The question remains of how the right to maintenance where it exists is to be satisfied. On this point the Mitâkharâ is silent, which however shows only the fragmentary manner in which as a running commentary on a particular Smṛiti it deals with the body of the law. In the Vyavahâra Mayûkha (*a*) it is said that in an undivided family the widow "obtains food and raiment or else a share so long as she lives." (*b*) As a condition however she is to be assi-

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J., in *Comulmoney Dossee* v. *Rammanath Bysack*, 1 Fult. at p. 200, and per Seton, J., *ib.* 203. As to her general incapacity to contract, Nârada, Pt. I. Ch. III. 27, Ch. IV, 61; Vyav. May. Ch. II. Sec. I. para. 10; Col. Dig. Bk. I. Ch. I. T. 8; Ellis in Madras Mirasi Papers, 198; that she may like an infant be represented by a next friend, Vyav. May. Ch. I. Sec. I. para. 21. That her right as mother or wife is untransferrible, see *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 C. W. R. 111; *Ramábái* v. *Ganesh Dhonddev Joshi*, Bom. H. C. P. J. 1876, p. 188, except perhaps where a specific charge has been decreed; *Gangábái* v. *Khrishnáji*, Bom. H. C. P. J. 1879, p. 2. But the right is doubtful even then, see *Seith Gobin Dass* v. *Ranchore*, 3 N. W. P. R. 324; *Bai Lakshmi* v. *Lakhmidás Gopáldás*, 1 Bom. H. C. R. 13; *Ramábái* v. *Trimbak Ganesh*, 9 Bom. H. C. R. 283. As to the share given on partition see *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I. A. at p. 514. The contracts which have sometimes been relied on even if consistent with the relation of husband and wife must in nearly all cases fail through the operation of the principles embodied in Secs. 14 and 16 of the Indian Contract Act IX. of 1872 and the Indian Evidence Act I. of 1872, Sec. 111. See *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99, and the references. In England there can be no contract between a husband and his wife, *Legard* v. *Johnson*, 3 Ves. 352, 358, nor can any agreement between them alter her legal capacities as a married woman, *Marshall* v. *Rutton*, 8 T. R. 545. The same rules hold under the Hindû law by which the wife's dependence, and the husband's dominion and obligations are as strongly recognized as by the English law, and in a way remarkably analogous to it. *See* Vyav. May. Ch. IV. Sec. X. para. 7 ss.; Ch. V. Sec. IV. para. 20; Ch. XX; Col. Dig. Bk. V. T. 470; *Nathubái Bhailal* v. *Javher Ráiji*, I. L. R. 1 Bom. 121; *Ramábái* v. *Trimbak Ganesh*, 9 Bom. H. C. R. 283; S. A. 94 of 1873. [As to the English law *see* now 45 and 46 Vic. C. 75.]

(*a*) Ch. IV. Sec. 8. para. 7.

(*b*) *See* Vîramit. Transl. pp. 173, 174.

duous in service to her "guru" that is "to her father-in-law and other (head of the family supporting her). At his pleasure she may receive a share; otherwise merely food and raiment." The "anna vastra," translated "food and raiment," means a direct supply of necessaries as distinguished from a money allowance. (*a*) Kâtyâyana's Smṛiti (*b*) on which this precept rests contains the further direction as given in the Vivâda Chintâmani. (*c*) "If he (the husband) leave no estate let her remain with his family." The same Smṛiti goes so far even as to say that "what has been promised to a woman by her husband as her strîdhana is to be delivered by his sons provided she remain with the family of her husband, but not if she live in the family of her father." (*d*) A various reading in Varadrâja (*e*) supports her right to her strîdhana in either of the cases supposed but leaves the condition as to maintenance untouched.

The condition of residence and performance of household duties may however be dispensed with on proper occasions. Thus after providing for a wife's support during her husband's life by a kind of distraint in cases where food, apparel, or habitation is withheld, Kâtyâyana says, (*f*) "She may take it also (if refused) from his heir.....but when she has obtained it (*i. e.* maintenance = food, apparel and lodging) she must reside with the family of her husband. Yet if afflicted by disease or in danger of her life she may go to her own kindred." (*g*) Apart from this Kâtyâyana, as we have seen, says property promised by her husband as

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(*a*) *See* the Śâstri's answer in *Ichha Lakshmi* v. *Anandram*, 1 Borr. R. at p. 130.

(*b*) *See* Vîramit. Transl. 173, 174.

(*c*) Transl. p. 261.

(*d*) Col. Dig. Bk. V. T. 483.

(*e*) Transl. p. 50.

(*f*) Vivâda Chint. p. 265.

(*g*) Col. Dig. Bk. V. T. 481; Coleb. in 2 Str. H. L. 401.

stridhana—a promise specially sacred (*a*)—may be withheld by the sons if she choose to withdraw to her own family. (*b*) Various readings of the Smritis give a different sense, (*c*) but the ones adopted by Jagannâtha were approved by Colebrooke, whose opinion, confirming that of the Śástri, is given at 2 Strange H. L. 401. The widow, it is said, may visit her own relatives but is to reside with those of her husband, who must provide her with a suitable allowance. The Śâstris in the Bombay presidency have always given similar opinions, making the widow's right one to maintenance as a member of the household in the husband's family. (*d*) The Judicial Committee also say, "The Hindû wife upon her marriage passes into and becomes a member of that family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to.....reside." (*e*)

Consistently with these authorities it was said in *Udárám* v. *Sonkábái* (*f*) that "the ordinary duty of a Hindû widow is to reside with her husband's family, who in return are charged with the duty of maintaining and protecting her," (*g*) but it was in the same case ruled that for a failure in kind usage the widow might leave her father-in-law's house and obtain a separate maintenance. In *Rango Vináyak* v. *Yamunábái* (*h*) it was held that although in the discretion

(*a*) Vîram. Transl. p. 228.

(*b*) Col. Dig. Bk. V. T. 483; Vivâda Chint. 265.

(*c*) *See* Varadrája, pp. 50, 51.

(*d*) *Kumla Buhoo* v. *Muneeshunkur*, 2 Borr. 746; *infra*, Bk. I. Ch. I. Sec. 2, Q. 12, 25; Ch. II. Sec. 1, Q. 6; Sec. 6 A. Q. 2; Sp. Ap. 5 of 1862; see *Rango Vinayak* v. *Yamunábái*, I. L. R. 3 Bom. at p. 46, and *see* 2 Macn. H. L. 111, 118; 1 Str. H. L 244, 245; 2 *ib.* 272.

(*e*) *Sri Raghunadha* v. *Sri Broze Kishore*, L. R. 3 I. A. at p. 191.

(*f*) 10 Bom. H. C. R. 483.

(*g*) "A widow's nearest guardian, if there be no dower, will maintain her." Answers of Castes (Brahmans) to Borradaile's questions, Bk. E. p. 13 MS.

(*h*) I. L. R. 3 Bom. 44.

of the Court a separate maintenance might be awarded to a widow quitting her husband's family, yet this could not ordinarily be claimed. "All she can strictly demand," it was said, "is a suitable subsistence when necessary and whatever is required to make such a demand effectual." In the absence of any special cause for her withdrawal a separate allowance was refused. (*a*) In a previous case (*b*) it had been said by Sir Michael Westropp, C. J., "If he (the father-in-law) ill-treated her and expelled her from the family house the Civil Court would, we think, have been warranted in awarding to her a residence and a separate maintenance out of the family estate in his hands." The mention of the condition implies that it was thought essential.

In a Bengal case, however, that of *Cassinath Bysack* v. *Hurrusoondaree Dossee*, (*c*) it was said by the pundits who were consulted that a widow removing from her husband's family for other than unchaste purposes does not forfeit her right of succession to her husband's estate. This was made the foundation of the decision of the Judicial Committee in appeal. (*d*) The Hindû widow in Bengal, it must be borne in mind, takes her husband's share even in an undivided family, (*e*) and there being no text to deprive her of the estate on her withdrawing from the family abode she retains it, (*f*) as does even a widow who becomes incontinent. (*g*) In the subse-

(*a*) Loss of right to maintenance by removal from her father-in-law's is set forth as a customary law by many castes in answer to Mr. Borradaile's inquiries. *See* Lithog. pp. 53, 74, 82, 83, 160, (177) (211), 194, 475-6, 498; MS. C. 50, 155; F. sheet 36, 40, 44; G. Sootar Goojar Talabda, Lohar Sootar, Pardesi Sootar, Lohar Surati; Sh. 16, 25, 49, 55; Koombar 8, Mochi 20, Khalpa Khimbatta 48. The only case to the contrary is one in Bk. F, Broach Brahmans.

(*b*) *Sávitribái* v. *Laxmibái*, I. L. R. 2 Bom. at p. 590.

(*c*) 2 Morl. Dig. 198.

(*d*) *See* 12 Beng. L. R. at p. 242, 243.

(*e*) Dâyabhâga, Ch. XI. Sec. 1, para. 46.

(*f*) *See* Vîram. Transl. p. 236.

(*g*) Vîram. Transl. 253. See *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. 115.

quent case of *Jadumani Dasi* v. *Khetra Mohun Shil*, (*a*) Sir L. Peel said that the right of a widow to maintenance was a charge on the late husband's property in the hands of the heir. As the property did not descend to the widow the case must have been one under the law of the Mitâkshará, not of the Dáyabhâga. The learned Chief Justice however applies the former decision to the new case under a different law, and gives it an extension beyond the matter to which the earlier decision applied, which certainly could not have been expected by the pundits whose opinions formed the ultimate basis of the judgment. "The freedom of choice (of residence)," his Lordship observes, "had respect to causes as applicable to a widow not an heiress as to one who inherited." "There are certainly texts," he continues, "which speak of the right of the relatives of the husband to have the widow resident under their roof," but these he thinks may be controlled by reference to the needs of modern society, and as a forfeiture of maintenance is not prescribed as a penalty for withdrawal, the widow is equally entitled to it whether she resides at her father's house or with her deceased husband's family.

It does not seem to have occurred to the learned Judge that "the right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession," (*b*) and that the converse is equally true. The widow does not forfeit her right by withdrawing from her husband's family, but then the right itself is a right to be supported there not elsewhere. Its enjoyment is lost simply because that enjoyment is essentially local. It is only when the husband's family are unable or unwilling to maintain the widow that her right to a separate allotment of property arises. (*c*) Strictly it is only in the patnî or principal wife

(*a*) Vyav. Darp. 384.

(*b*) Judicial Committee in *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A at p. 151.

(*c*) Vyav. May. Ch. IV. Sec. VIII. p. 7; Smṛiti Chand. Ch. XI. Sec. I. p. 33, 46; Vivâda Chint. 265.

that this latter right can become vested. She is answerable for sacrifices to her husband's manes, and ought to have the means of performing them when she cannot share in the united family sacrifices: the wife of inferior class is not a subject of the duty or the right. (*a*) It is not in any case strictly a charge on the estate constituting a property. The widow's maintenance is a personal right (*b*) to be made good by the heir taking the property, (*c*) but the corresponding duty does not necessarily and in all cases adhere to the property itself. (*d*) It is not a right which can be assigned or attached. (*e*) The father's debts take precedence of the mother's subsistence, and even these are not a charge in such a sense as to prevent the sons giving a clear title to a purchaser. (*f*) Although therefore the maintenence of a widow of a coparcener is in a sense a charge on the estate, (*g*) it does seem to be one necessarily attended with the incidents of ordinary property until at least a special lien has been created by agreement or by judgment of a Court. In *Baijun Doobey* v. *Brij Bhookan Lall Awasti* (*h*) the phrase "charge upon inheritance" seems to be used in the sense of a liability passing with the estate to

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(*a*) *See* Smriti Chand. Ch. XI. Sec. I. paras. 9, 10, 12, 15, 21, 35.

(*b*) *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 C. W. R. 111; *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311.

(*c*) What the Roman law called a *modus*.

(*d*) *Lukshman* v. *Sarasvatibái*, 12 B. H. C. R. 69; *Adheranee Narain Coomary* v. *Shona Malee*, I. L. R. 1 Cal. 365; *Johurra Bibee* v. *Sreegopal Misser*, ib. 470. See *Lakshman* v. *Satyabhámábái*, I. L. R. 2 Bom. 494.

(*e*) *Bhyrub Chunder* v. *Nubo Chunder*, 5 C. W. R. 111; *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311; *Ramabái* v. *Ganesh*, Bom. H. C. P. J. 1876, p. 188.

(*f*) *Lukshman Ramchandra* v. *Satyabhámábái*, I. L. R. 2 Bom. at p. 505; *Jamiyatrám* v. *Parbhudás*, 9 B. H. C. R. 116; *Lakshman Rámchandra* v. *Sarasvatibái*, 12 B. H. C. R. 69; *Nátchiarammál* v. *Gopala Krishna*, I. L. R. 2 Mad. 126.

(*g*) *Ramchandra* v. *Sávitribái*, 4 Bom. H. C. R. 73, A. C. J.

(*h*) L. R. 2 I. A. at p. 279.

successors: the claim in that case was realized against the personal interest of the holder of the estate, herself a widow. In *Nárâyanrâo* v. *Ramábái* (*a*) the Judicial Committee recognizes that "an obligation.....to make allowance for the support of the widows analogous to the maintenance to which widows by Hindû law are entitled," does not "create a right which [is] a specific charge on the inheritance." The assumption therefore that the right to maintenance is an estate like that taken by a widow on succession seems to be unwarranted, and thus the ground originally taken for giving to the minor right the absoluteness of the other fails. (*b*)

But however questionable the origin of the doctrine we are considering, it has been so frequently acted on that it must now probably be considered as finally established. (*c*) The duty of residence with the family of the deceased husband has been reduced to a mere moral obligation. (*d*) In the case of *Pirthee Singh* v. *Ranee Rajkooer*, (*e*) an appeal from the High Court at Allahabad, the widow was entitled under her husband's will to maintenance and provision for charities. There was no direction as to residence. The Judicial Committee finding this, relied on the general principle laid down by Sir L. Peel in *Jadumani's* case, (*f*) and

(*a*) L. R. 6 I. A. at p. 118. Comp. *Koomaree Dabea's* case, 1 Marsh. 200.

(*b*) The husband's obligation under the English law to settle lands on his wife is not forfeited even by elopement and adultery. It is a legal right vested in her and is not divested though dower is barred by similar misconduct: *Sidney* v. *Sidney*, 3 P. Wms. 268; and the wife keeping apart from her husband cannot claim a separate maintenance: *Manby* v. *Scott*, 2 S. L. C. 375; *Marshall* v. *Rutton*, 8 T. R. 545, 547.

(*c*) See *Subsoondaree Dossee* v. *Kisto Kisore Neoghy*, 2 Tay. and Bell, 190; *Shurno Moyee Dassee*, v. *Gopal Lall Dass*; 1 Marshall, 497; *Visalatchi Ammal* v. *Annusamy Śástri*, 5 M. H. C. R. 150.

(*d*) *Koodee Monee Dabea* v. *Tarrachand Chuckerbutty*, 2 C. W. R. 134; *Ahollya Bhai Debia* v. *Luckhee Monee Debia*, 6 C. W. R. 37; *Ganga Bai* v. *Sita Ram*, I. L. R. 1 All. 170, 174.

(*e*) 12 Beng. L. R. p. 238.

(*f*) V. Darp. 384.

declared the right of the widow to an allowance not impaired by her withdrawal from the family of her husband. The case of *Náráyanráo* v. *Ramábái* (*a*) from Bombay was very similar to that of *Pirthee Singh*, and there being no condition as to residence in the will, the Judicial Committee held that the widow "was to be left in this respect in the ordinary position of a Hindû widow, in which case separation from the ancestral house would not generally disentitle her to maintenance." The law thus laid down was followed in *Kasturbai* v. *Shivajiram* (*b*) and it must now be taken that when the members of a deceased husband's family have family property it lies not on the widow claiming separate maintenance to show that her withdrawal was necessary or proper, but on them to show that it was improper or else "that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance." (*c*)

The different incidence of the burden of proof thus established will not probably produce much variance in practice. Under the British rule, a widow could make herself so disagreeable that the members of the husband's family would be glad to part with her on any reasonable terms, and mere disagreement has in some instances been thought by the Śástris a sufficient ground for approving a separate maintenance.

The right to maintenance is by the common law one "accruing from time to time according to the wants and exigencies of the widow." (*d*) The limitation to a suit for a declaration of the right is now 12 years under Act XV. of 1877, Sched. II. Art. 129, so that decisions under the preceding Acts limiting the claim to 12 years from the husband's death

(*a*) L. R. 6. I. A. 114.

(*b*) I. L. R. 3 Bom. 372.

(*c*) See *Rámchandra* v. *Sagunábái*, I. L. R. 4 Bom. 261.

(*d*) *Náráyanráo* v. *Ramábái*, L. R. 6 I. A. at p. 118; S. C. I. L. 3 Bom. 415. It cannot be attached: *Ramabai* v. *Ganesh*, Bo. H. C. P. J. 1876, p. 188.

are no longer applicable. (*a*) But though limitation arises on a time to be counted from the application and refusal, the right is not to be referred to that demand as its origin so as to prevent the award of arrears in a proper case. (*b*) A decree fixes the payments awarded as a charge on the estate, (*c*) and though future sums to become due are still inalienable (*d*) the amount decreed for arrears may be attached by the widow's judgment creditors. (*e*)

Maintenance may be awarded for the future, subject if necessary to a variation on a change of circumstances. (*f*) The award or refusal of arrears rests in the discretion of the Court. (*g*) These decisions are obviously inconsistent with the sum payable for maintenance being a charge on the property in the strict sense of a real right in it. A wife's right to maintenance has been attributed to a kind of identity with her husband in proprietary right, but then her right is quite subordinate. (*h*) She cannot deal with it nor can she

(*a*) *Ib.*

(*b*) *Jivi* v. *Rámji Válji*, I. L. R. 3 Bom. 207.

(*c*) *Ram Kullee Koer* v. *The Court of Wards*, 18 C. W. R. 473; *Koomaree Debia* v. *Roy Luchmeeput Singh*, 23 C. W. R. 33; *Gangábái* v. *Krishnaji Dádáji*, Bom. H. C. P. J. for 1879, p. 2.

(*d*) This is recognized generally by the customary law of castes, as in Borradaile, C. Rules, MS. G. Sheet 32.

(*e*) *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311; and see *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*, 6 C. W. R. 64 M. R.; and *Hoymobutty Debia Chowdhrain* v. *Koroona Moyee Debai*, 8 C. W. R. 40 C. R.

(*f*) *Ram Kullee Koer* v. *The Court of Wards*, 18 C. W. R. 473; *Nubo Gopal Roy* v. *Sreemutty Amrit Moyee Dossee*, 24 C. W. R. 428; *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99. The successor of a zamindár it was said might readjust the terms of the grant made for maintenance to his predecessor's mother: *Bhávanamma* v. *Rámasámi*, I. L. R. 4 Mad 193.

(*g*) See *Jadumani Dossee's* case, *supra*; *Raja Pirthee Sing* v. *Ranee Raj Kooer*, 12 Beng. L. R at p. 248; *Náráyanráo* v. *Ramábái*, I. L. R. 3 Bom. 415; S. C. L. R. 6 I. A. 114; *Venkopadhyáya* v. *Kávan Hengasu*, 2 Mad. H. C. R. 36. As to the amount to be awarded see *Sreemutty Nittokissoree Dossee* v. *Jogendronath Mullick*, L. R. 5 I. A. 55.

(*h*) *Jamna* v. *Machul Sahu*, I. L. R. 2 All. 315.

effectively release her husband and his heirs from her right to subsistence (*a*) by a document executed in the husband's life, though the amount of her subsistence may thus be defined in case of a disagreement in the family.

The maintenance of parents (*b*) and of children in a united family is provided for by the law which determines their several interests. This is discussed under the head of Partition. Apart from property or after a partition the parents are always entitled to subsistence from their sons. (*c*) The adult son is not usually entitled to support by his father, (*d*) but in extreme indigence the right arises in favour of one who is incapable of maintaining himself. (*e*) These rights cannot however be considered as charges on the property held by those subject to them, though the extent of the corresponding obligation depends very much on the means by which it can be satisfied. Illegitimate children not taking a share of the estate are entitled to maintenance (*f*) but not in general as a charge on the property, though the father of a Śûdra may allot a share to him, (*g*) and in the higher castes may make a grant. (*h*)

In families in which a rule of primogeniture prevails, that is generally in families holding estates granted for the support of some public service of importance, the younger members are entitled to a provision by way of appanage in

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(*a*) *Lakshman Rámchandra* v. *Satyabhámábái*, I. L. R. 2 Bom. 494, 503; *Narbadábái* v. *Mahádev Náráyan*, I. L. R. 5 Bom. 99.

(*b*) A son must always support his parents, his mother even though she be an outcaste. Baudh. Tr. 230; Gaut. Tr. p. 279.

(*c*) *See* Manu quoted Col. Dig. Bk. V. Ch. VI. T. 379, Comm.

(*d*) *Premchand Pepara* v. *Hoolaschand Pepara*, 12 C. W. R. 494.

(*e*) Col. Dig. Bk. V. Ch. I. T. 23; Smṛiti Chand. Ch. II. Sec. I. para. 31 ss.; Steele, L. C. 40, 178.

(*f*) *Rádi* v. *Govind*, I. L. R. 1 Bom. 97; *Sri Gajapathi Radhik* v. *Sri Gajapathi Nilamani*, 13 M. I. A. at p. 506.

