(*b*) See *Mádhavráo* v. *Gangábái*, I. L. R. 2 Bom. 639; the *F. B.* case, 7 N. W. P. R. 261; *Visalatchi Ammal* v. *Annasamy Sastry*, 5 M. H. C. R. 150; *Ganga Bai* v. *Sita Ram*, I. L. R. 1 All. 170; *Narhar Singh* v. *Dirgnath Kuar*, I. L. R. 2 All. 407. Bo. H. C. P. J. 1878, p. 131.

(*c*) *See* above p. 79; Bk. I. Ch. I. Sec. 2, Q. 7, 11, 12, 25, 26. *See* Index, Tit. Residence; *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Bhikham Das* v. *Pura*, I. L. R. 2 All. 141; *Mangal Debi* v. *Dinanath Bose*, 4 Beng. L. R. 73, O. C. J.

(*d*) *Ibid.*

(*e*) See *infra*, Bk. I. Ch. I. Sec. 2, Q. 9; *Lakshman Rámchandra* v. *Satyabhámábái*, I. L. R. 2 Bom. 494, 506.

(*f*) *Mangala Debi* v. *Dinanath Bose*, 4 Beng. L. R. 73 O. C. J.; *Srimati Bhagabati Dasi* v. *Kanailal Mitter*, 8 Beng. L. R. 225; *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353.

(*g*) See *Lakshman Ramchandra* v. *Satyabhámábái*, I. L. R. 2 Bom. at pp. 514, 518, 519. In *Parwati* v. *Kisansing*, Y was a widowed daughter-in-law of X. She occupied a house allowed to her as residence by X. This was attached in execution of a decree against X by his creditor C; Y then sued X for maintenance and residence in the

the family property when there is such property, but it does not constitute an interest in the estate unless it has been limited by a decree or a legal transaction.(*a*) Her own resignation of her right cannot be effectual, seeing that as a wife she is incapable of contracting (*b*) except with reference to her strîdhana, (*c*) that during her husband's life her right is a mere expectancy, (*d*) and that afterwards she cannot deal by anticipation with her right to subsistence, which is a personal relation between her and her husband's heirs, though she may dispose of that to which by allotment in partition she has acquired a right *ad rem*. (*e*)

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house occupied by her. This was adjudged to her. In the meantime X's interest in the house had been sold in execution and purchased by C, who sought to expel Y. It was declared however that X's ownership was subject to Y's right of residence, and that C could not take possession until Y's "life estate fell in."

On the remark of the District Judge that debts take precedence of maintenance, the judgment observes "We may assume that this is correct," but found in it no ground for disturbing Y. This if laid down without regard to the nature of the debt contracted by X to C, would go to make Y's title to residence a complete life-tenancy of the house occupied by her. This puts her right rather higher than *Satyabhâmábái's* case, but the proceedings may have suggested to the Court that there had been collusion for the purpose of getting rid of the daughter-in-law Y.

(*a*) *Lakshman Ramchandra* v. *Satyabhâmábái*, supra; *Kalpagathachi* v. *Ganapathi Pillai*, I. L. R. 3 Mad. 184, 191.

(*b*) Manu, VIII. 416, says her property becomes her husband's, like a wife's chattels under the English Common law. Her earnings are her husband's: Vyav. May. Ch. IV. Sec. X. para. 7, and even the presents of friends except in special cases, *ib.* Col. Dig. Bk. V. T. 470.

(*c*) S. A. 261 of 1861; *Nathubhái Bháilál* v. *Javher Ráiji*, I. L. R. 1 Bom. 121; *Govindji Khimji* v. *Lakhmidás Nathubhoy*, I. L. R. 4 Bom. 318; *Náhálchand* v. *Bái Shivá*, I. L. R. 6 Bom. 470; *Narotam* v. *Nanka*, *ib.* 473; Col. Dig. Bk. V. T. 475; Coleb. on Oblig. Bk. II. Ch. III. 54.

(*d*) The Judicial Committee declined to affirm the principle that an expectant interest can be the subject of a sale under the Hindû law. *Baboo Dooli Chand* v. *Baboo Brij Bhookan Lall*, decided 4th Feb. 1880.

(*e*) *See* on the woman's general dependence, below, Sec. 11; Yâjñ. I. 85; Vyav. May. Ch. IV. Sec. V. para. 17. That she is always under tutelage *see* Steele, L. C. 177; especially a widow, per Grant,