(*g*) Coleb. in 2 Str. H. L. 68. *See* below, Bk. I. Ch. VI. Sec. 2, Q. 2, Rem.

(*h*) *Raja Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159.

the shape either of an assignment of the revenue of particular villages or lands, or else of an income out of the general revenue of the impartible estate. (*a*) It often happens that a family which has an estate of this kind has also property apart from its watan or estate appropriated to public purposes. When that is the case there may be a partition if there is not a family usage to the contrary, in which the "service lands" are taken into account along with the other property in the aggregate for partition. They are assigned to one of the sharers, and if impartible may make that share larger than the others. The lands however though subject to provide for a public service may still be partible within the family, and this is a very common case. When the partible estate is insignificant, the holder of the impartible estate is subject to claims for maintenance of the junior branches of the family so far as he can support them. No precise limit has as yet been set to the degree of family connexion on which the right and obligation depend. (*b*) An allotment of land or revenue seems to continue to lineal descendants in the branch, and on their *extinction* to revert. (*c*) But sometimes it is absolute. (*d*)

When a share is unsuccessfully sued for by a widow or a member of a junior branch of a family it is the practice of the Courts to award maintenance if the right to it is established in the course of the trial. (*e*)

(*a*) Steele, L. C. 229; *Shidhojiráv* v. *Naikojiráv*, 10 B. H. C. R. 228; *Narsinh Khanderav* v. *Yádaoráv*, Bom. H. C. P. J. 1882, p. 345; *Chowdhry Hurcehur Pershad Doss* v. *Gocoolanund Doss*, 17 C. W. R. 129, C. R.; comp. Imperial Gazetteer of India, Art. Rajputáná, vol. VII. p. 520.

(*b*) *See* Sleeman, Journey through Oude, vol I. p. 169, 173; above, p. 242; and *Sávitriavá* v. *Anandrao*, 12 Bo. H. C. R. 224.

(*c*) *Raja Woodoyaditto Deb* v. *Mukoond Narain*, 22 C. W. R. 225.

(*d*) *Salúr Zamindár* v. *Pedda Pakir Raju*, I. L. R. 4 Mad. 371.

(*e*) *Rakhmábái* v. *Rákhábái*, 5 Bom. H. C. R. 193 A. C. J.; *Rázábái* v. *Sadu Bhaváni*, 8 Bom. H. C. R. 99 A. C. J.; *Shidhojiráv* v. *Náikojiráv*, 10 Bom. H. C. R. 228, 234.

An allowance for maintenance fixed by a decree "is ordinarily liable to be varied if the party ordered to pay it shows that there are circumstances which render it equitable to vary the amount," and "no Court," it was said, "would pass a decree fixing a grant of maintenance in perpetuity." (*a*)

§ 11.—ON STRÎDHANA OR WOMAN'S PROPERTY.

The simple etymology of the word 'Stridhana,' 'woman's property,' affords little or no guidance towards determining its exact comprehension. The principal divergencies of view indeed amongst the native commentators may perhaps be ascribed to their efforts to get more out of the term than it really contains, to find a sufficient and decisive direction in that which in itself is essentially ambiguous. (*b*)

The expression 'Strîdhana' may obviously connote:—

(1) A limitation of woman's proprietary competence to certain kinds of things amongst those regarded as generally admitting of ownership.

(2) Special limitations or extensions of the rights and competencies of the woman, as compared with the man, in transactions concerning things her ownership of which is recognized.

(*a*) *Narsinh Khanderáv* v. *Yádavráv*, Bom. H. C. P. J. 1882, p. 345.

(*b*) The principles of interpretation professedly followed by the Hindû lawyers are closely connected with their philosophical systems. *See* the Introduction, above, pp. 11, 14; Coleb. Essays, Vol. II. page 239. In practice, "the interpretations of Indian commentators, even if traditional, are chiefly grammatical and etymological, explaining every verse, every line, every word by itself, without inquiring if the results so obtained harmonised with those derived from other quarters." Roth, quoted 2 Muir's Sanscrit Texts, 169 Note, 200, though an isolated construction of the texts is condemned, *ibid.*, page 177. Though the hairsplitting habits of the Commentators are very puzzling to a European, and they constantly appeal to standards which he cannot accept, their conclusions are generally wrought out with rigorous logic from the data assumed by them. Many of their

(3) A special course of devolution, on a woman's death, of the property owned by her while living.

Thus we have—(1) the ordinary enumerations of the six or more kinds of Strîdhana; (2) the woman's unlimited right to deal with Saudâyakam, coupled with the restrictions imposed by some lawyers on her dealings with immoveable property; and (3) the rule, referred to by Ellis, (*a*) that "sons shall succeed to the father, and daughters to the mother." Jîmûtavâhana (*b*) defines Strîdhana as that which a woman may alien or use independently of her husband. (*c*) Vijñâneśvara defines it as property which a woman may have acquired by any of the ordinary modes. What property she is capable of owning, if there be any discrimination between this and the property of males, is not a point embraced within either definition, though if any difference exists, the definition ought apparently rather to have rested on this than on the particular rules which could apply only when the character of the property had been first established. Nîlakaṇṭha, in the Vyavahâra Mayûkha, (*d*) does attempt to define Strîdhana by an enumeration of its several constitu-

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rules of construction are identical with those of the English law. Thus the more general, it is said, yields to the more particular, and the determination of which is the more general and which the more particular in any case is to be made by an application of trained experience. *See* Vijñâneśvara in Macn. H. L. p. 188. Instances of an expression, taken by some literally and by others as a 'dikpradarśana,' or indication of a principle, are discussed in this volume. For the use of 'Ganas,' suggestions of class, *see* Burnell's Introduction to Varadrâja's Vyavahâra-Nirṇaya, p. xiii. The Vedic Commentator Vallabha propounds the perfectly correct principle: "A vedic text cannot be interpreted by itself: its context must be considered and the interpretation must harmonize with other texts of the Veda bearing on the same subject." *See* the Mimânsadarśana, p. 371.

(*a*) 2 Str. H. L. 405; *see* Coleb. Dig. Bk. V. Ch. IX. Sec. 1, T. 461; and Nârada, Vivâdapada, Ch. XIII. 7, 2, Transl. p. 94.

(*b*) Dâyabhâga, Ch. IV. Sec. 1, p. 18; Stokes, H. L. B. 240.

(*c*) Coleb. Dig. Bk. V. T. 470.

(*d*) Ch. IV. Sec. 10; Stokes, H. L. B. 98.

ents ; but accepting the word 'other,' (*a*) in a text of Yâjñavalkya, as allowing an indefinite extension of the objects of woman's ownership ; he is led to divide Strîdhana into two classes, according to its devolution, either as prescribed by texts bearing on particular elements of it, or under a residual rule, which he (*b*) draws from another passage of Yâjñavalkya, and which brings the inheritance to all other kinds of Strîdhana under the rules applicable to a male's estate.

The notion set forth by Âpastamba, (*c*) as held by some, is that, though the wife, being identified with her husband in the fruits of piety, and the acquisition of wealth, might during his absence expend the common funds without being guilty of theft, yet in a partition, her share comprises only her ornaments and the wealth given to her by her relations. From this to the liberal rule of Yâjñavalkya, as construed by the Mitâkshará, it is possible to trace in the Smṛitis something like a gradual development of the recognized capacity of women for property, which may have corresponded in a measure to the successive generations in which the texts were framed, but which at any rate indicates by its progressive reception and influence a growing predominance of personal regard towards wives and daughters over the harsher regulations of the earlier Brâhmanical law. Baudhâyana indeed (*d*) provides only for the succession, in the case of woman's property, of daughters to their mother's ornaments, consistently with his rule that women are excluded generally from inheritance. In Vasishṭha, (*e*) daughters are admitted to divide the nuptial presents of their mother. Manu enumerates (*f*) [1] gifts at the bridal altar, [2] in the bridal pro-

(*a*) "Âdhivedanika âdyam" = "a gift on supersession and so on," Yâjñ. II. 143, Stenzler.

(*b*) *See* para. 26; Stokes, H. L. B. 105.

(*c*) *See* Praśna II. Patala. 6, Kan. 14, Sl. 9 in the Appx.

(*d*) Praśna II. Kan. II. 27.

(*e*) Ch. XVII. 24.

(*f*) Ch. IX. Sl. 194.

cession, [3] as a token of affection, or [4] from a father, [5] mother, or [6] brother, and to these Vishnu adds gifts by sons, the present on supersession, the wife's fee, and the gift subsequent. The gift subsequent [by parents and relatives] may be considered as included in Manu's 'prîtidatta' or gift as a token of affection, (*a*) and then the real additions are the son's gift, the fee (śulka), and the gift on supersession through the husband's marrying another wife (*Ádhivedanika*). Nârada, who presents some indications, according to Dr. Jolly, of modern influences, merely repeats the rule of Manu, (*b*) with a substitution of a gift from the husband in place of the "gift as a token of affection," which might be taken more extensively. (*c*) Devala goes much further. He says that a gift to a woman for her maintenance, her fee (śulka), and her gains (lâbha) shall be her separate property or Stridhana. (*d*) The Vîramitrodaya limits the *lâbha* to "gains received in honour of Gaurî and other deities," but this restriction seems to be arbitrary. (*e*)

Lastly, comes the passage of Yâjñavalkya (II., 144) quoted by Mitramiśra in the Vîramitrodaya. As quoted by Jagannâtha and by Jîmûtavâhana, (*f*) the passage seems not to have the word 'Ádyam,' on which Vijñâneśvara in a great measure builds his construction. (*g*) This is in itself vague, since the words "and the rest" or "the like"

(*a*) *See* Coleb. Dig. Bk. V. Ch. IX. T. 465, 468, Comm.

(*b*) *See* Nârada, Vivâdapada, Part II. Ch. XIII. 8, Transl. p. 95.

(*c*) *See* Mit. Chap. II. Sec. 11, p. 5; Stokes, H. L. B. 459; Coleb. Dig. Bk. V. Chap. IX. T. 462, Comm.

(*d*) *See* the Vîramitrodaya on Strîdhana, and Coleb. Dig. Bk. V. Chap. IX. T. 478.

(*e*) *See* the Smriti Chandrikâ, Chap. IX. Sec. 2, p. 15.

(*f*) *See* also Coleb. Dig. Bk. V. Chap. IX. T. 463; Dâyabhâga, Chap. IV. Sec. 1, para. 13; Stokes, H. L. B. 239; Mit. Chap. II. Sec. 11, para. 2, note; Stokes, H. L. B. 458; Smriti Chandrikâ, Chap. IX. Sec. 1, para. 3, note (2).

(*g*) Stenzler, Yâjñ. 143, translates this "*und ähnliches.*"

may be translated by reference to the preceding enumeration so as to extend only to property acquired in a way similar to those specified. (*a*) The Smṛiti Chandrikâ adopts the reading "Âdyam," (*b*) yet in the section on Strîdhana makes no mention of property inherited by women, whence the translator of that work (*c*) and the High Court of Madras have concluded that inherited property is not Strîdhana. Yet a widow according to the same authority takes the property of her deceased husband in a divided family, (*d*) and a daughter on failure of the widow succeeds as a *dâyâdi* or sharer of the inheritance. (*e*) The Mitâksharâ, an earlier work, but under the influence of more advanced views, or as an easier solution of the questions arising on Yâjñavalkya's text, takes "Âdyam" as meaning "any other separate acquisition," and indicates, by enumerating "inheritance, purchase, partition, seizure, or finding," (*f*)

(*a*) *See* the Mâdhaviya, p. 41.

(*b*) Chap. IX. Sec. 1, para. 3.

(*c*) Translation, p. 110, note (1).

(*d*) Smṛiti Chandrikâ, Chap. XI. Sec. 1, para. 24.

(*e*) *Ibid.* Sec. 2, p. 9; Sec. 4, p. 19.

(*f*) Mit. Chap. II. Sec. 11, para. 2; Stokes, H. L. B. 458. By âdi (= and the rest) Vijñâneśvara must have known that the passage quoted by him from Yâjñavalkya would remind his readers of the instances of female inheritance which he had already given (*see* Stokes, H. L. B. pp. 383, 427, 440, 441, 446). He could not but have excepted these expressly had he intended to except them. He found a varying enumeration of the constituents of Strîdhana in Smṛitis, all of which had a sacred authority, and adopted a generalization that embraced them all. This was an application of the received principle that where different objects are named as of a particular class by different Smṛitis, all are to be included in it in order to preserve consistency (*ekavâkyatâ*). Inheritance he specifies, and names it first; the comprehensive final term shows that it is not used in any restricted sense. Such words as *âdi* are constantly used in the Smṛitis which were learned by heart to suggest a statement or a class by a single term. Vijñâneśvara, commenting on Yâjñavalkya's smṛiti, interprets the other smṛitis by means of that, and

that a woman may acquire property in precisely the same ways as a man. (*a*) As to inheritance from her husband, Vijñâneśvara supports the complete right of the widow by reference to Bṛihaspati's text, in her favour, (*b*) without the exception contained in another passage of the same Smṛiti, excluding her from succession to Nibandha or fixed property. (*c*) The daughter too inherits from her father, and thus inheriting becomes complete owner, as when she takes her one-fourth share in a partition. (*d*) *See* Bk. I. Ch. II. Sec. 7.

Whether Vijnâneśvara has not given to the text of Yâjñavalkya a comprehension going much beyond the intention of its writer may reasonably be doubted. If we look back to the state of Brâhmanical feeling as the expression of which the principal Smṛitis were composed, we find the position of women regarded as essentially dependent. Those who on account of their weakness had a claim to be protected and maintained by their male relatives in their family of marriage (*e*) or of birth (*f*) were not likely to excite the commiseration out of which might spring the moral and eventually the legal recognition of their right to take the estate

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of Gautama's, which also (Ch. XXVIII, 24) gives but a single general rule for the descent of Strîdhana and a single exception in the case of the śulka or fee. Other lawyers take other texts, as Manu IX, 192-4, 198, as the leading authority, and construe Yâjñavalkya and Gautama by them, but without any precise general agreement as to details.

(*a*) *Ibid.* Chap. I. Sec. 1, para. 8; Stokes, H. L. B. 366.

(*b*) Mit. Chap. II. Sec. 1, paras. 6, 30, 31, 39; Stokes, H. L. B. 428-439.

(*c*) *See* Smṛiti Chandrikâ, Chap. XI. Sec. 1. para. 23; Mit. Chap. II. Sec. 2. para. 1; Stokes, H. L. B. 440. This incapacity seems to be still recognized in the Siâlkot district of the Panjâb. *See* Panj. Cust. Law, II. 210.

(*d*) *Ibid.* Chap. I. Sec. 1, paras. 3, 8; Stokes, H. L. B. 365, 366; Sec. 7, para. 14; Stokes, H. L. B. 401.

(*e*) *See* Vyâsa quoted Varadrâja, p. 39, and the Comment. p. 42; Vivâda Chintâmaṇi, p. 261, 262; above, p. 245 ss.

(*f*) *See* Nârada, Pt. II. Ch. XIII. Sl. 28; above, p. 246.

dedicated equally to the celebration of sacrifices (*a*) to the dead as to the support of the living members of the family. Such a recognition was wholly opposed to the earlier ideas as to the ownership of land. Yâjñavalkya himself regarded the inheritance as absolutely impartible and inalienable. Uśanas says that such property is indivisible "among kinsmen even to the thousandth degree," and Prajâpati is to the same effect. (*b*) Under such a law there would be no immoveable property for the widow or the daughter to take on the decease of the husband or father, and Bṛihaspati says (*c*) distinctly that a widow shall take her husband's wealth "with the exception of fixed property," as, "even if virtuous, and though partition has been made, a woman is not fit to enjoy fixed property." In this latter passage partition of the immoveable inheritance is as elsewhere in the same Smṛiti recognized, but the older note of exclusion of females as owners is still retained. Kâtyâyana, fully recognizing partition, yet declares that immoveable property is not to be given to a woman; (*d*) and Vyâsa says that the husband even is not to make her a present of more than a limited amount, apparently out of the moveable wealth. (*e*) So jealous was the Brâhmanical law of any impairment of the family estate. The wife being, along with the son and the slave, in this ancient constitution of Hindû Society, "Nirdhana" or without capacity for property, (*f*) and her

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(*a*) Manu IX. 142; Coleb. Dig. Bk. V. T. 413, 484, Comm.; and compare Coulanges La Cité Antique, Bk. II. Ch. VII.

(*b*) Smṛiti, Ch. I. c., p. 44, 46.

(*c*) *Ibid.* Ch. XI. Sec. 1, para. 23.

(*d*) Vyav. May. Ch. IV. Sec. 10, para. 5; Stokes, H. L. B. 99.

(*e*) Vyav. May. loc. cit.; Dâyabhâga, Ch. IV. Sec. 1, para. 10; Stokes, H. L. B. 238. Compare Coulanges, La. Cité, Bk. II. Ch. VI.

(*f*) *See* Manu and Nârada as quoted below. The Smṛiti Chandrikâ tries to explain away "Nirdhana" as incompetent for transactions, not as incapable of holding property. *See* Transl. Ch. IX. In China all property owned or inherited by a wife passes to the husband in consequence of the *potestas* with which he is invested, as under the

competence in that respect having been extended by steps, which seem to have been always jealously watched and restricted, the rather sudden and indefinite expansion, which the Mitâkshará supposes Yâjñavalkya to have given to it seems opposed to all probability. Apart from Vijñâneśvara's authority we should rather construe the words "and the rest" by reference to the context, and explain them as meaning "other kinds sanctioned by express scripture or by custom that may be referred to it." That Vijñâneśvara himself accepted the text in its widest signification cannot reasonably be doubted. (*a*)

It is this construction which underlies his whole subsequent treatment of the subject of inheritance. This is the construction which the Vîramitrodaya (*b*) adopts and which Jîmûtavâhana understands while he combats it. (*c*)

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earlier Roman Law. *See* Journ. of N. China Br. of the R. A. Society, Part XIII. p. 112. Women were regarded by the Teutonic laws as necessarily dependent, and the traces of this order of ideas still remain in the English law. The proper guardian was the husband, father, brother, or son, the nearest agnate or the King's Court. Lab. *op. cit.* 394. So under the early Roman Law. *See* Mommsen, Hist. of Rome, vol. I.

(*a*) A conclusive confirmation of this being the sense of the Mitâkshará may be drawn from an exceptional case. Inheritance is by Vijñaneśvara named as first amongst the sources of ownership (*see* Mit. Ch. I. Sec. I. para. 12). There is a passage of Baudhâyana which says, "the uterine brothers take the property of a deceased damsel." Here is a special rule of inheritance to Strîdhana in the particular case. Vijñaneśvara, amongst the rules on Strîdhana, says that under it the brothers take the property "inherited by her." Thus the inheritance constitutes Strîdhana, and the heirs of the woman, not heirs of the former owner, take it on her decease.

Similarly in the Vyavahâra Mayûkha, Ch. IV. Sec. 10, para. 26, property taken by inheritance is distinctly ranked as Strîdhana by the distinction drawn between it and Strîdhana of the less important specified kinds to which special texts apply.

(*b*) Section 1, p. 4 ff, below.

(*c*) Dâyabhâga, Ch. IV. Sec. 2, p. 27 (Stokes, H. L. B. 250); Sec. 3, p. 4 (*ibid.* 251), compared with Mit. Ch. II. Sec. 11, p. 11 (*ibid.*

By what precise course the Hindû woman, from the condition of complete dependence, from being *Nirdhana*, rose in the estimation of the Brâhman lawyers to the high position assigned to her by Vijñâneśvara, cannot probably, upon the existing sources of information, be determined with any certainty. Sir H. S. Maine, tracing her right to property to the Bride-Price paid for the damsel taken in marriage and in which she shared, remarks (*a*) :—

"If then the Strîdhan had a pre-historic origin in the Bride-Price, its growth and decay become more intelligible. First of all it was property conferred on the wife by the husband 'at the nuptial fire,' as the sacerdotal Hindû lawyers express it. Next it came to include what the Romans called the *dos*, property assigned to the wife at her marriage by her own family. The next stage may very well have been reached only in certain parts of India, and the rules relating to it may only have found their way into the doctrine of certain schools; but still there is nothing contrary to the analogies of legal history in the extension of the Stridhan until it included all the property of a married woman. The really interesting question is, how came the law to retreat after apparently advancing farther than the Middle Roman Law in the proprietary enfranchisement of women, and what are the causes of the strong hostility of the great majority of Hindû lawyers to the text of the Mitâkshará, of which the authority could not be wholly denied? There are in fact clear indications of a sustained general effort on the part of the Brâhmanical writers on mixed law and religion, to limit the privileges of women which they seem to have found recognised by elder authorities."

460). So also the Smṛiti Chandrikâ, which, though it does not allow inheritance as a source of strîdhana (*see* Transl. Ch. IX. Sec. I.), yet admits that the Mitâkshará does so (Transl. Ch. IV. para. 10). The Vivâda Chintâmani and the Sarasvati Vilâsa follow the Mitâkshará. *See* below.

(*a*) The "Early History of Institutions," pages 324, 333.

And again (*a*) :—

"On the whole the successive generations of Hindû lawyers show an increasing hostility to the institution of the Strî-dhan, not by abolishing it, but by limiting to the utmost of their power the circumstances under which it can arise. .....The aim of the lawyers was to add to the family stock, and to place under the control of the husband as much as they could of whatever came to the wife by inheritance or gift, but whenever the property does satisfy the multifarious conditions laid down for the creation of the Strîdhan, the view of it as emphatically 'woman's property' is carried out with a logical consistency very suggestive of the character of the ancient institution on which the Brâhmanical jurists made war. Not only has the woman singularly full power of dealing with the Strîdhan—not only is the husband debarred from intermeddling with it, save in extreme distress —but, when the proprietress dies, there is a special order of succession to her property, which is manifestly intended to give a preference, wherever it is possible, to female relatives over males."

That the institution of Bride-purchase existed amongst the Hindûs, and for a time even amongst all classes, seems almost certain. Manu recognizes it (Ch. VIII., 204) and guards against fraud on the purchaser by giving to him both of the young women when an attempt is made to substitute one for another. Âpastamba says (*b*) :—

"It is declared in the Veda that at the time of marriage a gift for (the fulfilment of) his wishes should be made (by the bridegroom) to the father of the bride, in order to fulfil the law. 'Therefore he should give a hundred (cows), besides a chariot; that (gift) he should make bootless (by returning it to the giver).' In reference to those (marriage

(*a*) *Op. cit.* p. 333.

(*b*) Praśna II. Patala 6, Kaṇ. 13, para. 12; *see* also Manu III. 51; and Vasishṭha I. 36, 37.

rites) the word 'sale,' (which occurs in those Smṛitis is only used as) a metaphorical expression; for the union (of the husband and wife) is effected through the law."

This shows at once the former prevalence of the practice and the abhorrence with which at a later time it came to be looked on by the Brâhmanical community. (*a*) It had then become peculiar to, and therefore distinctive of, the lower castes, Vaiśyas and Śûdras, (*b*) though in the approved Ârsha form of marriage, a gift of a bull and a cow, to the bride's father was still prescribed, (*c*) a remnant, probably of a practice amongst a pastoral people, of compensating the family which lost the daughter in the most usual and valuable form of property then recognised. The formula prescribing the gift survived the circumstances in which it originated, but still exacted observance through the associations with which it was connected. (*d*) Manu, (*e*)

(*a*) *See* Baudhâyana, Transl. p. 208.

(*b*) Âpastamba, Praśna II. Pâṭala 5, Kaṇḍika 12, para. 1; Gaut. IV. 11; Yâjñavalkya I. 58, 61; Coleb. Dig. Bk. V. T. 499. At 2 Borr. R. 739, there is a case, *Massamat Rulivat* v. *Madhowjee Pánáchund*, of a mother (a widow) receiving Rs. 700 for consenting to her daughter's marriage which "was deemed disgraceful and was only done secretly," but which did not invalidate the betrothal made in consequence. Secret sales of girls are, it is believed, still very common in Gujarát even amongst the classes which publicly condemn the practice.

(*c*) Âpast. Praś. II. Pat. 5, Kaṇḍ. 11, para. 18; Manu III. 53; Vasishṭha I. 32.

(*d*) That kine were a common form of gift in the Vedic period, *see* 5 Muir's Sanskrit Texts, 467. In the Huzâra district it is noted that the bridegroom gives his bride a milch cow and some jewels as a premium when their cohabitation begins; and that she is persuaded to forego the rest of her promised dower. By a complete inversion of the ancient ideas a price is given nominally to buy jewels for the bride at betrothal, but usually to the father, who appropriates it. Panj. Cust. Law, II. 220. On the important place of cows in the wealth of a family amongst the ancient Irish, *see* O'Curry's Lect. I. 172, &c.

(*e*) Ch. III., paras. 25, 31, 51.

who condemns the Âsura form of marriage, recognizes it as still in vogue, and as distinguished by a consent gained by a liberal gift on the part of the bridegroom to the bride's father and the bride herself. (*a*) This gift is not, however, by Manu identified with that "gift before the nuptial fire," (*b*) which may accompany the most approved marriages. Vyâsa (*c*) defines the *Śulka* as the bribe given to the bride to induce her to go to her husband's house. Vijñâneśvara, (*d*) commenting on Yâjñavalkya II., 143, 144, who enumerates the nuptial gift as distinct from the '*Śulka*,' or 'fee,' calls the latter 'the gratuity for which a girl is given in marriage'; and the Vishṇu Smṛiti also (*e*) distinguishes the *Śulka* from the gift at the nuptial fire. Kâtyâyana distinguishes the nuptial gift (*f*) from the *Śulka*, which latter he defines as "what is received as the price of household utensils, of beasts of burthen, of milch cattle (*g*), or ornaments of dress, or for works." (*h*) This definition, though passed by in silence by the Mitâkṣharâ, is adopted by the Vyavahâra Mayûkha, (*i*) by the Vivâda Chintâmaṇi, (*j*) and with a somewhat different reading is adopted by Jîmûtavâhana in the Dâyabhâga. (*k*) This writer insists that the gift of the

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(*a*) So the Ratnâkara. *See* the Smṛiti Chandrikâ, Ch. IX. Sec. 1, para. 4, note.

(*b*) Manu IX. 194; III. 54.

(*c*) Dâyabhâga, Ch. IV. Sec. 3, para. 21; Stokes, H. L. B. 255.

(*d*) Mit. Ch. II. Sec. 11, para. 6; Stokes, H. L. B. 460.

(*e*) Ch. XVII. 18.1

(*f*) Mit. Ch. II. Sec. 11, para. 5; Stokes, H. L. B. 459.

(*g*) DeGubernatis, Storia Comparata Degli Usi Nuziali, Bk. I. Chap. XV. p. 95, points to "il dono d'una vacca che lo sposo Indiano faceva alla sposa e al prete maestro." Compare Yâjñ. I. 109; Manu XI. 40.

(*h*) Smṛiti Chandrikâ, Chap. IX. Sec. 10, para. 5; Mâdhaviya, p. 41.

(*i*) Chap. IV. Sec. 10, para. 3; Stokes, H. L. B. 98.

(*j*) p. 228.

(*k*) Chap. IV. Sec. 3, para. 19; Stokes, H. L. B. 254. *See* also Coleb. Dig. Bk. V. T. 468; Varadarâja, p. 46.

ordinary *Śulka* may accompany a marriage in any form, (*a*) and is to be carefully distinguished from the *Śulka* presented in marriages according to the disapproved forms to the father or brothers giving the damsel in marriage. The latter, he says, belongs to them alone. (*b*)

Varadrâja, page 48, admitting the two kinds of *Śulka*, says that the "Bride-Price" goes to the mother or the brother, while the gift made for the purchase of ornaments and furniture reverts on the woman's death to its giver. Mitramiśra says there is a *Śulka* given in the form of ornaments

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(*a*) Dâyabhâga, l. c. para. 22 ff; Stokes, H. L. B. 255.

(*b*) Amongst the Jews "a dowry or purchase money was usually given by the bridegroom to the bride's father." Milman, History of the Jews, I. 174. The ancient Germans purchased their wives, and the form remained after the reality had passed away. *See* Guizot, Hist. de la Civ. Fr. Leç. VII. The *co-emptio* of the Roman law was in form a purchase of the bride. Gaius I. 113.

To buy a wife remained in the Middle Ages the common expression for an engagement to marry. No bargain being complete without a change of possession, the suitor paid money for the *mundium* or guardianship and control of his intended bride, or earnest, on account of it, and this payment completed the marriage contract. (This payment of earnest, and the deposit of valuables as security, is still common in Bombay.) The sum stipulated was in progress of time always secured as a provision or part of the provision for the wife, and the pledging of the husband and his estate was in early times the wedding. As the bride assumed greater independence the earnest-money came to be paid to her, and in the English ceremony was eventually appropriated by the priest as a fee. The effacement of the guardian brought about the marriage *per verba de praesenti*, which may be compared with the Hindû Gândharva rite, but which was never received as sufficient in England. The confusion between betrothal or marriage, or the variance of opinion in regarding the one or the other as the essential ceremony, has prevailed alike in Europe and in India. *See* Baring Gould, Germany, Ch. V.; Nárada II., XII., 32-35. If the bridegroom had failed to purchase the *mundium* or guardianship of his bride from her father, the latter, according to the Code of the *Allemanni*, could reclaim her with damages, and if meanwhile she died leaving children, these ranked as illegitimate. Lab. *op. cit.* 393. The purchase money becoming by degrees the *dos*

for the bride to her parents, and another as a present to her on her going to her husband's house. (*a*)

This perplexity of the Smritis and the commentators over "*Śulka*," as a gift to the parent or brothers, and as a gift to the bride, as a gift at the marriage, at the time of the bride's change of residence, and as a fund for procuring household goods and ornaments, shows that at a very early date the word had lost the definite sense of "Bride-Price," if it had ever been confined to it. Stenzler translates *Śulka* as "*Morgengabe*," (*b*) but this gift on the morning after the completed nuptials, an important institution amongst many nations, (*c*) seems not to have obtained special recognition amongst the Hindûs. It would indeed be incompatible with the spirit of modesty with which, according to their

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legitima or marriage gift of the bride herself, was subject to the husband's *mundium* and fell to him on his wife's predecease; but it belonged to her inalienably in case of her survival. Lab. *op. cit.* 403. The Weotuma or Witthum by which parents provided against their daughter's being absolutely dependent on her husband consisted of land, money or stock (*see* below), and it was regarded as essential to a true marriage, so that when there was nothing to give, the bride-groom went through a form of receiving. In return he used to settle lands or houses on his bride. It was only when she was poor that she had to depend wholly on the *morgengabe*, and hence an unequal marriage acquired the name of "Morganatic."

In China the betrothal or marriage contract is made by the heads of the families, but before matrimonial union the bridegroom has to buy the potestas of the father. This is not reduced to a mere form like the Roman *coemtio*, but is a serious and expensive transaction. The wife thus passes into her husband's agnatic connexion and forsakes her own.

(*a*) *See* Vîramit. Tr. p. 223.

(*b*) Yâjñavalkya, II. 144.

(*c*) In Ireland the Coibche (= *morgengabe*) gradually absorbed the bride-price as Christianity softened the manners of the people, and then a part of the gift (called Tindsera) was handed to the father as a consideration for his resigning at once the person and guardianship of his daughter. *See* O'Curry, Lect. I. 174 ss. *See* De Gubernatis Storia Comparata, Lib. III. Ch. VII., Ancient Laws of

law-givers, the relations of the spouses are to be governed.(*a*) All the Smṛitis, which deal with the subject, agree that this *Śulka* goes on the woman's death childless to her brothers or her parents, (*b*) for which no good reason could easily be found, unless the more primitive idea, attached to the word, had been that which it really expressed during the formation of the law. All agree too that the property of a woman married by the Âsura rite goes to her own family(*c*)

Wales, p. 47, § 62, 63. A practice prevails amongst some castes in Western India which may possibly have originated in the same way as the "Morgengabe." On the first night of cohabitation the elder women of both families conduct the married pair to their chamber, and seat them together on the nuptial bed. The bridegroom then puts a gold ring on the bride's finger, and ties in her *sari* or scarf two gold coins. The analogy of this to the use of the wedding ring, the gift of money now taken by the priest, and the concurrent declaration "with all my worldly goods I thee endow," (Bl. by Kerr, vol. II. p. 114,) in the English marriage service is curious and interesting. The gift makes the property Stridhana. The male parents also are present in some cases. The bride's mother retires telling the bride by all means to insist on the agreed *præmium pulchritudinis*. The door is then closed; but outside it the sisters or cousins of the married pair sit in opposite lines, and for two or three hours sing alternately on love and marriage.

(*a*) The morning gift of favour became in time a matter of contract, and marriage articles eventually stipulated as a rule for a settlement as *morgengabe* of one-fourth of the bridegroom's property by way of dower on the intended bride. This, however, does not seem to be the gift intended by Śulka in the Śmṛitis. *See* Lab. *op. cit.* 407; Baring Gould, Germany, &c., p. 89. Where a husband had failed to present the *morgengabe*, the wife, if left a widow, could claim generally one-third of all acquired lands. The dower and *morgengabe* thus became confused, and in the English law were not distinguished. *See* Bk. I. Ch. II. Sec. 6 A. Q. 7, note.

(*b*) *See* the Transl. of Gautama XXVIII. 23; Kâtyâyana, quoted Dâyabhâga, Chap. IV. Sec. 3, para. 12; Stokes, H. L. B. 253; Yâjñavalkya, *ibid.* paras. 10, 26; Stokes, H. L. B. 253, 256.

(*c*) Dâyabhâga, Chap. IV. Sec. 2, para. 24; Stokes, H. L. B. 249; Mit. Ch. II. Sec. 11, para. 11; Stokes, H. L. B. 460; Manu IX. 197; Yâjñavalkya, II. 145.

on her death without children. According to most of the commentators the same rule is prescribed by Yâjñavalkya as to a gift by her own kindred. (*a*) Vijñâneśvara himself, while he converts the rule in favour of the woman's kinsmen generally into one favouring her husband's kinsmen, (*b*) as the necessary complement of the wide extension that he had given to Strîdhana, is forced to set aside his own construction in favour of the brothers, who take the *Śulka* not only as relatives, but under a special text in their favour. (*c*) The Vyavahâra Mayûkha, (*d*) adopting the Mitâksharâ's doctrine as to Stridhana, defined by special texts, admits the brothers' right to the *Śulka*, and in the case of an *Âsura* marriage the right of the woman's own family to property arising from gifts made by them.

This identity of rules in cases which the modern Hindû law widely distinguishes must probably have originated in some common cause. The form of capture recognised for soldiers as the Râkshasa rite (*e*) still subsists as an essential part of the marriage ceremony amongst several of the uncivilized tribes of India. (*f*) The resistance of the

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(*a*) Dâyabhâga, Chap. IV. Sec. 3, paras. 10, 29; Stokes, H. L. B. 253, 257; Coleb. Dig. Bk. V. T. 503 ff. The Teutonic Codes provided for a gift by way of advancement on the part of a father or brother at a maiden's marriage. This, which the Lombard law called *faderfium*, was inherited by the bride's children, in default of whom it returned to her family. Lab. *op. cit.* 409; Gans, Erbrecht, III. 176.

(*b*) Mit. Chap. II. Sec. 11, paras. 9, 14; Stokes, H. L. B. 460; Coleb. Dig. Bk. V. T. 508, 509, 512, Comm.

(*c*) So the Smṛiti Chandrikâ, Chap. IX. Sec. 3, paras. 27, 29, 33.

(*d*) Chap. IV. Sec. 10, paras. 27, 32; Stokes, H. L. B. 105, 106.

(*e*) Manu, III. 26, 33. An allusion to it seems to be made in the passage from the Rig. Veda X., 27, quoted in Muir's Sanskrit Texts, vol. V. p. 458. The authority exercised by brothers is alluded to, *ibid.* This in Vasishṭha, I. 34, is called the Kshâtra rite.

(*f*) *See* Lubbock's Primitive Condition of Man, pp. 76, 86; Transactions of the Literary Soc. of Bom. vol. I. 285; Tupper, Panj. Cust. Law, vol. II. 90 ss; Rowney, Wild Tribes of India, p. 15

bride's relatives was an assertion, until it became a mock assertion, of rights, (*a*) which seems to have been exercised by the ancient Britons amongst many other nations. It is a step in advance when marriages resting on contract, and distinct exogamous families are formed, as in India they seem to have been at a very early period,(*b*) and the legend of Draupadi can be looked on as remote from national experience. This advance is, in some instances, accompanied by a development of ancestor worship, which gives a sacred character to the head of the family, (*c*) and the father or eldest

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(Gonds); p. 37 (Bhîls); p. 46 (Kâthis, amongst whom as amongst the Pâhânas and others the niyoga or levirate prevails); p. 68 (Kholls); p. 76 (Santhâls, who before a maid's marriage require her to take part in a week's sexual orgy like the Babylonian feast of Mylitta); p. 81 (Orâons); p. 147 (Koches, amongst whom the bridegroom becomes a dependent of the wife's mother); p. 177 (Cachâris).

(*a*) *See* however McLennan's Studies in Ancient History, p. 425 ff.

(*b*) The story of Yama, Ṛig. Veda, X. 10, 1, marks the abhorrence with which an incestuous connexion was looked on already in the Vedic period. *See* 5 Muir's Sanskrit Texts, p. 289. In some tribes, as amongst the Jats of Rohtak, a marriage is not allowed to a woman of the father's, mother's, or father's mother's clan. *See* Rohtak Settlement Report, p. 65.

(*c*) *See* Muir's Sanskrit Texts, Vol. V. p. 295; Tylor's Primitive Culture, Vol. II. 103, 109; Coulanges la Cité Antique, Bk. I. Ch. II. Bk. II. Ch. VIII. The dependence of sons under the early Brâhmanical law may be gathered from Manu I. 16, and Nârada, Pt. I. Ch. III. pa. 36; "Women, sons, slaves, and attendants are dependent, but the head of a family is subject to no control in disposing of (or dealing with) his patrimony," as well as Pt. II. Ch. V. para. 39. In Ch. IV. para. 4, it is said that a son or a wife can no more be given away than a thing already promised to another; which indicates, as does Yâjñavalkya III. 242, how far the *patria potestas* had been pushed. *See* too Vasishṭha, Ch. XV. A similar superiority is assigned to the eldest brother by the Smṛiti cited in Coleb. Dig. Bk. II. T. 15. Manu IX. 105, directs the eldest brother "to take entire possession of the patrimony," and the others to "live under him as under their father." The modifications introduced at a later time appear from Kulluka's comment, and the following verses of Manu, as also from Nârada, Pt. II. Ch. XIII. para. 5; and the modern law from Jagan-

brother is found exercising despotic power over its other members. He will not part with his daughter or sister except for a reward. (*a*) Natural affection leads to his endowing the bride with some portion of the gain; it becomes a point of honour and ostentation to do this, (*b*)

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nâthâ's remarks, in Coleb. Dig. l. c. The cases of *Duleep Singh et al* v. *Sree Kishoon Panday*, 4 N. W. P. R. 83; *Ajey Ram* v. *Girdharee et al*, *ibid.* 110; and *Musst. Bhowna et al* v. *Roop Kishore*, 5 *ibid.* 89, may be compared with *Jugdeep Narain Singh* v. *Deen Dyal Lall et al*, L R. 4 I. A. 247; and *Mohabeer Pershad et al* v. *Ramyad Singh et al*, *ibid.* 192. The absence of ownership in a wife and son is insisted on in a way which shows that its existence had once been recognized. *See* Vyav. May. Ch. IV. Sec. 1, p. 11, 12 (Stokes, H. L. B. 45); Ch. IX. Sec. 2, para. 2 (*ibid.* 133); Coleb. Dig. Bk. II. Ch. IV. T. 5, 7, 9, Comm. The Hindû law on this point may be compared with the Roman law as to the *patria potestas* in its original and its mitigated forms. *See* Bynkershoek's treatise on this subject.

(*a*) As to the sale of wives amongst the Kholes and other tribes, *see* Rowney's Wild Tribes, pp. 47, 177, 200. The wife thus acquired being not unnaturally looked on as property, he who took her on her husband's death became answerable, as having received the estate, for the debts of the deceased. *See* Nârada, Pt. I. Ch. III., paras. 21—24. In his account of the Himâlyan Districts of the N. W. P., p. 19, Mr. Atkinson says: "the practice of accepting a sum of money for a daughter is gaining ground." This is probably an indication that the tribes least amenable to Brâhmanical influence are improving in their pecuniary circumstances.

(*b*) In the Odyssey the ἕδνα presented by the bridegroom are returned with a favourite daughter. Compare Dr. Leitner's account of a Ghiljit marriage, *Indian Antiquary*, vol. I. p. 11; and Plautus Trinummus, III. 2, quoted by De Gubernatis, Storia Comparata, p. 106; Str. H. L. I. 37; II. 33–35; Coleb. Dig. Bk. IV. T. 175, 184; Manu VIII. 227; IX. 47, 71, 72; Jolly, Ueber die rechtliche Stellung, &c. p. 11 n. 25. Stinginess on the part either of the son-in-law or of the bride's brother was already a reproach in the Vedic era. *See* Rig Veda, I. 109, quoted 5 Muir's Sanskrit Text, 460; Vedârthayatna, Bk. II. 737; and Comp. Coleb. Dig. Bk. V. T. 119, Comm. The reference appears to be to a connexion formed by purchase. The profuse expenditure at Hindû weddings thus finds a kind of warrant in the earliest traditions of the race.

and on her death it seems reasonable that the gift, in early times still retaining its original shape, should return to the stock from which it proceeded. (*a*) At a still later point of progress the sale of women, retained by the uncivilized tribes, comes to be looked on as an opprobrium by those more advanced, and especially where, as amongst the Brâhmanical community, the wife has been admitted to a share with her husband in the performance of the most sacred household rites. (*b*) A concurrent elevation of feeling amongst the warrior caste brings about the Svayaṁvara, (*c*) the choice of her favoured suitor by the high born maiden, or at least a state of manners and ideas akin to that of the age of chivalry in Europe, in which the beautiful pictures of female character presented by the Hindû epic poetry and drama could be conceived and appreciated. (*d*) At this point the rules and the ceremonies which pointed to a ruder age, would be explained away; and the recollection of their true origin dying out as a newer system acquired consistency, the texts would be subjected to such manipulation either in the way of change or of exegesis as we find they have in fact undergone. (*e*) The right of women to marriage gifts continued while the rules still retained became anomalous.

(*a*) It was found necessary at Athens to limit the paraphernalía which a bride might take to her husband's house. The dowry given with her had to be restored on her death. *See* Grote, Hist. of Greece, vol. III. 140.

(*b*) Âpastamba, Pr. II. Pat. I. Kan. 1, para. 1; Pat. V. Kan. 2, para. 14; Baudhâyana, P. 2, Adh. 1, K. 2, Sûtra 27; Coleb. Dig. Bk. IV. T. 414; Bk. V. T. 399. Compare Max. Müller's Hist. San. Lit., pp. 28, 205. Land in moderate quantity is sometimes settled on a daughter for her sole and separate use at her marriage even amongst tribes which most strictly prohibit lands leaving the family or tribe. *See* Panj. Cust. Law, II. 221.

(*c*) *See* Mon. Williams, In. Wis. 438.

(*d*) A Svayaṁvara seems to have been occasionally allowed even in the Vedic times; *see* 5 Muir's San. Texts, 459.

(*e*) *See* Burnell, *op. cit.* Introduction, p. xiv.

Side by side with this source of women's property, however, there was another which has received less attention. (*a*) The total severance from her own family, which in a particular form of civilization the woman undergoes when she marries and thus enters that of her husband, is still unknown to some Indian tribes. (*b*) Many traces of custom

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(*a*) Amongst the Anglo-Saxons a wife did not enter her husband's "maegth" or family by marriage. Her own kindred remained responsible for producing her or making compensation in the event of her committing a crime. Schmid, Die Gesetze der Angl. Sax., cited Taswell-Langmead, Const. Hist., p. 35. The dotal marriage or *matrimonium sine conventione* of the Romans was attended with a similar effect as to property. The bride remained a member of her father's family. *See* Tom. and Lem. Gaius, p. 102 ss; Smith's Dic. Ant., Art. Matrimonium, Divortium.

(*b*) "In Spiti, if a man wishes to divorce his wife without her consent he must give her all she brought with her, and a field or two besides by way of maintenance. On the other hand if a wife insists on leaving her husband she cannot be prevented," but in this case or in case of her elopement he may retain her jewels. Panj. Cust. Law, II. 192. As to the Nâyars, *see* Buchanan's Mysore, vol II. pp. 418, 513. The polyandry formerly universal amongst this tribe has almost disappeared under the British rule. In some families it has taken the intermediate form of a limitation to biandry, not more than two husbands being allowed. In Cochin and Travancore the older institution subsists in its loosest form. A quasi-matrimonial ceremony having been celebrated by a Brâhman or Kshatriya the woman thenceforward associates with anyone she pleases. Where the family is one of position the woman does not leave her own tarwad, and her husband has to visit her at her family residence. Amongst the Thiyens there is a fraternal partnership in the wife formally married to one of the brothers. On this one's death the other marries the widow in an undivided family and all the children inherit in common. A separated brother has not the same privilege or obligation. There is a class of Nambudri Brâhmans in N. Malabar who follow the regular law of marriage but the Nâyar rule of inheritance. (They are probably a race of mixed origin, or who have assumed a higher caste rank than they are entitled to, as it is virtually impossible that Brâhmans with indissoluble marriage and known paternity should adopt the Nâyar law of succession). The manager of a Nâyar tarwad tries to get his own children mar-

remain to show that a connexion through the mother was till recently recognized, and indeed still is in some places recognized, as superior or as running parallel to that through the father, and as in some degree regulating the devolution of property. (*a*) The custom of *patnîbhâg* still prevailing in Madras and in some parts of the Punjab (*b*) is traceable to this source. In Bengal Jîmûtavâhana founds the law of devolution on Viśvarupa's statement that all the property of a woman dying childless goes to her brother. (*c*) The rule indeed under which, according to the Bengal law, patrimony taken by a daughter from her father, instead of passing to her husband and his family, returns to the family stock from

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ried to his sister's in order to benefit by the same estate as himself. Marriages between cousins through their mothers or grandmothers as sisters are considered incestuous. (These particulars are gathered from a letter from Mr. C. Sankaram Nair to the Hon. Dr. W. W. Hunter, dated 8th Oct 1882.) In Canara there is a quasi-permanent connection not with the husband but with a paramour; yet though this identifies the children as the offspring of a particular man, his heritage goes not to them but to his sister's children by her paramour. Amongst the Bants there is a conflict between the older law, which favours the nephews and the natural tendency of fathers to enrich their own children, which now requires legislative sanction to give it full effect. Among this tribe there is a polygamy without polyandry: each wife's children and goods are regarded as specially her own; and on her divorce or the death of her husband, go with her to the joint family dwelling of her brothers. The eldest brother manages the estate; but his heir in that capacity is the eldest son of his eldest sister, his own children, like the other offshoots of the family, being entitled only to subsistence. Buchanan's Mysore, vol. III, p. 16, &c. The conflict between paternal affection and duty to the tarwad in Malabar is referred to in *Tod* v. *P. P. Kunhamud Hajee*, I. L. R. 3 Mad. at p. 175, where, too, it is recognized that estates and acquisitions belong wholly to the tarwad or female *gens*, though the manager may grant leases and the mortgages called Kánam and Otti not subject to foreclosure. *See* Rev. and Jud. Selections, vol. I. p. 891; Fifth Rep. App. 23, p. 799; *Edathil Itti* v. *Kopashon Náyar*, 1 M. H. C. R. 122.

(*a*) *See* Rowney, Wild Tribes of India, p. 147, as to the Koches.

(*b*) *Supra*, p. 386; Tupper, Panj. Cust. Law, vol. I. p. 72.

(*c*) Dâyabhâga, Ch. IV. Sec. 3, p. 13 (Stokes, H. L. B. 254).

which it was severed, may be referred to this principle. So as to the effect of Âsura marriages and as to succession amongst Sûdras; so as to prîtidatta the Sm. Ch. quoting Kâtyâyana. Even in Manu, the text (IX. 185) in favour of a father's succession is balanced by one (IX. 217) which says "of a son dying childless the mother shall take the property," and on a mother's death all her sons and daughters are to share her propertyequally (IX. 192). Yâjñavalkya (II. 117) says the daughters, and failing them the issue. (*a*) In the Mitâkshara (Ch. II. Sec. 4, p. 2; Stokes, H. L. B. 444) a passage is cited from Dhâreśvara, which, failing the mother, assigns the son's heritage to his grandmother in preference to his father, in order that it may not pass to his brothers of another class. This rule, rejected in the later law, may well have come down from a time when the clan connexion through the mother was thought more close than that of mere half-brothership through the same father. (*b*) Many instances of this are to be found in different parts of the world. In India the distinctive marks of an exclusive female gentileship are generally wanting even among the ruder tribes; but the separate subsistence of the wife's property as belonging to her and her own family of birth is still recognized. In a recent case on the Kattiawar frontier the brothers of a woman who had died childless came and took possession of the whole household stuff. (*c*) Varadarâja, page 52, refers that part of Bṛihaspati's text, (*d*) which says that "the mother's

(*a*) At Athens a husband enjoyed only the fruit of his wife's dowry. On her death or divorce it went to her family. Her marriage gifts remained her own, but she could not dispose of them freely, being looked on as under guardianship except as to petty transactions. Schoe. Ant. of Greece, 516.

(*b*) Compare the case of the Lycians (Herod. I, 173,) and the other similar cases referred to in L. Morgan's Ancient Society, p. 347 ff.

(*c*) *Ex relatione*, J. Jardine, Esq., late Judicial Assistant in Kattiawar, and now Judicial Commissioner in Burmah.

(*d*) Coleb. Dig. Bk. V. T. 513; Vyav. May. Chap. IV. Sec. 10, p. 20; Stokes, H. L. B. 106.

sister..... [is] declared equal to a mother," to the case of an Âsura marriage attended with the consequence of the succession to the wife, not of her husband and his family, but of her own parents and their family. (*a*) And in this latter case he says, "When the mother and father would succeed, then in their default, of the three relatives through them the deceased woman's sister's son takes first. In his default her brother's son takes it. In his default the son-in-law takes it." This preference of a sister's son to a brother's son, which is not confined by other writers to the case of an Âsura marriage, (*b*) points probably to a time when female had not yet become quite superseded by male gentileship. A trace of the same state of things is to be found in Nîlakantha's preference of these collateral, and, according to modern ideas, but slightly connected, relatives to the husband's sapindas as heirs to a woman's *pâribhâshika* Strîdhana. Amongst the Brâhmans in the Surat district the custom as stated by the caste gives the succession to a maternal heritage taken by a son first to the widow of the propositus, then to his sister, sister's son and maternal aunt and her son in succession. Only on failure of these it goes

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(*a*) *See* Manu, IX. 197; Yajñ. II. 145; Dâyabhâga, Ch. IV. Sec. 2, p. 27; Stokes, H. L B. 250; Sec. 2, p. 6; *ibid.* 252.

(*b*) Smṛiti Chandrikâ, Ch. IX. Sec. 3, p. 36; Coleb. Dig. Bk. V. T. 513; Dâyabhâga, Ch. IV. Sec. 3, p. 31 (Stokes, H. L. B. 257); Vyav. May. Ch. IV. Sec. 10, p. 30 (*ibid.* 106). As to the close connexion subsisting amongst the ancient Germans between nephew and maternal uncle, *see* Tac. de Moribus German. c. 20. In some parts of Germany "the land always travels through a female hand. It goes to the eldest daughter; if there be no daughter, to the sister or sister's daughter." Baring Gould, Germany, I. 96. The succession to lands amongst the cultivating class is still traced through females. In some places a widow even transmits the farm of her first husband by her remarriage to the family of the second. *See* Baring Gould, Germ. Pres. and Past, Ch. III., and the authorities cited in the Appx. to the same work. Mr. Cust reports the existence of the custom of succession of sisters' sons in the Assam hills as well as in Travancore. Mr. Damant says it is in full force amongst the Gároo

to the maternal grandfather. (*a*) Similar rules prevail amongst some of the lower castes, instances of which are recorded. (*b*)

The patriarchal constitution of the family, which grew up amongst the Brâhmanical section of the Indian people, was logically connected with a set of ideas, with which those, to which we have just adverted, were incongruous. Accordingly we find, in the development of the now prevailing system, not only that "women, sons, slaves, and attendants are dependent," (*c*) but also (*d*) that "three persons, a wife, a slave, and a son, have no property; whatever they acquire belongs to him under whose dominion they are." This is the *patria potestas* in almost its full development; and starting from this point some writers (*e*) set down the woman as originally uninvested with any rights at all. Whether she had rights in the full sense of that term may indeed be doubted; but the law of her complete absorption in the family of her marriage was only by degrees and partially adopted by the community at large; and does not afford a sufficient source for the peculiar and varied rules in her favour with which in historical times it has always been blended.

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and Khâsias, north of Assam. The succession of the chiefs is entirely through females. *See* Ind. Ant. Vol. VIII. p. 205; also Rowney, Wild Tribes of India, p. 190. The Khâsya earns his wife by service to her father. A Gâroo husband has to submit to a mock capture by his bride and her friends, and plays the part of reluctance and grief as well as if he belonged to the other sex. *Ib.* As to the custom of Illatom (= affiliation of a son-in-law) in Madras, see *Hanumantamma* v. *Râma Reddi*, I. L. R. 4 Mad. 272.

(*a*) Borrad. C. Rules, Lith. p. 401.

(*b*) As in Bk. G. Sheet 17 of the same Collection.

(*c*) Nârada, Pt. I. Ch. V. Sl. 36.

(*d*) *Ibid.*, Pt. II. Ch. V. Sl. 39; Manu VIII. 416.

(*e*) As Dr. Jolly, in his Essay, Ueber die rechtliche Stellung der frauen bei den alten Indern, p. 4, and Dr. A. Mayr, Das Indische Erbrecht, p. 152, "Die Weiber waren in ältester Zeit keine Rechtssubjecte."

Amongst the polyandrous classes indeed, who are still much more numerous in India than is generally supposed,(*a*) it is obvious that, as the chief connecting links between successive generations, craving some ideal continuity, are the females, and they the sole centres of any certain identity of blood, the patriarchal constitution of the family, and its ordinary concomitants, are practically out of the question. Such classes, though not within the operation of the stricter Hindû law, have yet obtained a place in the Hindû commu-

(*a*) In Kamaun, the Rajputs, Brâhmans, and Sûdras all practise polyandry, the brothers of a family all marrying one wife like the Pâṇḍavas. The children are all attributed to the eldest brother alive. None of the younger brothers are allowed to marry a separate wife. When there are in a family but one or two sons it is hard to procure a wife through fear of her becoming a widow. Bhagvânlal Indraji Pandit, in Ind. Ant. March 1879, p. 88. The Khâsias usually have but one wife for a group of brothers. (Rowney, Wild Tribes of Ind., p. 129.) Polyandry even is exceeded by the Booteah women, *ib.* 142. As to the Duflas, *ib.* 151; the Meeris, *ib.* 154. Amongst the Sissee Âbors, a group of brothers have a group of wives in common, *ib.* 159. See as to the mountain tribes of the Himâlyan frontier, Panj. Cust. Law, II. 186 ss. The reason assigned in some of these cases for the polyandrous household is deficiency of means, as in the case of a similar arrangement amongst the Spartans, recorded by Polybius, XII. 6 (*b*), Ed. Didot. The rules, preserved in Manu IX. 58 ff, for regulating the intercourse with the childless wife or widow of a brother, point back to a previous institution which the gradual refinement of sensibility had thus ameliorated. The limitation of the practice to the lower castes mentioned by Manu does not occur in Nârada, who further allows this connexion even with a woman who has had children, if she is "respectable and free from lust and passion" (Nârada, Pt. II. Ch. XII. para. 80 ff). Yâjñavalkya assigns the duty to any kinsman of the deceased descended from the same stock. The male offspring of this kind of union was variously regarded either as the son of the deceased husband only, or of both him and the actual father. *See* Coleb. Dig. Bk. IV. T. 149, Comm.; Mitâkshará, Ch. I. Sec. 11, pp. 1, 5, note; Stokes, H. L. B. 410, 412; Baudhâyana, Pr. II. Kan. 2, Sl. 23; Vasishṭha, Ch. XVII. 8-11, ss.; Translation, p. 85.; Smṛiti Chandrikâ, Ch. X. That the practice, not subject apparently to severe regulations, obtained in the Vedic period, *see* Ṛig Veda, X. 40, quoted 5 Muir's Sanskrit Texts, 459.

nity, and have brought into it notions, which, on account of their harmonizing with some natural feeling or some need of the society, have obtained a more or less general acceptance.(*a*)

It is still the custom amongst some castes for the father of the bride to present with his daughter a household outfit, which is carried in procession at the wedding. (*b*) In others this is becoming superseded by a gift in money, which however is still regulated by the prices of the different equipments for which it is meant as a substitute. The husband who comes into possession in this way of a sum of money, and hands it to his wife to purchase household utensils, provides her with "Śulka" in the second sense. The *Adhyagnika* or gift at the altar, and the *Adhyávâhanika* or gift during the procession, are probably to be referred, like the 'Śulka,' to a state of things really anterior in its prevalence to the patriarchal system, out of which some suppose it to have grown by a gradual extension of the wife's proprietary capacity. So also as to the Pritidatta or token of affection, which was at first a gift from the woman's own family. She would be incapable of holding this, except through a capacity which Nârada's text denies. But that capacity not having been really extinguished in practice, the gift subsequent, *Anvâdheyika*, from her husband's relatives had a definite body of property,

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(*a*) *See* Burnell's Introd. to the Mâdhavîya, p. xv.; Introd. to Varadarâja's Vyavahâra Nirṇaya, pp. vii, viii; Ward's Survey Account, and the Madura Manual quoted by Mr. Nelson in his "View of the Hindû Law, &c.," pp. 141-145.

(*b*) Amongst the Brâhmans of the Southern Maratha Country the provision includes a couch with bedding or carpet, two silver or metal plates, two cups, &c. These are carried in procession to the bridegroom's house as an important if not essential part of the ceremony. In Germany it may be observed that the contribution of the bride towards the furnishing of the home in the shape of beds, linen, &c., becomes joint property of the spouses. Clothes and ornaments remain as we might say the Strîdhana of the bride, free from any right of the husband. An early instance of a simple trousseau is that in the Ṛig Veda, X. 85. *See* De Gubernatis, St. Comp. Bk. I. Ch. XVII.

real or potential, to which it could adhere; and the *Âdhivedanika* or compensation for supersession, in the form of a gift to make the first wife's position, as to paraphernalia, equal to that of the second, (*a*) if it was ever, as probably at first it was, a mere pacificatory present, easily took the character of a legal obligation, when other sources of exclusive female property were familiar to the people.

It seems at least probable then that the woman's distinctive ownership of property was not merely a development within the sphere of the Brâhmanical law itself, but in part a tradition from earlier times, or from an alien race, adopted as a process of amalgamation, blended the older and the newer inhabitants of India into a single people. The Hindû literature preserves many testimonies, that whatever may have been the strictly religious view of women's inferiority and dependence, they in fact retained a position of real influence and freedom down to the time when Mahomedan ideas began to permeate the community. Vijñâneśvara, whose literary activity is to be assigned to the eleventh century, was a stranger to these ideas. He had himself, it would seem, a tolerably high conception of female character and capacity; he looked on the union of the husband and wife as establishing an almost complete moral identity between them; and probably availed himself of a pretty widespread popular feeling, derived from the sources to which we have adverted, to propound his theory of female ownership. (*b*) That theory seems not to have been adopted without some misgiving or reserve by any of his numerous followers. Kâtyâyana and Vyâsa are quoted

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(*a*) Mit. Chap. II. Sec. 11, paras. 33-35; Stokes, H. L. B. 466.

(*b*) In this respect, as in his conception of Sapindaship as resting on consanguinity, and in establishing property as a matter of secular, not of religious, cognizance, Vijñâneśvara showed a boldness and reach of mind which it is hard for Europeans of the 19th century to appreciate. It was by these qualities however that his works became the chief authorities on the Hindû Law.

by the Vîramitrodaya (*a*) and by the Smṛiti Chandrikâ (*b*) to the effect that separate property bestowed upon a woman is not to exceed two thousand kârshâpaṇas, (*c*) and is to exclude immoveable property. It is there explained that as the gift might be repeated annually so a single endowment to produce the same amount may be given once for all even in the form of immoveable property. (*d*) The Vyavahâra Mayûkha repeats these rules, (*e*) and the further one that what the woman earns belongs to her husband; as also those gifts, from friends other than near relatives, which, if she could retain them herself, would afford a means of withdrawing her gains from her husband's control. Ornaments given to her for ordinary wear become her property, but in those handed to her for use only on extraordinary occasions the ownership of the nominal donors and of their families remains. (*f*) The Vivâda Chintâmaṇi (*g*) follows the Mitâkharâ in laying no restriction on the woman's capacity to take immoveable property. The "lâbham" or gain which Devala assigns to the woman (*h*) is unrecognized or cut down by all the commentators, except Vijñâneśvara, who does not himself expressly cite this authority.

A daughter, unmarried or married, may take immoveable property by gift, from her parents, according to the Dâya-

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(*a*) *See* below, Sec. 1, para. 13.

(*b*) Chap. IX. Sec. 1, paras. 6—11, 16. The passage of Vyâsa is by Varadarâja (p. 34) construed as a limitation on a widow's right of inheritance.

(*c*) Copper coins of small value, Vîramitrodaya, Trans. p. 224.

(*d*) Instances are given in the Panj. Cust. Law, Vol. II. of the gradual recognition of small gifts of land to daughters amongst the tribes which generally restrict land-ownership to males. Compare the Smṛiti Chandrikâ, Transl. Ch. IX. Sec. I. para. 10.

(*e*) Chap. IV. Sec. 10, paras. 5, 6, 7; Stokes, H. L. B. 99, 100.

(*f*) 2 Str. H. L. 55, 241, 370. *See* below as to such gifts from a husband.

(*g*) pp. 259, 260.

(*h*) *See* above, and Viram. Transl. p. 226.

bhâga, (*a*) which imposes no restriction on the amount, but Kâtyâyana there quoted is understood, as we have seen, by other commentators, as confining what may be given to married women within narrow limits. (*b*) Even that restriction would be disregarded in the case of property acquired by the donor, (*c*) and all gifts by parents proceeding from natural affection are to be respected, (*d*) unless they are of such a character as to be a fraud on other members of the family. (*e*) As to property which is free from the claims of co-owners a woman may take by gift from her father, mother, or brother, without limitation according to the modern law, which in this respect has become as liberal as the Mitâkshará would make it. (*f*) A devise is put practically on the same footing as a gift *inter vivos*. (*g*)

Similarly a wife may take gifts from her husband of any kind of property and to any amount, subject only to the rights which others may have in what is thus given to her. (*h*)

(*a*) Chap. IV. Sec. 3, paras. 12, 15, 29; Stokes, H. L. B. 253, 254, 257. See also Coleb. Dig. Bk. V. T. 354.

(*b*) So also the Mâdhavîya, p. 41.

(*c*) *Supra*, page 212; 2 Str. H. L. 6, 9, 10; *Muttayana Chetti* v. *Sivagiri Zamindár*, I. L. R. 3 Mad. at p. 378.

(*d*) Coleb. Dig. Bk. II. Chap. IV. Sec. 2, T. 49, 50; Nârada, Pt. II. Chap. IV. Sl. 7; Vyav. May. Chap. IV. Sec. 7, para. 11; Stokes, H. L. B. 76; Mit. Chap. I. Sec. 6, para. 13, 16 (*ibid.* 396, 397).

(*e*) Nârada, Pt. II. Chap. IV. Sl. 4; Vyav. May. Chap. IV. Sec. 10, p. 6; Stokes, H. L. B. 99; Vîramitr. Sec. 1, para. 5, *infra*; *Sivarananja Perumal* v. *Muttu Ramalinga et al*, 3 Mad. H. C. R. 75. An interdiction may be obtained by a son or a brother against a dealing with the heritage which would deprive him of his rights. Q. 1735, MS.; Vîram. Tr. p. 74; Mit. Ch. VI. Sec. VI. p. 10.

(*f*) See Coleb. Dig. Bk. V. T. 482, Comm., quoting Chandeśvar.

(*g*) See above, p. 181, 217 ss. *Judoo Nath Sircar* v. *Bussant Coomar Roy*, 19 C. W. R. 264, S. C. 11 Beng. L. R. 286.

(*h*) See the passages referred to in notes at p. 208. As to the essentials of the gift, see *G.* v. *K.*, 2 Morl. Dig. 234; *S. Pabitra Dasi et al* v. *Damudar Jana*, 7 Beng. L. R. 697; *Kishen Govind* v. *Ladlee Mohun*, 2 Calc. S. D. A. R. 309. *Venkatachella* v. *Thathammal*, 4 Mad. H. C. R. 460, recognizes the competence of the husband to make a gift, while exacting delivery to complete it.

The commentators, (*a*) who carefully provide against her alienation of immoveable property thus acquired, thereby acknowledge at least with the Mitâkshará her competence to receive it. The limitation imposed by Kâtyâyana's text above quoted applies in terms to a husband's gifts as well as to others, but where property ranks as separate estate, no one now has a right on which he can challenge the owner's disposal of it. (*b*) Colebrooke says (*c*) without qualification that "land may be given by the husband to his wife in Strî-dhan, and will be her absolute property." The last words must, as to Bengal at least, be qualified by the restriction set forth in the Dâyabhâga (*d*) against alienation of immoveable property given by a husband, but as to the wife's capacity to take such property by gift, they represent the modern law. (*e*) Ornaments given by the husband merely to be worn occasionally remain his property, but otherwise they become fully hers. (*f*) It follows from what has been said that a member of an undivided family, residing apart, is not at liberty, by converting his gains into costly ornaments, to deprive the other members of their share in his acquisitions; (*g*) and if the wife under cover of that position appropriates what belongs to her husband, she subjects herself to punishment. (*h*) On the other hand the general

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(*a*) *See* the Smriti Chandrikâ, Chap. IX. Sec. 2, p. 10.

(*b*) *See* above, p. 209.

(*c*) 2 Str. H. L. 19.

(*d*) Chap. IV. Sec. 1, pa. 23; Stokes, H. L. B. 241. See *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Calc. 684. For Bombay *see* the case of *Kotrabasapa* v. *Chanverova*, 10 Bom. H. C. R. 403.

(*e*) *See* above, p. 207 ss.

(*f*) 2 Str. H. L. 55, 241; *Musst. Radha* v. *Bisheshur Dass*, 6 N. W. P. R. 279. *See* above, p. 186. Actual gift without fraud, of ornaments to a wife, passes the property to her, but not a mere handing of them to her for use on ceremonial occasions. *Kurnárám* v. *Hinibhay*, Bom. H. C. P. J. 1879, p. 8; *see* Smriti Chandrikâ, Transl. Ch. IX. Sec. I. 11 ss.

(*g*) Q. 315 MS., Ahmednuggur, 13th June 1853.

(*h*) Nârada, Pt. II. Chap. XII. Sl. 92; compare Manu IX. 199.

sacredness of a promise (*a*) is upheld in the case of one made to a wife. The sons must fulfil it. (*b*) In this respect the modern treatises go beyond the text of the Mitâkharâ, though not probably beyond its intention, as Vijñâneśvara was a stickler for the literal fulfilment of the mental act in cases of gift without delivery of possession. (*c*)

Gifts to mothers, sisters, daughters-in-law, and to other female relatives occur not unfrequently in practice. (*d*) No difficulty is raised to the reception of such presents even of immoveable property, where the title of the donor is unincumbered; but the subject is not so dealt with in the modern commentaries as to afford a ground for a profitable comparison with the Mitâkharâ. Gifts even from strangers may be accepted; though these, according to the moderns, become the property of the husband when the donee is under coverture. (*e*)

That women may take property generally by inheritance has been shown in the foregoing pages of this work. (*f*) Baudhâyana's quotation from the Veda, (*g*) though supported by Bṛihaspati, (*h*) is no longer allowed to disqualify them. That text, as we have seen, may be differently construed. (*i*)

(*a*) Nârada, Pt. II. Chap. IV. Sl. 5; Manu IX. 47; Vyav. May. Chap. IX. para. 2; Stokes, H. L. B. 133.

(*b*) *See* the Smṛiti Chandrikâ, Chap. IX. Sec. 2, para. 25; Vîramitr. Sec. 1, para. 21, below; Vyav. May. Chap. IV. Sec. 10, para. 4; Stokes, H. L. B. 99.

(*c*) *See* the Mit. on the Administration of Justice; 1 Macn. H. L. p. 203, 217.

(*d*) See *Chattar Lalsing et al* v. *Shewukram et al*, 5 Beng. L. R. 123.

(*e*) Vyav. May. Ch. IV. Sec. 10, p. 7.

(*f*) To note (*b*) p. 120, add a reference to Dâyabhâga, Ch. XI. Sec. I, p. 49 (Stokes, H. L. B. 318); Vyav. May. Ch. IV. Sec. 8, p. 2 (*ibid.* 84).

(*g*) *See* Baudh. Pr. II. Ka. II. 27.

(*h*) *See* the Smṛiti Chandrikâ, Ch. XI. Sec. 1, p. 27; Vyav. May. Ch. IV. Sec. 8, p. 3 (Stokes, H. L. B. 84).

(*i*) *Supra*, p. 126 ff.

Manu's Text IX. 18, misquoted by the Vîramitrodaya, (*a*) points indeed to an essential inferiority of women as incapable of pronouncing expiatory formulas, (*b*) and Gautama (*c*) seems by omission to exclude even a mother from a share on a partition, but Kâtyâyana's Śrauta Sûtra, the only one on the White Yajûrveda, gives to women the right to sacrifice as allowed by the Vedas. (*d*) The Dâyabhâga (*e*) and the Smṛiti Chandrikâ (*f*) admit the wife's succession on the special ground of her association with her husband in sacrificial rites. (*g*) Kullûka Bhaṭṭa, commenting on the text of Manu XI., 187, which assigns succession to the nearest sapiṇḍas, says that a wife must be considered a sapiṇḍa, because she assists her husband in the performance of religious duties. (*h*) The Vîramitrodaya (*i*) adopts the less generous construction of the Smṛiti Chandrikâ, (*j*) and the Dâyabhâga (*k*) that a woman's capacity to inherit can arise only under special texts in her favour; but the Mitâkṣharâ (*l*) and the Vyavahâra Mayûkha do not recognize any general disability. The latter indeed, (*m*) as we have seen, treats a sister with special favour. (*n*)

(*a*) Vîram. Tr. p. 244.

(*b*) Manu XI. 194, 252 ff.

(*c*) Adhyâya 28, 1 ff.

(*d*) *See* Mon. Williams, In. Wis. 159.

(*e*) Ch. XI. Sec. 1, p. 47 (Stokes, H. L. B. 316).

(*f*) Ch. XI. Sec. 1, p. 10; Max Müller, Hist. San. Lit. 28, 205.

(*g*) Smṛiti Chand. Ch. XI. Sec. 1, p. 12; Mit. Ch. II. Sec. 1, p. 5 (Stokes, H. L. B. 428).

(*h*) Coleb. Dig. Bk. V. T. 397, Comm. *ad fin.*

(*i*) *See* Transl. p. 244.

(*j*) Ch. IV. p. 5.

(*k*) Ch. XI. Sec. 6, p. 11; Stokes, H. L. B. 346.

(*l*) Ch. II. Sec. 1, paras. 14, 22-24 (Stokes, H. L. B. 489, 490).

(*m*) Ch. IV. Sec. 8, para. 19; Stokes, H. L. B. 89; *Supra*, p. 181.

(*n*) The daughters take absolutely and so therefore do the sisters. *Vinayak Anundrao* v. *Lakshmibái*, 1 Bom. H. C. R. 124.

The nature of the estate, which a woman takes in the property in any way acquired by her, seems to have been regarded by Vijñâneśvara as standing on the same footing as the estate of a male. To this he mentions only one exception, "a husband is not liable to make good the property of his wife taken by him, in a famine, for the performance of an (indispensable religious) duty, or during illness, or while under restraint." (*a*) The Vyavahâra Mayûkha (*b*) and the Vîramitrodaya (*c*) repeat this text. The Smṛiti Chandrikâ (*d*) quotes one to the same effect from Devala. Devâṇḍa Bhaṭṭa goes so far even as to say:—"In a husband's property, the wife by reason of her marriage possesses always ownership, though not of an independent character, but the husband does not possess even such ownership in his wife's property." (*e*) The Hindû notion of ownership seems to be not incompatible, either with this right springing up on particular occasions, or with the woman's general dependence. (*f*) No limitation is prescribed by Vijñâneśvara to the

(*a*) Mit. Ch. II. Sec. 11, p. 31; Stokes, H. L. B. 465. In case of misconduct on the part of the wife of a flagrant kind the husband may take possession of her Strîdhana. Vîramit. Transl. p. 226.

(*b*) Ch. IV. Sec. 10, p. 10; *ibid.* 101.

(*c*) Sec. 1, p. 20.

(*d*) Ch. IX. Sec. 2, paras. 14, 15. In para. 26, Devâṇḍa insists on the mother's exclusive ownership of her Strîdhana as against any claim to partition advanced by her sons. But this must be understood by reference to his conception of Strîdhana, and, as to property formerly her husband's, by reference to his notion that the widow's share is not heritage and not partible property. *See* the Smṛiti Chand. Ch. IV. p. 11; Ch. VII. p. 22.

(*e*) Coleb. Dig. Bk. V. T. 415, Comm.; "A man, his wife, and his son are co-proprietors of the estate." Reply of the Śâstri at Ahmednuggur, 30th March 1878, MS. No. 39. According to the law of Western India a woman has full ownership of her *pattu* or Strîdhana, *Reg.* v. *Natha Kalyan et al*, 8 Bom. H. C. R. 11, Cr. Ca. The Roman law, like the English Equity, strove to guard a woman's property against dissipation by many provisions. *See* Goudsm. Pand. § 26, p. 55.

(*f*) Mit. Chap. II. Sec. 1, para. 25; Stokes, H. L. B. 435, and the cases cited above.

wife's or widow's use of the share taken by her in a partition. (*a*) It is shown in the Smṛiti Chandrikâ (*b*) that this share falls within Vijñâneśvara's conception of inheritance, and thus becomes property in the fullest sense. An unmarried daughter, who on such an occasion "shares the inheritance," (*c*) is similarly unfettered as to the disposal of it by any rule in the Mitâkshará. (*d*) It accepts the doctrine of the general dependence of women, but without working it out to any practical result. It omits the prohibitions referred to by the modern commentators, against the wife's expending even her separate property without the assent of her husband, (*e*) and in making no special provision as to Saudâyikam it may probably have intended to leave

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(*a*) Mit. Chap. I. Sec. 2, para. 8; Sec. 6, para. 2; Sec. 7, paras. 1, 14 (Stokes, H. L. B. 379, 394, 397, 401); Dâyabhâga, Ch. III. Sec. 2, para. 37 note, (*ibid.* 233).

(*b*) Chap. IV. para. 10. Comp. Coleb. Dig. Bk. V. T. 420, 515, Comm.

(*c*) Compare Coleb. Dig. Bk. V. T. 399, Comm. *sub fin.*; Mit. Ch. II. Sec. 1, p. 25, (*ibid.* 435).

(*d*) Mit. Ch. I. Sec. 7, para. 14; Stokes, H. L. B. 401. *See* above, p. 106, note (*g*).

(*e*) *See* the Vîramitrodaya, Sec. 1, paras. 14, 15, below; Vyav. May. Chap. IV. Sec. 10, para. 8; Stokes, H. L. B. 100; Dâyabhâga, Chap. IV. Sec. 1, para. 23 (*ibid.* 241); Smṛit. Ch. Chap. IX. Sec. 2, para. 12. Under the Teutonic laws the property of a girl remained her own after her marriage subject to the guardianship (*mundium*) of her husband and his use of the fruits during coverture. Of acquisitions made during the coverture the wife was entitled to an aliquot part fixed variously by different laws. The Saxon law gave her a moiety. But though her ownership subsisted her power of disposal was during coverture made subject to the assent of her husband. Lab. *op. cit.* 400. Under the English common law the wife's real estate remained hers, notwithstanding her marriage, subject to her husband's seisin in right of the wife and consequent assignment of the profits. On her death it belonged to her heirs subject only to the husband's tenancy for life by courtesy. But she could not dispose of the property without his assent (which is still required under the St. 3 & 4 Wm. IV. Cap. 75) except in the case of property vested in trustees for the wife's separate use without restraint on alienation. *See* Bl. by K., Bk. I. C. 15; Bk. II. C. 8.

the full ownership constituted by its texts to their natural operation on the whole of a woman's estate. (*a*)

This liberality was quite in accord with Vijñâneśvara's general tendency to carry principles out to their logical consequences without regard to the exceptions and contradictions established by actual practice. It may be doubted whether the equality of a woman with a man as an heir and owner of patrimony was ever generally accepted as a customary law. The ancient Smṛitis did not contemplate it, and caste rules, so far as they have been investigated, are almost uniformly against it. This advance in the position of women moreover seems never to have quite commended itself to those even who are in a general way followers of the Mitâkṣharâ. The Smṛiti Chandrikâ limits the woman's right of disposition to Saudâyika, defined as wealth received from her own or her husband's family, and excluding immoveable property given by her husband. (*b*) The "patni" wife's dependent ownership over her separated husband's property becomes, on his death, according to this authority, independent, yet without power to give, mortgage, or sell the estate, except for religious or charitable purposes. (*c*) The Vîramitrodaya (*d*) gives full power of disposition over Saudâyika only. So too does the Vyavahâra Mayûkha, (*e*)

(*a*) *See* above p. 145, 268; *Govindji Khimji* v. *Lakshmidas Nathubhâi*, I. L. R. 4 Bom. 318. In a note to the case of *Doe dem Kullammal* v. *Kuppu Pillai*, 1 Mad. H. C. R. at p. 90, the principal passages are collected, which bear on a woman's power to deal with her separate property. In *Brij Indar et al.* v. *Rani Janki Koer*, L. R. 5 I. A. 1, a grant to a widow and her heirs of her husband's confiscated estate was construed in favour of her daughter as against her husband's heirs, a grandson through a daughter by another wife and distant collaterals. The restrictive construction of the Mitâkṣharâ's rule, Ch. II. Sec. XI. paras. 1 ff. is denied as to grants made to a widow.

(*b*) Sm. Ch. Chap. IX. Sec. 2, paras. 6, 11.

(*c*) Chap. XI. Sec. 1, paras. 19, 28, 29.

(*d*) Sec. 1, paras. 14, 15, below.

(*e*) Chap. IV. Sec. 10, para. 8 (Stokes, H. L. B. 100).

and as to property taken by the widow on her husband's death, it limits her strictly to a life enjoyment subject only to an exception in favor of religious gifts. (*a*) The Vivâda Chintâmaṇi is to the same effect. (*b*) Jîmûtavâhana, (*c*) while denying the wife's ownership of gifts from strangers, (*d*) says that over all property, really hers, her power of disposition

(*a*) *Ibid.* para. 4 (Stokes, H. L. B. 99). In the case of *Chooneena* v. *Jussoo Mull Deveedass*, 1 Borr. R. 60, it was decided on the Vyav. May that a widow could not devise property inherited from her husband to her family priest so as to deprive the next heir, her nephew's widow. In *Jugjeevun Nuthoojee et al* v. *Deonunkur Kaseerâm*, 1 Borr. R. 436, on the other hand, a widow was allowed to bequeath by way of *Krishnarpana* the property inherited from her husband, except the family house and the sum requisite for her obsequies, to the exclusion of her husband's cousin. The decision rested on the sacred character of such a gift; as in the Vyavasthâ in *Dhoolubh Bhaee et al* v. *Jeenee et al*, 1 Borr. R. 75, the Śâstri says, (p. 78) "Goolal Bai was not authorized to assign to the children of her brethren the house of her husband, Pitâmber (which after his demise had descended to her) without the sanction of the heirs." In *Poonjeeabhaee et al* v. *Prankoonwur*, 1 Borr. 194, it was ruled that a woman who had a son could not in discharge of her deceased husband's debts alienate property which she had inherited from her father, without the assent of the son, after he had attained 16 years of age. This is referred to the passages from Bṛihaspati and Kâtyâyana, quoted in the Vyavahâra Mayûkha, to show that a woman is generally unfit to enjoy fixed property, and that a widow cannot dispose of it except for special purposes. Her son enjoying according to the Mayûkha an unobstructed right of inheritance (Ch. IV. Sec. 10, p. 26; Stokes, H. L. B. 105), was probably regarded by the Śâstris as having a joint ownership in the property, which thus became inalienable without his assent. "A son," says the Pandit at 2 Morl. Dig. 243, "inherits the estate of his mother in the same manner as that of his father." *See* p. 152. The Smriti Chandrikâ Ch. VIII. para. 11; Ch. IX. Sec. II. para. 26; Sec. III. para. 4, denies the unobstructed ownership of a son in his mother's property. See also the Mit. Ch. I. Sec. VI. para. 2.

(*b*) p. 262, 263. See *B. Gunput Sing* v. *Gunga Pershad*, 2 Agra R. 230.

(*c*) Dâyabhâga, Ch. IV. Sec. 1, paras. 20, 23; Stokes, H. L. B. 240, 241.

(*d*) Coleb. Dig. Bk. V. T. 420, Comm. II.

is unfettered, save in the case of her earnings and of immoveables bestowed by the husband. (*a*) These she is only to enjoy by way of use; and similarly when she takes his estate on his death, which, according to the Dâyabhâga, she does, whether he was separated or unseparated from his brethren, (*b*) she "must only enjoy her husband's estate after his demise. She is not entitled to make a gift, sale, or mortgage of it," except in the fulfilment of a pious duty, under the pressure of necessity, or with the sanction of the paternal uncles and other near relatives of her deceased husband. (*c*) Jagannâtha, being forced to admit that the widow

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(*a*) Coleb. Dig. Bk. V. T. 470, Comm.; 420 Comm. As to a gift for maintenance by a son, see *Musst. Doorga Koonwar* v. *Musst. Tejoo Koonwar et al*, 5 C. W. R., 53 Mis. R.; and the Dâyabhâga, Ch. IV. Sec. 1, p. 18 (Stokes, H. L. B. 240).

(*b*) *Op. cit.* Ch. XI. Sec. 1, paras. 6, 46 (Stokes, H. L. B. 305, 316). See *Keerut Singh* v. *Koolahul Sing et al*, 2 M. I. A. 331; *Ghirdharee Sing* v. *Koolahul Sing et al*, 2 *ibid.* 344; *Rao Karun Sing* v. *Nawab Mahomed Fyz Alli Khan et al*, 14 *ibid.* 187; *The Collector of Masulipatam* v. *C. Vencata Narrain Appah*, 8 *ibid.* 500; *Gobind Monee Dossée* v. *Sham Lall Bysack et al*, C. W. R., Sp. No., p. 165; East, C. J., in *Cossinaut Bysack et al* v. *Hurroosoondry Dossee et al*, 2 Morl. Dig. at p. 215.

(*c*) *Op. cit.* Ch. XI. Sec. 1, paras. 56, 62, 64 (Stokes, H. L. B. 320-322); *Deo dem Ramanund Mookopadhia* v. *Ramkissen Dutt*, 2 Morl. Dig. 115. For the case of an estate taken jointly under this law by two widows, see *Gobind Chunder et al* v. *Dulmeer Khan et al*, 23 C. W. R. 125; *Sreemuttee Muttee Berjessory Dossee* v. *Rameonny Dutt et al*, 2 Morl. Dig. 80; and compare p. 103 of this work. A wife having a joint interest with her husband may after his death sell her own share, *Madavaraya* v. *Tirtha Sâmi*, I. L. R. 1 Mad. 307. "In respect of gifts by a husband to his wife she takes immoveables only for her life and has no power of alienation, while her *dominium* over moveable property is absolute," per Jackson, J., in *Koonjbehari Dhur* v. *Premchund Dutt*, I. L. R. 5 Calc. at p. 686. The rule was applied to a bequest by a will which imposed restrictions on a widow's absolute dealing with moveables, but none as to the immoveable property. Comp. *Brij Indra* v. *Rani Janki Kooer*, L. R. 5 I. A. 1; *supra*, p. 101. If a widow turns funds given to her by her husband into land she may dispose of such land as of the money by gift or devise, *Venkata Râma Rao* v. *Venkata Surya Rao*, I. L. R. 2 Mad. 333. A gift by a widow to her daughter's

has independent power over *dâya* as her husband's gift or as heritage, (*a*) says in one place that, as to such property, if immoveable, "her enjoyment only of it is authorized," (*b*)—a rule which applies to moveables also. (*c*) He thinks however that her alienation of the property, though blameable, may be valid, (*d*) yet he quotes Nârada (*e*) against any

son was held valid as against the heirs of her husband's cousin whose share before the husband's decease had been sold in execution, *Gokul Singh et al* v. *Bhola Singh*, Agra S. R. for 1860, p. 222.

(*a*) In the case at 2 Str. H. L. 21, ejectment seems to have been maintained by a woman against her husband for a house which he had given to her on his second marriage. So also in the case CXXIX. of East's notes, *G. v. K.*, 2 Morl. Dig. 234. A suit for jewels was maintained, *Wulubhram* v. *Bijlee*, 2 Borr. R. 481. *See* Coleb. Dig. Bk. V. T. 481, Comm. Coleb. on Oblig. Bk. II. Ch. III. recognizes this right. The answer at 2 Morl. Dig. 68 (*Jushadah Raur* v. *Juggernaut Tagore*), denies to a mother any power to dispose by will of the personalty inherited from her son, which she might have expended. It escheats to the crown. As to realty, see *ibidem;* and pp. 100 (*Gopeymohun Thakoor* v. *Sebun Cower et al*); 131 (*Doe dem. Sibnauth Roy* v. *Bunsook Buzzary*). At p. 155 (*Doe dem. Gunganarain Bonnerjee* v. *Bulram Bonnerjee*), the opinion of the Pandits, given by Macnaghten, is that in Bengal a widow's estate being only usufructuary and untransferable, her sale of the property is invalid even as to her own interest. This principle might operate where something had been allotted merely for maintenance, as a right to future maintenance cannot be assigned, *Ramabai* v. *Ganesh Dhonddeo*, Bom. H. C. P. J. F. for 1876, p. 188. A widow and mother's right to maintenance out of her deceased husband's estate inherited by her son is a purely personal one and cannot be transferred or sold in execution. *Bhyrub Chunder* v. *Nubo Chunder Gooho*, 5 C. W. R. 111, unless perhaps where it has been made a specific charge on some part of the estate. *Gangábái* v. *Krishnáji Dádáji*, Bom. H. C. P. J. 1879, p. 2.

Compare the case of dower under the English law which cannot be aliened to a stranger, only released to the tenant of the land so as to extinguish it. *Colston* v. *Carre*, 1 Rolle, Abridgm. 30, Langdell, Contracts, 419. But as to a widow's estate properly so called, see *supra*, p. 298, and the further cases cited below.

(*b*) Coleb. Dig. Bk. V. T. 515, Comm.

(*c*) *Ibid.*, T. 402, Comm.

(*d*) *Ibid.*, T. 399, Comm., T. 420 Comm.; as to this *see* above, p. 212.

(*e*) *Ibid.*, T. 476.

such alienation, and says that all the authorities concur in forbidding it as to property devolved on a widow by the death of her husband. (*a*) Property acquired by inheritance by a woman before her marriage he regards as at her independent disposal; (*b*) if acquired during coverture, it is subject to her husband's control like her other acquisitions, so long as the husband lives. (*c*) To a daughter he assigns full power over Stridhana which devolved on her from her mother. (*d*)

The share taken by a mother in a partition is according to the Smṛiti Chandrikâ (*e*) only a means of subsistence. That given to a sister is only a marriage portion. (*f*) The Vîramitrodaya insists (*g*) that in a partition by brothers, daughters are entitled to shares, not merely to a provision for marriage. The Vyavahâra Mayûkha,(*h*) in providing for the mother and the sisters, says nothing of the nature of the estate they take in the property thus acquired by them. Nîlakantha does not adopt Vijñâneśvara's definition of heritage, (*i*) and it seems that he would, on a widow's death, assign the share allotted to her in a partitition to her sons, (*j*) but the

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(*a*) *Ibid.*, T. 402, Comm., *sub fin.* *See* Colebrooke, cited 2 Morl. Dig. p. 212 (*Cossinaut Bysack et al* v. *Hurroosoondry Dossee et al*).

(*b*) *See* 2 Macn. H. L. 127.

(*c*) Coleb. Dig. T. 470, Comm.

(*d*) *Ibid.*, T. 515, Comm. Several cases under the Bengal law will be found in 2 Macn. H. L. Ch. VIII. Property inherited by a daughter from her father is not Strîdhana in Bengal. *Chotay Lal* v. *Chunnoo Lal*, L. R. 6 I. A. 15.

(*e*) Ch. IV. p. 9. The share which a mother takes as representative of a deceased son in a partition under the law of Bengal is not there, it seems, regarded as Strîdhana. *See* per Kennedy, J., in *Jagmohan Haldar* v. *Sarodamoyee Dossee*, I. L. R. 3 Cal. 149. The pandit's opinion was different. *See* below.

(*f*) Ch. IV. p. 16, 17, 18.

(*g*) Transl. p. 85.

(*h*) Ch. IV. Sec. 4, p. 15, 18, 40 (Stokes, H. L. B. 51, 52, 57).

(*i*) Vyav. May. Chap. IV. Sec. 2, para. 1; Stokes, H. L. B. 46.

(*j*) *Ibid.* Sec. 10, p. 26; Stokes, H. L. B. 105.

same remark might on the same ground be made as to the succession to a share given to a sister. It is doubtful therefore whether any abiding interest of the family of the former co-sharers in such property would still subsist or not. Jagannâtha (*a*) says that such a share may be aliened by its recipient, and he applies the same rule to property inherited, (*b*) but his discussion of these questions shows that conflicting opinions are maintained by the principal modern commentators. (*c*)

The views of English scholars and lawyers on these points have been no less various. Prof. H. H. Wilson, in Vol. V. of his Works, at p. 29, says:—"It is absurd to say that a woman was not intended to be a free agent, because the old Hindû legislators have indulged in general declarations of her unfitness for that character. Manu, it is true, says of women, 'Their fathers protect them in childhood, their husbands protect them in youth, their sons protect them in age. A woman is never fit for independence'; (*d*) but what does this prove in respect to their civil rights? Nârada goes further, and asserts that 'after a husband's decease the nearest kinsman should control a widow, who has *no sons*, in expenditure and conduct'. (*e*) But as we have observed, this is neither the law nor the practice of the present day. Besides it does not apply to the case of partition, as there the widow has sons, and they surely abandon a right to control property which they themselves have given. To sanction any other mode of procedure would only tend to perpetuate the degraded condition of the female sex in India."

(*a*) Coleb. Dig. Bk. V. Chap. II. T. 88, Comm.

(*b*) *Ibid.* 399, Comm., and compare T. 470, and T. 483, Comm.

(*c*) The Pandits of the Supreme Court of Bengal in 2 Morl. Dig. at p. 217, said that, even recognizing the restrictions on a widow's estate taken by mere succession, yet what she received on a partition was to be regarded as Strîdhana subject to her absolute disposal. *See* also *ibid.* 239, where the restrictions imposed seem to be only moral ones.

(*d*) XI. 3.

(*e*) Quoted in the Dâyabhâga, p. 269.

And again, at page 20 :—"The old lawyers have said, 'let a widow enjoy a husband's wealth; afterwards let the heirs take it'; what obligation does this involve that she *must leave it?*..... Now as to the gift, the same authorities, from whom there is no appeal, define what things are alienable as gifts, and what are not. Amongst the things not alienable no mention is made of a widow's inheritance. The *whole* estate of a man, if he have issue living, or if it be ancestral property, he cannot give away without the assent of the parties interested, and this may indeed be thought to apply to the *immoveable* property inherited by a widow, but it is the only law that can be so applied: there being, therefore, no law against the validity of her donation, it follows that she has absolute power over the property, (*a*) at least such was the case till a new race of law-givers, with Jîmûtavâhana at their head, chose to alter it; but they only tampered with the law of inheritance, and the law respecting legal alienation being untouched remains to bear testimony against their interpretation of a different branch of the law."

On the widow's rights in property, to which she has succeeded on her husband's death, the same learned scholar says (page 16):—"There are but two ancient texts which bear positively on the widow's power over the property which she inherits as her husband's sole heir. One is attributed to Kâtyâyana, and states 'Let the childless woman preserving (inviolate) the couch of her lord, and obedient to her spiritual guide, enjoy, resigned, her husband's wealth until her death. Afterwards let the heirs take it.' (*b*) The other is from the

(*a*) In *Doe* v. *Ganpat*, Perry, O. Ca. at pp. 135, 136, the Śâstri of the Sudder Court expressed an opinion that the widow of a separated Hindû might make a gift of the property she had inherited from her husband, except for improper purposes. This was followed by Sir E. Perry, but for an additional and inapplicable reason, viz. that the grandson of the deceased husband's daughter was pointed out by English law and natural reason as a successor to the property preferable to the nephew of the deceased, one of the line of heirs expressly named by the Hindu authorities.

(*b*) Vîramitra. Trans. p. 136, 225; Vivâda Chint. p. 261; Dâyakrama Sangraha, Ch. I. Sec. II. para. 3; Ch. II. Sec. II. paras. 11, 12.

Mahâbhârata, which as law, by-the-bye, is no authority at all. 'Enjoyment is the fruit which women derive from the heritage of their lords,—on no account should they make away with the estate of their lords.' (*a*) Such are the ancient injunctions; which can scarcely be interpreted to mean that if a widow gives away or sells her estate, such gift or sale is invalid. Even the later writers who entertained less reverence for the female character than the ancient sages, have stopped short of such declaration, and Jîmûtavâhana is content to say that 'a widow shall only enjoy the estate; she ought not to give it away, or mortgage or sell it.' (*b*) He allows her also, if unable to subsist otherwise, to mortgage or even to sell it, and to make presents to her husband's relatives and gifts or other alienations for the spiritual benefit of the deceased. It is not till we come to the third generation of lawyers, the commentators on the commentators, that the restriction is positive, and Srî Kṛishṇa Tarkâlaṅkâra, expounding Jîmûtavâhana's text, declares 'a widow shall use her husband's heritage for the support of life; and make donations, and give alms in a moderate degree for the benefit of her husband, but not dispose of it at her pleasure like her own peculiar property.' The utmost that can be inferred from all this is, that originally the duty of the widow was only pointed out to her, and she was left, in law as she was in reason, a free agent, to do what she pleased with that which was her own; but that in later times attempts of an indefinite nature have been made to limit her power."

Returning to the same subject, a few pages later, he says (page 24) :—"The spirit and the text of the original law, in our estimation, recognise the widow's absolute right over pro-

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(*a*) Apahṛi, Take off or away: it is translated in the Digest and elsewhere, "waste," which perhaps scarcely renders its due import. [According to the Dâyakrama Sangraha, the passage is taken from the Dânadharma of the Anuśâsanaparva (?)]

(*b*) *See* Dâyabhâga, p. 265.

perty inherited from a husband in default of male issue. (*a*) In Bengal the authorities that are universally received have altered this law and restrict a widow to the usufruct of her husband's property. They have not, however, provided for its security, nor for its recovery if aliened, and by such neglect have virtually left the law as they found it, or the power, if not the right, of alienation with the widow: it is open to the Court, therefore, to make what regulations on this subject they please, as far as their jurisdiction extends, and as far as they are authorised by the Charter; and the regulation most conformable to reason, to analogy, and spirit of the Hindû Code, would be to give the widow absolute power over personal property, and restrict her from the alienation of the estate, except with the concurrence of her husband's heirs."

Again at page 26, he says:—"In the case of the widow's sole inheritance, we have granted that the Bengal lawyers limit her in all respects to a life-interest, whilst the Mithila writers maintain her absolute right in moveables, and the old law authorities oppose nothing to her absolute right in every kind of property. In the case of property, however, acquired by partition, (*b*) the arguments in favour of absolute right are infinitely stronger, inasmuch as the Bengal authorities lean to the same view of the subject. Jîmûta-vâhana starts no objection to such power, his remark being confined entirely to the case of sole inheritance, and the Vivâda Bhangârṇava concludes a long and satisfactory discussion of the question by the corollary, 'Therefore a wife's sale or donation of her own share is valid.'"

(*a*) Mitâkh. Ad. Yâjñ. II. 135; Vivâda Chintâmaṇi, p. 151; Vîramitród. page 193 *a*; Vyavahâra Mayûkha, Ch. IV. Sec. 8, p. 2 ff. (Stokes, H. L. B. 84).

(*b*) "These laws (of Inheritance and Partition), as is observed by Sir Thos. Strange, are so intimately connected that they may almost be said to be blended together." P. Co. in *Katamma Natchiar* v. *Raja of Sivagunga*, 9 M. I. A. 539, on which their Lordships rest the widow's inheritance to property separately acquired by her husband, as such property would be retained by him in a partition.

With special reference to the share taken by the widow in a partition, (*a*) he remarks (page 27) :—"It is asserted, indeed, that a husband's heirs succeed to such property in preference to a woman's own heirs, and therefore her enjoyment of it is only for life: but the postulate is supported only by analogy, not by any positive law, and therefore the inference is by no means proved: besides even if admitted, preference of succession does not imply restriction of right in possession: our law of primogeniture does not preclude, under ordinary circumstances, the father's right to sell, give, or bequeath his property as he pleases; and why should any order of succession exercise such influence here, when not specially provided for? 'Heritage and partition' are included by the text of the Mitâkshará, which is good law in every part of India, even in Bengal amongst the constituents of 'woman's property,' and a woman is acknowledged by all to be mistress of her own wealth. It is argued that lands and houses *given by a husband* to his wife must not be aliened by her after his death: *therefore*, a share of land and houses *given by his sons* on partition of his wealth, must not be made away with by their mother; but this is surely a different case. A husband, in undue fondness, might bestow upon a wife the *heritage of his sons*, and they would be deprived of that patrimony in which *they have a joint interest with the father*: it is not unwise, therefore, to secure to them the reversion of such effects."

Colebrooke's opinions on this subject appear to have varied to some extent at different times. At 2 Str. H. L. 19, he says:—"Land may be given by the husband to his wife in Stridhan and will be her absolute property." The same doctrine as to property inherited is supported by a treatise bearing the name of Raghunandana, which Prof. Wilson seems to have thought genuine, but which Colebrooke himself pronounces "more than doubtful," as opposed to the whole current of authorities, in his note to Dâya-

(*a*) *See* Viramit. Transl. p. 147; Mit. Ch. I. Sec. VI. para. 2.

bhâga, Chap. IV. Sec. 1, para. 23 (Stokes, H. L. B. 241). At 2 Str. H. L. 402, he agrees with the Sâstrî that a woman may give away her own property, except lands taken by gift or inheritance from her husband,(*a*) "which she cannot dispose of without consent of the next heir." (*b*) At page 407, he seems in a Broach case, to intimate that what comes to a woman from her husband is not even Strîdhana. He must here have had the Bengal law in mind, as the Mitâkshará, Chap. I. Sec. 1, para. 20 (Stokes, H. L. B. 373), uses the case of a gift by a husband to his wife, as an illustration of the fact that full property may arise, otherwise than by birth. As Mr. Sutherland (*ibid.* 430) points out, the Mitâkshará is silent on the woman's power to alien her peculiar property,(*c*) and she may, on her husband's death dispose as she pleases of his affectionate gift with the exception of immoveables. As to these (*ibid.* p. 21), the Benares and Mithila authorities, he says, impose a general restriction upon the woman's alienation of the property. (*d*) At pp. 108, 110, Colebrooke says that a widow succeeding is restricted from aliening the immoveables, and in this Ellis concurs on the ground that "No woman under any circumstances is absolutely independent"; (*e*) but as to that the case at p. 241 shows that

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(*a*) So in *Haribhaṭ* v. *Damodharbhaṭ*, I. L. R. 3 Bom. 171, as to a will by a daughter who having inherited from her father took, it was said, an absolute estate. But in *Bharmanagavda* v. *Bharmappagavda*, H. C. P. J. for 1879, p. 557, Pinhey and F. D. Melvill, JJ., ruled that a widow *of a collateral* inheriting in that right cannot dispose of the property thus inherited by will. A widow's will was held inoperative against her step-daughter's right as heir to her father, *O. Goorova Butten* v. *C. Narrainsawmy Butten*, 8 M. H. C. R. 13. The testamentary power is as to Strîdhana commensurate with the right of disposal during life. *Venkata Rámá's* case, I. L. R. 2 Mad. 333.

(*b*) So 1 Macn. H. L. 40.

(*c*) *Doe dem. Kullamal* v. *Kupper Pillai*, 1 Mad. H. C. R. 88.

(*d*) *See* also 2 Macn. H. L. 35.

(*e*) So per Grant, J. See *Comulmoney Dossee* v. *Ramanath Bysack*, Fult. R. 200, and as to the higher castes, Steele, L. C. 177.

Colebrooke thought a widow could dispose as she pleased of her Stridhana, consisting of jewels. (*a*)

As to the share taken by a woman on a partition, Colebrooke appears to have distinctly recognized her as a subject of "Dâya" or inheritance in the fullest sense. (*b*) At 2 Str. H. L. 382, he says that, according to the Mitâksharâ, such a share is an absolute assignment heritable therefore by the widow's daughters. (*c*) And this is confirmed by the rule which makes the wife's share in a partition her separate property even in her husband's life, and as such heritable by her daughters in preference to sons. (*d*) In the case at p. 404, there is an apparent misreading of Colebrooke's note. It should be, "The share allotted as a provision to the widow does not pass to the heirs of her peculiar property, but to her husband's heirs. This point may, however, involve some difficulty according to the opinion of those who hold that it is not a mere allotment for maintenance but parti-

(*a*) *See* the Vivâda Chintâmaṇi, p. 260. The presumption is that ornaments given for ordinary wear are meant to be Stridhana, *Mussi, Radha* v. *Bisheshur Dass*, 6 N. W. P. R. 279. *See* above, pp. 208 and 186. Family jewels, it has been held in Bengal, are not transferable by a widow as her own property, *Bhagwanee Koonwur* v. *Parbutty Koonwur*, 2 C. W. R. 13 Mis. R., but *see* also the Vyavasthâ Darpana, p. 684. Vishṇu, Ch. XVII. para. 22, seems to exempt a woman's jewels from partition only during her husband's life, but this cannot be regarded as the accepted law, and is indeed, as we have seen, opposed to other Smritis. *See* Gautama, Ka. XIV. para. 9, below; Coleb. Dig. Bk. V. T. 473. Macnaghten says (1 H. L. 40) "that the Hindû law recognizes the absolute dominion of a married woman over her separate and peculiar property except land given to her by her husband," but he adds rather inconsistently, "He (the husband) has nevertheless power to use the woman's peculium and consume it in case of distress; and she is subject to his control even in regard to her separate and peculiar property."

(*b*) Mit. Ch. I. Sec. I. p. 2, 8, 12 (Stokes, H. L. B. 364, 366, 370); Ch. II. Sec. I. p. 2, 31, 39 (*ibid.* 427, 436, 439); Sec. 2, p. 1, 2 (*ibid.* 440).

(*c*) *Ibid.* Ch. I. Sec. 3, p. 9; Stokes, H. L. B. 383.

(*d*) Mit. Ch. I. Sec. VI. p. 2, 3; Stokes, H. L. B. 394.

cipation as heir." This makes it agree with the opinion at p. 382. In the same case Sutherland thinks, but with diffidence, that the share allotted to a stepmother reverts on her death to the partitioning sons. In *Bhugwandeen Doobey* v. *Myna Baee*, (*a*) the Judicial Committee seem to have inclined to the view that, except in Lower Bengal, the widow's property in her share becomes absolute, but the point was not one requiring decision in that case. That a sum of money given to a widow in lieu of maintenance is at her own absolute disposal was ruled in the Madras case, cited below, p. 315, note (*a*). Under the Bengal law, Sir W. Jones says, (*b*) "The moveable property is at the widow's disposal, the immoveable descends to the heirs"; but Colebrooke says, "the doctrine of the Bengal school controls the widow even in the disposal of personal property." (*c*)

This being the state of the authorities, it must probably be admitted, notwithstanding the view of Prof. Wilson, that the more recent writers have prevailed against Vijñâneśvara, at least as to a woman's dealings with immoveable property taken by inheritance or by gift from her husband. (*d*) In a Bengal case, 2 Macn. H. L. 214, the Sâstri says that in the precept "'Let the wife enjoy with moderation the property until her death,' the word 'wife' is employed with a general import," including all cases of female inheritance. The restriction does not apply, he says, to land *given* to a daughter by her father. (*e*) In the case at Bk I. Ch. II. Sec. 9, Q. 7, the Sâstri denies to a mother inheriting from her son

(*a*) 11 M. I. A. at p. 514.

(*b*) 2 Morl. Dig. 243.

(*c*) *Cossinaut Bysack et al* v. *Hurroosoondry Dossee et al*, 2, Morl. Dig. 205, 219.

(*d*) The passage of Nârada, Pt. I. Ch. III. Sl. 30, prohibiting the gift by a widow of land given to her by her husband (Dâyabhâga, Ch. IV. Sec. 1, p. 23; Stokes, H. L. B. 241) seems to qualify the special rule in paras. 39, 40, enabling her as surviving parent to deal at her discretion with the estate.

(*e*) *See* Coleb. Dig. Bk. V. T. 478, 420, Comm.

any power to alien the property, though the Smriti Chandrikâ (*a*) and the Dâyabhâga (*b*) would apparently give her an exclusive interest as against her husband. (*c*)

In the Bombay Presidency, immoveable property given by a husband to his two wives was held, as to the share of each, to be Strîdhana not transferable after the husband's death for value to the other, so as to deprive the grantor's daughter of her right to inherit, (*d*) and in *Balvant Rav* v. *Purshotam*, (*e*) Sir M. Westropp, C. J., says, "The widow in this Presidency takes a limited estate only in the immoveable property of her childless husband, or son, but she takes his moveable estate absolutely." (*f*) In *Purshotam* v. *Ranchhod*, (*g*) the same learned Judge has dealt with the nature of the widow's estate with reference to litigation between the death of her husband and the issue of letters of administration to his estate:—

"Here, from the moment of the testator's death, at the very least, up to the 27th January, the date of the letters of

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(*a*) Ch. XI. Sec. 3, p. 8.

(*b*) Ch. IV. Sec. 1, p. 1, 18, 19 (Stokes, H. L. B. 235, 240).

(*c*) See P. *Bachiraju* v. *V. Venkatappadu*, 2 Mad. H. C. R. 402.

(*d*) *Kotarbasapa* v. *Chanverova*, 10 Bom. H. C. R. 403. Comp. *Rindamma* v. *Venkata Ramappa et al*, 3 Mad. H. C. R. 268.

(*e*) 9 Bom. H. C. R. at p. 111.

(*f*) *Bechar Bhagvan* v. *Bai Lakshmi*, 1 Bom. H. C. R. 56; *Vinayak Anandrav et al* v. *Lakshmibai*, ib. 117; *Pranjivandas et al* v. *Devkuvarbai et al*, *ib.* 130; *Mayaram* v. *Motiram*, p. 313 of the 2nd Edition, 2 *ibid.* 323; 2 Str. H. L. 13 &c. So in *Doorga Dayee et al* v. *Poorun Dayee et al*, 5 C. W. R. 141. *See* above, p. 100. Under a gift from a Hindû, his wife takes only a life estate in immoveables, and an absolute estate in moveables. There is no difference whether she takes either kind of property by will or gift. It is necessary for her husband to give her in express terms a heritable right or power of alienation to enable her to dispose of immoveable property. *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Calc. 684. A gift from mere generosity by a widow out of a gift from a husband was held invalid. *Rudra Narain Singh* v. *Rup Kuar*, I. L. R. 1 All. 734.

(*g*) 8 Bom. H. C. R. at p. 156 O. C. J.

administration, and the day on which they were issued (a period covering the institution of these suits, the laying on of the attachments before judgment, and the recovery of the judgments themselves), the representation was full. It was filled by the widow, who took as heir, and, although a Hindû widow's estate in immoveables inherited from her husband, which has been compared to that of a tenant-in-tail after possibility of issue extinct, (*a*) [is such that] she may alien only under very special circumstances, and although she may be restrained by injunction from committing waste, (*b*) yet she does fully represent the inheritance even in that kind of property. (*c*) Peel, C. J., once described her estate thus: 'The estate, although sometimes so expressed to be, is not an estate for life: when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do, if she had not a life-estate in quantity. There is no ground for altering the nature of the estate. It devolves as an estate by inheritance under the Hindû law, and is the estate which passed from the late owner: nothing is in abeyance. (*d*) The incapacity to alienate is not in any way inconsistent with an inheritance.' (*e*) And then he instances estates tail after the statute *de donis* and until the invention of recoveries, and other estates of inheritance which are not alienable; and I may add that

(*a*) *Mohar Rance Essadah Bai* v. *The E. I. Company*, 1 Taylor and Bell, 290.

(*b*) *Hurrydoss Dutt* v. *Rungunmoney Dossee et al*, 2 Taylor and Bell, 279; *Oojutmoney Dossee* v. *Sagormoney Dossee*, 1 *ibid.* 370; *Sreemutty Jadomoney Dabee* v. *Saradaprosoon Mookerjee*, 1 Boulnois, Rep. 120.

(*c*) *Doe dem. Rajchunder Paramanic* v. *Bulloram Biswas*, Fulton, Rep. 133, 135; *Gopeymohun Thakoor* v. *Sebun Cower et al*, 2 Morl. Dig. 105, 111; *Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al*, 2 *ibid.* 210, 215.

(*d*) A right of pre-emption may be exercised by a widow who takes her husband's property by inheritance. *Phulman Rai* v. *Dani Kurai*, I. L. R. 1 All. 452.

(*e*) *Hurrydoss Dutt* v. *Rungunmoney Dossee et al*, 2 Taylor and Bell, 281, 282.

of a Hindû, entitled to ancestral lands of inheritance, who, after he has male issue, and while they are living, is unable to alienate their inchoate shares in the lands which he holds undoubtedly as of inheritance. (*a*) Peel, C. J., continues: 'Nor does the fact that the next taker takes as heir to a prior owner, and not to the immediate predecessor, furnish any reason for holding the estate a mere life-estate. It is, however, for purposes of alienation unwarranted by Hindû law, no greater an estate—and in one respect it is less beneficial—than a life-estate under the English law, since the accumulations on the death of the female heir pass, not to her heir, but go with the principal. Whenever, in legal decisions or in text-writers, the estate is described as one for life, nothing more is meant than a reference to the usufruct and the power of disposition, where the exceptional power of disposition is not properly exercised. The estate is not held in trust, express or implied. It is a restrained estate: not a trust estate. In her husband's moveable property at this side of India she takes an absolute estate, subject to payment of her husband's debts. (*b*)

"In *Ramchandra Tant[r]a Das* v. *Dharmo Narayan Chuckerbutty*, (*c*) a Full Bench held at Calcutta 'that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency, that it cannot be regarded as property, and, therefore, is not liable to attachment and sale under Sec. 205 of the Civil Procedure Code."

As to what is said by Peel, C. J., in the passage quoted from his judgment on the subject of accumulations, reference may be made for the Bengal law to the language of the Judicial Committee in the recent case of *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.* (*d*) Their Lord-

(*a*) As to this *see* now under Partition, Bk. II. Introd.

(*b*) *Vinayak Anand Rav et al* v. *Lakshmibai*, 1 Bom. H. C. R. 118; *Pranjivandas et al* v. *Devkuvarbai et al*, *ibid.* 130.

(*c*) 7 Beng. L. R. 341.

(*d*) L. R. 2 I. A. at p. 261, S. C. 24 C. W. R. 168.

ships say, "if she took the estate only of a Hindû widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal." But the documents executed by the husband and son gave, as construed, such an interest to the widow, it was said, "that whatever property, real or personal, was bought by Chunderbutti out of the proceeds of her husband's estate belongs to her and consequently to the defendant." In the same case it was held that land or personal property purchased out of the accumulations were the widow's equally with the fund, and devolved upon her heir. (*a*)

In the case of *Gonda Kooer et al.* v. *Kooer Oodey Singh*, (*b*) their Lordships considering that purchases made by the widow were to be deemed accretions to the deceased husband's estate, awarded them to his heir against her devise, but purposely refrained from expressing an opinion as to what would be the effect of a widow's making purchases out of the profits of her widow's estate, with a distinct intention of appropriating such purchases to herself and conferring them on her adopted son. (*c*) The Mitâksharâ, as we have seen,

(*a*) *See* further the case of *S. Soorjeemoney Dossee* v. *Denobundoo Mullica et al*, 6 M. I. A. 526, and 9 *ibid.* 123; *Govind Chunder et al* v. *Dulmeer Khan et al*, 23 C. W. R. 125; *Nihalkhan et al* v. *Hurchurn Lall et al*, 1 Agra R. 219. In *Sri Raja Rao Venkata Mahapati* v. *Mahipati Suriah Rav* (16 Nov. 1880), the Judicial Committee held that immoveable property bought by the widow out of funds given by the husband is equally at her disposal as the money with which it was purchased. Accumulations from her maintenance or her life estate and presents may be invested by a lady in land, which remains Strîdhana. *Nellarkumaru Chetti* v. *Marukathammal*, I. L. R. 1 Mad. 166, and the cases at pp. 281, 307 of the same volume, elsewhere referred to.

(*b*) 14 Beng. L. R. 159.

(*c*) *See* also *Sonatun Bysack* v. *T. Juggutsoondree Dossee*, 8 M. I. A. 66; *Gooroo Pershad Roy et al* v. *Nuffar Doss Roy et al*, 11 C. W. R. 497; *S. Puddo Monee Dossee* v. *Dwarka Nath Biswas et al*, 25 *ibid.* 335.

would not restrict her dealing with such property. In one case the Śâstrî said that a carriage and bullocks purchased by a widow out of her pension were Strîdhana, (*a*) and in the recent case at Madras of *Venkata Râma Rau v. Venkata Suriya Rau et al*, (*b*) it was held that where a widow, having received presents of moveable property from her husband, had, after his death, purchased immoveable property with these and the money raised on her jewels, the property was Strîdhana which she could dispose of by will. Under the Bengal law, as decided by the Judicial Committee, in *Luchmunchunder Geer Gossain et al* v. *Kalli Churn Singh et al*, (*c*) a woman purchasing property out of her Strîdhana has full power to dispose of it during her husband's life. (*d*)

The Śâstri in the case of *Musst. Thakoor Deyhee* v. *Rai Baluk Ram et al*, (*e*) a case from the N. W. Provinces, governed generally by the Mitâkshará, went so far as to say, "The real property which *G.* or *H.* acquired during their lifetime with the proceeds of the former's separate share is not hereditary, and the latter (because her husband died without issue) can give it away to any one she likes. Real property cannot be alienated in the event of the person who acquired it having issue of his own." He seems to have been hampered by his recollection of some of the ancient texts against a severance of the patrimony from the family, (*f*) but apart from the practical error into which

(*a*) Q. 1576, MS., Ahmednuggur, 26th August 1856.

(*b*) I. L. R. 1 Mad. 281.

(*c*) 19 C. W. R. 292.

(*d*) In *Gunnesh Junonee Debia* v. *Bireshur Dhul*, 25 C. W. R. 176, a widow sued her husband's brother successfully for two-thirds of a house partly as her husband's heir, partly on a conveyance to her during her husband's life by her husband's brother of his one-third share on a purchase, said, but not proved, to have been made out of her Strîdhana.

(*e*) 11 M. I. A. at p. 150.

(*f*) Even now "the Rajput never gives lands with his daughters, except possibly a life-interest in the revenue." Sir A. C. Lyall, in *Fortnightly Review* for January 1, 1877, p. 111.

this led him, it would not be easy to demonstrate that this opinion was not in accordance with the Mitâksharâ. The Judicial Committee, however, after a review of the principal text books and decisions, dissented from the Śâstri's view. They say (at page 175): "The result of the authorities seems to be, that although according to the law of the Western Schools, the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pandit between ancestral and acquired property. In some of the cases cited the property was not ancestral."

In *Vijiarangam's* case, (*a*) it was said that property, inherited by a woman from her husband, ranked like that inherited from any other relative, as Strîdhana, according to the Mitâksharâ, but her capacity to deal at will with such property, if immoveable, as a necessary consequence of this proposition, was denied. At page 263, it is said :—

"We have seen that Vijñâneśvara includes all property inherited by a woman in her *Strîdhan*. In the same chapter (Mitak., Ch. II. Sec. 1, pl. 39) he had previously arrived, through an elaborate course of argument, at the conclusion that a widow takes the whole estate of her deceased husband separated in interest from his brethren. This doctrine, therefore, must have been fully present to his mind when he developed his theory of *Strîdhan* in Sec. 11. He makes no distinction between the inheritance of a woman from her husband and her inheritance from any other person. The right which he thus confers on her is balanced by a corresponding right which he allows to the husband and his

(*a*) *Vijiarangam et al* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J.

sapiṇḍas. That inheritance from a member of her own family, which on a woman's death would, according to the Bengal School, revert to the next heirs of him from whom she inherited (*a*) and which, according to the Vyavahâra Mayûkha, would go to her heirs as though she had been a male, is assigned by Vijñâneśvara (*b*) to her daughters, her sons, and after them to her husband and his *sapiṇḍas*. The two rules spring from the same source—a higher conception of a woman's capacity for property, and of her complete identification by marriage with her husband's family, than the Bengal lawyers would entertain—while the limiting of the widow's rights as an heir to the case of her husband's having been separated in interest from his brethren, harmonises more with the Hindû theory of the united family than the opposite doctrine of her taking his share equally, whether the family have been divided or not.

"Vijñâneśvara, like all the Hindû lawyers, denounces the appropriation of a woman's property by her husband, except in cases of great pressure, and by the other kinsmen under any circumstances. (*c*) But he lays down no rule as to the extent of the woman's own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estates of a male proprietor. Now in Ch. I. Sec. 1, pl. 27, 28, it is laid down that a man is 'subject to the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited,' though he may make a gift or sale of it for the relief of family necessities or for pious purposes. (*d*) It is

(*a*) Colebrooke, Dig. Bk. V. T. 399, 477.

(*b*) Mitâk. Ch. II. Sec. 11, pl. 9, 12, 25.

(*c*) Mitâk. Ch. II. Sec. 1, pl. 32, 33; Stokes, H. L. B. 465–66.

(*d*) If he reserve enough for the support of the family, however, the father is allowed to deal, free from interference with what he has himself

clear, therefore, that a right of absolute disposal did not enter into Vijñâneśvara's conception of the essentials of ownership. (*a*) He admits (*b*) the genuineness and the authority of the text of Nârada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a hus-

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acquired. Such is the effect of the passage referred to when taken with Chapter I. Sec. 5, pl. 10, unless the latter is to be referred—as perhaps on correct principles of interpretation, it ought to be referred—solely to moveable property.

(*a*) With the Hindû conception of ownership as consisting in exclusive use not necessarily including a right of alienation, we may compare in the English law the estate of the tenant for life under the Statute *De Donis* and under the Roman law the estate of an heir subject to substitutions. He was during his life regarded as sole proprietor, the substitute down to the time when the substitution opened had only a bare expectation; judgments and prescriptions operative against the successor as heir operated also against the substitute; yet subject to special exceptions the former could not alienate the property. The substitute moreover, though he had but a mere hope of succession, could take all measures requisite for the preservation of the property. *See* Poth. Tr. des Substitutions, Sec. V. Art. 153, 155, 160, 175, 178.

The closest resemblance however to the estate of the Hindû widow is perhaps to be found in that of the widow under the old Teutonic laws in the property enjoyed by her as dower. Of this she was proprietress, yet without any power of alienation. The rights of the heirs were suspended during her widowhood; the succession opening only on her death or remarriage. This dower in the lands of the husband was variable in proportion according to the settlement, but by custom was fixed usually at one-third. This was exclusive of the *dos legitima* or money gift, the amount of which it was found necessary to limit by law. The dower of the English law was confined to the husband's lands, though called *dos*. It originated probably in the Saxon law which is continued in that of gavelkind and free-bench, giving a moiety of the lands to the widow during a chaste widowhood modified by the more widely spread custom, limiting her enjoyment to one-third. This she holds as a sub-tenant for life of her husband's heirs who must set out her lands by metes and bounds. *See* Laboulaye, *op. cit.* 401; Bl. Comm. Bk. II. Ch. VIII.

(*b*) Mitâk. Ch. II. Sec. 1; pl. 25, Stokes, H. L. B. 435.

band, as we have seen, in some cases to dispose of his wife's property. The inference to be gathered from these passages is strengthened if we look into his chief authorities. Manu allows women no independence. The verse denying it occurs in Yâjñavalkya also (Ch. I.). Kâtyâyana, so frequently quoted in the Mitâkshará, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (*a*) consistently with that passage of the Mahâbhârata (*b*) which limits the widow to simple enjoyment. Jagannâtha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immoveable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Brihaspati, who, as we have seen, insists emphatically on a widow's right of inheritance, is equally emphatic in restraining her power of dealing with it (*c*). .....
It seems a reasonable inference from these and other authorities that, as to immoveable property at any rate, (and with immoveable property, according to the Hindû law, is classed every kind of property producing a periodical income,) the woman's ownership is subject to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice. Kâtyâyana, indeed, as quoted by Nîlakaṇṭha, (*d*) says expressly "she has not property therein to the extent of gift, mortgage, or sale," except, as Nîlakaṇṭha adds, for appropriate purposes. A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognise inherited property as part of her *Stridhana* by no means involves the

(*a*) Colebrooke, Dig. Bk. V. T. 477.

(*b*) T. 402.

(*c*) Vyav. May. Ch. I. V. Sec. 8, pl. 3 ; *ibid.* 84.

(*d*) Vyav. May. Ch. IV. Sec. pl. 4; Stokes, H. L. B. 84. This restriction applies equally to lands given by a husband to his wife as Strîdhana. As wife or as widow she cannot alone dispose of them. 2 Macn. H. L. 35.

consequence that she can alien it without good reason. (*a*) The argument in support of this consequence put forward by Jagannâtha in his comments on Colebrooke's Digest, Bk. V., T. 399, involves a very obvious fallacy.

And this is the practical conclusion at which Prof. H. H. Wilson at last arrives. He says (page 77) :—" We have so fully discussed the doctrine of alienation by widows that we need not advert to the cases illustrative of grants made by them. There is clearly a difference between the situation of a widow inheriting, and a father in possession, because the sons and grandsons have a direct lien upon the estate, which remote heirs have not : although, however, the law might be held to permit a widow's alienation of property to which she succeeds as heir, yet the obvious analogy of the case, and the general impression on the subject, operate to prevent her alienation of fixed property and chattels, and therefore the decisions of the Sadr Dewani in the cases of *Mahoda* v. *Kalyani et al*, (*b*) and *Vijaya Devi* v. *Annapurna Devi* (*c*), may be admitted as law, the authority of the Court having been interposed, as we have recommended it should be, in every case, to make that invalid which was considered immoral."

At 1 Macn. H. L. p. 40, it is said that a wife is subject to her husband's control even as to her separate and peculiar property; but this is opposed to the definition of Strîdhana in the Dâyabhâga. (*d*) It rests perhaps on the general texts as to a woman's dependence which are cited in Coleb. Dig.,

(*a*) *See* Nârada, Ch. I. Sec. 3, p. 28. Property consists not in the right of alienating at pleasure; Coleb. Dig. Bk. V. T. 2, Comm. Dependence does not imply defect of ownership, *ibid.* Bk. II. Ch. IV. T. 17, Comm. As to property taken as her share by a wife or widow in a partition, Jagannâtha asserts her power to dispose of it equally with Strîdhana. Coleb. Dig. Bk. V. T. 87, 88, Comm. This agrees with the opinion of the pandits cited below, and with the Mitâkshara Ch. I. Sec. VII., Sec. II. para. 8; above, p. 303, 308, 310.

(*b*) 1 Calc. S. D. A. R. 62.

(*c*) *Ibid.* 162.

(*d*) *See* above, p. 266.

Bk. III. Ch. I., T. 51, 52; and on these Jagannâtha throws out a suggestion that, although a widow, being free from the dominion contemplated by Manu and Nârada, is absolute mistress of her acquisitions of property, yet an unmarried daughter, being possibly comprehended within the general term 'son' takes any acquisition of wealth subject to her father's superior right, which, as to such property, continues during her subsequent coverture, so as to prevent an alienation without his assent. (*a*) But her guardianship is transferred to her husband and his family on her marriage. The texts, if taken literally, would prevent any acquisition at all, and being superseded or explained away so as to allow of a widow's acquisition of property, they cannot properly be applied to a state of things which their writers did not conceive as possible.

The circumstances under which a widow may, according to the law which assigns her only a special estate, deal with the property inherited from her husband, have already been considered at p. 99. The chief of them are compendiously stated in the case of *Lalla Gunpat Lall et al* v. *Musst. Toorun Koonwur et al* (*b*) :—"The Śrâddha of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are legitimate grounds of necessity for alienations." Self-maintenance, discharge of just debts, protection or preservation of the estate, are grounds of expenditure equally justifiable as pious purposes. (*c*) The charges of a pilgrimage were refused recognition as a ground for alienation in *Huro Mohun* v. *S. Auluck Monee Dassee et al.* (*d*) A compromise made by the widow in fraud of the rights of the expectant heirs is not binding against them. (*e*) That her defective capa-

(*a*) Coleb. Dig. Bk. V. T. 477, Comm.

(*b*) 16 C. W. R. 52 C. R.

(*c*) *Soorjoo Pershad et al* v. *R. Krishan Pertab*, 1 N. W. P. R. 49.

(*d*) 1 C. W. R. 252.

(*e*) *Musst. Indro Kooer et al* v. *Shaikh Abdool Purkat et al*, 14 C. W. R. 146 C. R.

city however must not be made a means of fraud is noticed in Bk. I. Ch. II. Sec. 2, Q. 4, as also that her transactions must be made good so far as they can be out of her limited estate. (*a*) A wife in Bengal has a power of sale over immoveables which she has purchased out of her separate funds. (*b*) The wife, however, according to Macn. H. L. 40, on whom their Lordships rely, is subject to her husband's control, even as to her Strîdhana. A widow turning her moveable Strîdhana into immoveable property can dispose of the latter by will. (*c*)

Srî Krishna Tarkâlankâra in the Dâya Krama Sangraha regards Strîdhana chiefly from the point of view of the particular modes of devolution prescribed for the different elements of it. It is for the purpose, he says, of determining precisely to which of these the different rules of succession apply, that the definitions of the different kinds of Strîdhana have been framed. (*d*) Vijñâneśvara's rules for the succession to Strîdhana are discussed in the Introductory Remarks to Bk. I. Ch. IV B., Sec. 6, of this work, (*e*) where too the rules of the Vyav. May. on the same subject are considered. The statement of Sir W. Macnaghten (1 H. L. 38) that "In the Mitâkharâ whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*," is entirely unsupported by anything in the Mitâkharâ itself, (*f*) and has been the source of much con-

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(*a*) See *Mayaram* v. *Motiram*, 2 Bom. H. C. R. 313; *Bagoba Jha* v. *Lal Doss*, 6 C. W. R. 36 C. R.; *Ram Shewuk Roy et al* v. *Sheo Gobind Sahoo*, 8 *ibid.* 519.

(*b*) *Luchman Chunder Geer Gossain et al* v. *Kalli Churn Singh et al*, 19 C. W. R. 292, P. C.

(*c*) *Venkata Rama Rau* v. *Venkata Suriya Rau et al*, I. L. R. 1 Mad. 281.

(*d*) Dâya Krama Sangraha, Ch. II. Sec. 2, pa. 1; Stokes, H. L. B. 487.

(*e*) *See* also Bk. I. Introd. p. 145 ff. above.

(*f*) "Vijñâneśvara.....erklärt Âdyam.....als alles auf irgend eine Art.....Erworbene; er behauptet, dass Strîdhana hier einfach in seiner

fusion in practice. That work, having enlarged the woman's capacity to take property all of which it terms Strîdhana, then lays down rules of corresponding breadth as to its devolution. The exception of the Śulka and its probable origin have already been noticed. The Mayûkha, as we have seen, (*a*) while accepting Vijñâneśvara's definition of Strîdhana, distinguishes between the kinds specially described in the Śâstras, and for the devolution of which special rules are laid down, and all other kinds, which descend, he says, as if the female owner had been a male. (*b*) In the absence of a distinct rule in the Mitâkshará for the devolution of woman's property this might have been an admissible doctrine under that law. But first the Mitâkshará makes the woman inherit; then it says that Strîdhana includes the property thus taken (Mit. Ch. II. Sec. XI. para. 3); then it says "Strîdhana has been thus described" (Mit. Ch. II. Sec. XI. para. 8); "Failing her issue Strîdhana *as above described* shall be taken by her kinsmen.....as will be explained" (Mit. Ch. II. Sec. XI. para. 9); then that daughters and their offspring take in priority to sons; lastly that sons

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etymologischen Grundbedeutung.....zu nehmen sei: ..... Im ganzen folgenden Abschnitt über das Strîdhana und die Succession in dasselbe wird diese Definition festgehalten."—Jolly, Ueber die Rechtliche Stellung der Frauen &c. p. 57. Vijñâneśvara explaining Ádyam so as to include every kind of acquisition, insists on the etymological sense of the definition and adheres to it throughout the section on Strîdhana and its devolution. If by *peculium* Macnaghten meant the kinds of property specifically enumerated in the Smritis, he is in direct contradiction to the Mitâkshará, or else draws a distinction which the Mitâkshará does not draw, and on which therefore nothing turns. The rules given are as to "woman's property," not as to *peculium*, except in the single instance of Śûlka.

(*a*) Above, p. 145, 150 note (*b*); p. 272.

(*b*) The Śâstri in a Bengal case, at 2 Macn. H. L. 121, directed that a woman's sons should succeed to land acquired by her. In this he agreed with the Mayûkha, but in excluding a grandson he disagreed with it. The succession of the remoter heirs is in all cases governed by the same rules as though the property were a male's, according to the Dâya Krama Sangraha. *See* Vyavasthâ Darpaṇa, p. 727.

take (Mit. Ch. II. Sec. XI., para. 19). An exception made as to the Śulka (Mit. Ch. II. Sec. XI. para. 14) and the special rule laid down as to that, serve to emphasize Vijñâneśvara's intention that the general rules should extend to every other case, "the author," as he says, "now intending to set forth fully the distribution of Strîdhana, begins by describing it," (Mit. Ch. II. Sec. XI. para. 1) and then gives rules for its devolution as above. (*a*)

The view taken by Jîmûtavâhana, and constituting the Bengal law, is this. The Anvâdheya or gift subsequent and the Prîtidatta or present from a husband are types of all the special kinds of Strîdhana, which he recognizes, and are, he says, to be equally divided between sons and daughters. The Yautaka or gift at the marriage goes to the unmarried daughters alone, (*b*) who have a preference over their married sisters in the distribution of the other Strîdhana also. (*c*) Next after daughters as successors come the sons and their sons, taking precedence of the daughter's sons, after whom come the barren and widowed daughters. (*d*) This line of succession resting on the principle of exequial benefits differs widely from Vijñâneśvara's, who next to daughters, places their daughters, and next to them, daughter's sons, (*e*) before the sons of the deceased woman are admitted. On failure of offspring, Jîmûta-

(*a*) What Yâjñavalkya (II 117) calls the "mother's property." Vijñâneśvara calls Strîdhana. Unless, therefore, what the mother has inherited is not her property, it follows of necessity that he intended Strîdhana to include heritage. So as to property inherited by a daughter included in Strîdhana but subject to a special rule of devolution. Mit. Ch. II. Sec. XI. para. 30.

(*b*) See *Srinath Gangopadhya et al* v. *Sarbamangala Debi*, 2 Beng. L. R. 114 A. C.

(*c*) Vîramit. Sec. 3, p. 20.

(*d*) Dâyabhâga, Ch. IV. Sec. 2 (Stokes, H. L. B. 243-251). For the step-son by a co-wife, see *ibid.* Sec. 3 (*ibid.* 251); Dâya Krama Sangraha, Ch. II. Sec. 3, para. 11 (*ibid.* 493); Coleb. Dig. Bk. V. T. 505, 506.

(*e*) Mit. Ch. II. Sec. 11, p. 10, 12, 18, 19; Stokes, H. L. B. 460-2.

vâhana (*a*) assigns to the deceased woman's husband married by an approved rite only property received at the nuptials. Her other property goes to her brother, mother, and father in succession. (*b*)

Jagannâtha (*c*) follows Jîmûtavâhana to some extent in his rules as to the succession to Strîdhana. Sons and daughters succeed jointly except to the Yautaka. This on failure of sons is taken by daughter's sons, after whom come the son's sons. To other Stridhana, failing maiden daughters, sons, and married daughters, the son's son succeeds, and in default of him the daughter's son. (*d*) After these the inheritance goes to the woman's own family of all her property, except gifts at the marriage. (*e*) The husband as to such property comes in after her brothers and parents. (*f*) The succession of the husband in the first place is limited to the specially enumerated kinds of Strîdhana. As to property taken by inheritance the rule is that on the death of the woman it goes to the then nearest heirs of him whom she succeeded. The woman's own heirs are not regarded as heirs to property thus acquired. (*g*) Jimûta

(*a*) Dâyabhâga, Ch. IV. Sec. 3, p. 4 ff; Stokes, H. L. B. 251.

(*b*) See *Judoonath Sircar* v. *Bussunt Coomar Roy*, 11 Beng. L. R. 286. Further details on the Bengal law will be found in the summary, Dâyabhâga, Ch. IV. Sec. 3 (Stokes, H. L. B. 251), under the head of Strîdhana, in Macnaghten's H. L. and in the Vyavasthâ Darpana. At 2 Morl. Dig. 237, the Śâstri says, in a Bengal case, that even immoveable property given to a woman by her husband descends, on her death as a widow, to the heirs of Strîdhana or female property. Compare the answers, referred to above, pages 304, 308. Property taken by a woman before her marriage by bequest from her father is in the same case pronounced Strîdhana. If it is her Strîdhana then her heirs as classed in the province should inherit it. *See* Coleb. Dig. Bk. V. T. 420, Comm; Mit. Ch. II. Sec. XI. para. 30.

(*c*) Coleb. Dig. Bk. V. Ch. IX. Sec. 2.

(*d*) *Op. cit.* T. 445, Comm.

(*e*) *Ibid.* T. 504, 508, 509, 511.

(*f*) *Ibid.* 512.

(*g*) Dâyabhâga, Ch. XI. Sec. 1, p. 56 ff; Stokes, H. L. B. 320, &c. Sec. 2, p. 30, *ibid.* 329; Coleb. Dig. Bk. V. T. 420, 422, Comm.; 1 Str. H. L. 130 ff.

extends the rule even to a daughter's son succeeding to his maternal grandfather, but this is contradicted by Jagannâtha. (*a*) Mitramiśra (*b*) condemns the explanation given by Jîmûta and generally follows the Mitâksharâ. He however not only gives the Śulka to the brothers, but also immoveable property bestowed by their parents, and what was given by the kinsmen. The husband married by an approved rite succeeds, with these exceptions, to the whole property left by his childless wife, not merely to her nuptial presents. The rules of the Smṛiti Chandrikâ (*c*) and the Mâdhavîya (*d*) are glanced at in the course of Mitramiśra's discussion. The Vivâda Chintâmaṇi gives the Yautaka to the unmarried daughter, the son, and the daughter's son in succession. Presents from the woman's kinsmen it distributes equally between sons and daughters. The Śulka it assigns to the brothers. On failure of issue as far as her daughter's son, the deceased woman's husband is pronounced heir. (*e*)

This slight sketch of the systems or attempts at system of the other commentators will serve to show the great advantage of Vijñâneśvara's scheme in point of simplicity. This, as shown in Bk. I. Ch. IV. of this work, and above, p. 146 ss., has generally prevailed in Bombay. Thus in *Gangârâm et al* v. *Bâlia et al*, (*f*) it was ruled that property inherited by a woman from her father is Strîdhana, which descends first to her daughter, and failing a daughter, to her husband and his heirs. In *Pránjeevandás et al* v. *Dewcooverbáee et al*, (*g*) it was held that "daughters take the immoveable property absolutely from their father after their mother's death." In *Vináyek Anundráo et al* v. *Luxumeebáee et al*, (*h*) it is said of the mother

(*a*) *Sitabai* v. *Badri Prasad*, I. L. R. 3 All. 134.
(*b*) Vîramitrodaya, Transl. p. 221, 228 ss.
(*c*) *See* Smṛiti Chandrikâ, Ch. IX. Sec. 2, 3.
(*d*) Mâdhavîya, p. 43.
(*e*) Vivâda Chintâmaṇi, p. 266 ff.
(*f*) Bom. H. C. P. J. F. for 1876, p. 31.
(*g*) 1 Bom. H. C. R. 130.
(*h*) 1 Bom. H. C. R. 121.

inheriting from her son :—"The quantum of estate which she is allowed to take in the character of heir to her son, is not free from doubt; although in the category of those who take as heirs to a separated brother, there is no distinction or difference made between the quantum of estate taken by a mother from that taken by a son, a father, a brother, or any other relative, who admittedly takes in such an inheritance the most absolute estate known to Hindû Law." (*a*) As to sisters it is said (p. 124) :—"As to the mode in which sisters take, it would appear by analogy that they take as daughters. In a passage from the Commentary of Nanda Paṇḍita, cited by Mr. Colebrooke in his annotations to para. 5 of Sec. 5 of the second chapter of the Mitâkshará, occur these words : 'The daughters of the father and other ancestors must be admitted like the daughters of the man himself, and for the same reason,' but the daughters of the man himself take absolutely, and so, therefore, do the sisters." (*b*)

In the case already referred to, the Śâstri says that the property taken by inheritance by a mother from her son is for the purpose of further descent to be regarded as her property. In the case of *Jugunâth* v. *Sheo Shunkar*, (*c*) the Suddur Court, on the advice of its Śâstri, applied the law of the Vyav. May., by pronouncing a woman's own sister heir in preference to her husband's sister to property that the deceased had inherited from her father. The case, Q. 5, is a strong one, for there the son of a woman by her first marriage was pronounced her heir to property inherited by her from her second husband, in preference to that husband's

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(*a*) Manu, Ch. IX. Sec. 185, 217; Mitâkshará on Inheritance, Ch. II. Sec. 3 (Stokes, H. L. B. 441); Vyavahâra Mayûkha, Ch. IV. Sec. 8, p. 14 (Stokes, H. L. B. 87).

(*b*) *See* now Bk. I. Ch. II. Sec. 14, I. A 1, Q. 4, Remark. A maternal great-niece takes an absolute estate by inheritance like a daughter or sister. I. L. R. 5 Bom. 662.

(*c*) 1 Borr. R. 102.

own family. In *Bai Muncha* v. *Narotamdas Kashidas et al*,(*a*) it was ruled that property inherited by a woman, except by a widow from her husband, ranks as Strîdhana and descends accordingly, and lastly, as we have seen in *Vijayarangam* v. *Lakshman*, (*b*) that a widow succeeds to her husband's property as Strîdhana, which then devolves according to the law of the Mitâksharâ or of the Mayûkha, as either authority may locally prevail over the other. (*c*) In *Kotarbasapa* v. *Chanverova*, (*d*) property given by a husband to one of his wives was held to be Strîdhana, held by her under a restriction against a sale after his death to her co-widow, so as to deprive her daughter of her right of inheritance.

The use of the word *Strîdhana* in the several senses to which we have referred may be observed in the above cases. According to the Mitâksharâ, the property must have been Strîdhana in every case, but it is not clear that in some instances the idea was not present that there might be property held by a woman which was not Strîdhana, and which was not subject according to the Mitâksharâ to the general rules laid down for the devolution of that kind of property. In Bengal and Madras (*e*) this notion has gained a distinct ascendancy through the prevalence, in those provinces, of authorities which, as we have seen, give to Strîdhana a narrower meaning, and prescribe for its devolution much more intricate rules than Vijñâneśvara.

(*a*) 6 Bom. H. C. R. 1 A. C. J.

(*b*) 8 Bom. H. C. R. 244 O. C. J.

(*c*) As to this see *Sakhárám Sadáshiv* v. *Sitabái*, I. L. R. 3 Bom. 353; and above, pp. 10 ss.

(*d*) 10 Bom. H. C. R. 403.

(*e*) Colebrooke (2 Str. H. L. 403) says the descent from the widow is regulated by the text of Brihaspati, Bk. V. T. 513 (misquoted as T. 413) of Coleb. Dig. This the Vyav. May. Chap. IV. Sec. 10, para. 30 (Stokes, H. L. B. 106) applies to the special Strîdhana only, in the case of a failure of the nearer heirs provided by para. 28, *i.e.* the husband in case of an approved marriage, and the parents in other cases, though apparently before the Sapiṇḍas of either. The Mit.

In *Chotay Lall* v. *Chunnoo Lall*, (*a*) Pontifex, J., says, "It appears to me, therefore, that if this case was uncovered by authority, property taken by inheritance by a woman from her father would be her separate property, unless the words 'acquired by inheritance' are altogether rejected from the text'; but being constrained by the weight of the contrary authorities he felt bound (p. 239) "to decide that in this case Luckey Bibee's estate was only a qualified estate, and that, upon her decease, the plaintiffs, as the heirs of her father, became entitled to the property in dispute: though I must confess that, speaking for myself, if the case had been untouched by authority, I should have felt compelled to give a plain meaning to the plain and unqualified words of the Mitâkshará, rather than explain them away or in effect reject them, by the application of principles of which, after all, we have only a hazy and doubtful knowledge." (*b*) On appeal this decision was affirmed by Sir R. Couch, C. J., and Ainslie, J. In the judgment of the learned Chief Justice, the chief precedents for a departure from the text of the Mitâkshará are cited. (*c*)

Chap. II. Sec. 11, para. 11 (Stokes, H. L. B. 460) merely allows the sapindas of husband or parents to succeed. In this case Colebrooke must have intended to state the law of the Smriti Chandrikâ and Mâdhaviya, not of the Mitâkshará. *See* Smriti Chandrikâ, Chap. IX. Sec. 3, para. 36. In Madras on the death of one who inherited as a maiden daughter she is succeeded by her married sisters, not by her own sons, *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, I. L. R. 3 Mad. at p. 335; and *Simmani Ammal* v. *Muttammâl*, *ib.* at p. 268. *See* p. 107 ss. *supra*.

(*a*) 14 B. L. R. at p. 237.

(*b*) A similar conclusion is arrived at by Innes, J., I. L. R. 3 Mad. at pp. 310, 313, and at p. 333, Muttu Swámi Ayyar, J., says, "There is no doubt that Vijñáneśvara Yogi, the author of the Mitâkshará, classes it as strîdhanam," but these learned judges held that the Mitâkshará did not on this point give the law to the Madras presidency.

(*c*) These are: *Musst. Gyankoowur* v. *Dookhurn Singh*, 4 Calc. Sel. Rep. 330; *Sheo Sehai Singh et al* v. *Musst. Omed Koowar*, 6 Calc. Sel.

Of these four are Bengal cases, and rest partly on the doctrine of the Dâyabhâga and partly on Macnaghten's mistaken notion that the Mitâkshará recognized woman's property which was not Strîdhana, or that it provided some rule for the descent of such property different from the one prescribed for Strîdhana. A Madras case (*a*) also is cited in which it is said that the texts recognizing a daughter's inheritance as Strîdhana relate only to the appointed daughter. This is directly opposed to the Mitâkshará, (*b*) as is another theory started in the same case that the daughter inherits only as the passive instrument of providing a worshipper for the deceased. (*c*) Vijñânesvara basis Sapiṇdaship entirely on consanguinity. (*d*) The Bombay case of *Navalram Atmarám* v. *Nandkishor Shivnarayan*, (*e*) referred to by the learned Chief Justice of Bengal, rules that property inherited by a married woman from her father is Strîdhana and descends as Strîdhana to her daughters. Vijñâneśvara's leading principle is that women gain as full ownership by inheritance as by any other recognized mode of acquisition. If however they take a full ownership they must in the absence of an express rule to the contrary transmit the property to their heirs. (*f*) Kâtyâyana's rule, (*g*) supposed

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Rep. 301; *Heralal Baboo* v. *Musst. Dhuncoomary Beebee*, Calc. S. D. A. R. for 1862, p. 190; *Punchunand Ojhab et al* v. *Lalshan Misser et al*, 3 C. W. R. 140; *Deo Persad* v. *Lujoo Roy*, 14 Beng. L. R. 245 *n*, 246 *n*, S. C. 20 C. W. R. 102; *Katama Natchiar* v. *the Raja of Shivagunga*, 6 M. H. C. R. 310.

(*a*) *Katama Natchiar* v. *The Raja of Shivaganga*, 6 M. H. C. R. 310.

(*b*) *See* Mit. Ch. II. Sec. 2, para. 5, and Ch. I. Sec. 11, para. 1; Stokes, H. L. B. pp. 441, 410.

(*c*) 6 M. H. C. R. p. 338; Mit. Ch. II. Sec. II. paras. 2, 3.

(*d*) *See* above, p. 120.

(*e*) 1 Bom. H. C. R. 209.

(*f*) *See* Vyav. May. Ch. IV. Sec. X. paras. 22, 26; Smṛiti Chand. Ch. VIII. para. 11.

(*g*) Coleb. Dig. Bk. V. T. 477.

by other commentators to bring in the husband's heirs after the widow by the mere word "heirs," is by Vijñâneśvara significantly omitted.

Jagannâtha shows (*a*) that the inference drawn in the case of other female successors by Jîmûta Vâhana from the text of Kâtyâyana relating to a widow is altogether unfounded. Of Jîmûta's view that on the death of a daughter who had succeeded as a maiden to her father's property, that property passes to her married sisters as his heirs previously excluded by her, he says it is "not directly supported by the text of any legislator or the concurrence of any commentator." Hence, he says, in the case of a daughter's succession to her father, her heirs, not his, take on her death except where Jîmûta's personal authority is accepted.

In one of the Bengal cases the Vivâda Chintâmani is referred to as if it supported the narrower limitation of the estate taken by way of inheritance by a widow or daughter. What the Vivâda Chintâmani says, however, as stated by the learned editor, is that "any property which a woman inherits is her Strîdhana. Hence any property of her husband which she inherits shall on her death be received by the heirs of her peculiar property." (*b*) This being so even in the case of a widow to whom Kâtyâyana's rule in favour of "the heirs" directly applies, it follows *a fortiori* that "if the mother die after inheriting her son's property such property becomes her Strîdhana. Hence the heirs of her peculiar property get it." Similarly Visveśvara and Bâlambhatta, the two principal commentators on the Mitâkshará, say: "If the succession (to a man deceased) be taken.....by the grandmother it becomes a maternal estate and devolves on..... her daughters, or successively on failure of them on her daughter's sons, her own sons and so forth, (*c*) *i. e.* the property

(*a*) Coleb. Dig. Bk. V. T. 420, Comm.

(*b*) *See* Viv. Chint. Table of Succession XII, XIII, pp. 262, 292.

(*c*) Mit. Ch. II. Sec. IV. para. 2, note. At Allahabad, however, exactly the contrary was held, consistently with the other cases, *Phukar Singh* v. *Ranjit Singh*, I. L. R. 1 All. 661.

is Strîdhana though taken by inheritance from a grandson. The term is not used, because the doctrine of the Mitâksharâ being once received, it had no specific significance, (*a*) but the devolution prescribed necessarily implies it.

The Saraswati Vilâsa, Sec. 264, explains Yâjñavalkya's text in precise agreement with the Mitâksharâ. It describes Strîdhana as a kind of "dâya" (*b*) Sec. 333 ff; and includes a woman's succession in the class of unobstructed inheritance, Sec. 398. (*c*) In providing also for succession to Strîdhana in this largest sense, though it recognizes the special rules applicable to Sûlka, &c., Secs. 288, 303, it does not ground any difference on the fact of the Strîdhana's having been inherited or not inherited property. In all cases save those which are the subjects of special rules, it assigns the succession first to daughters on account of their partaking their mother's nature more fully than sons. It limits the woman's power of dealing with immoveable property as do the Vivâda Chintâmani and the other commentaries, (*d*) without contra-

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(*a*) Comp. Vyav. May. Ch. IV. Sec. X. para. 25.

(*b*) The Smṛiti Chandrikâ, Ch. IV., reconciles the familiar Vedic text on the unfitness of women to inherit with the passages that assign shares to a mother and a sister, by arguing that these shares not being of definite portions, constituting property subject to partition, cannot be Dâya (commonly rendered heritage), which involves the notion of a continuous right of participation in the successive male members of the family, inherent in each member from the moment of his birth. As women have not common family sacrifices to support, that central notion of the joint family fails in their case as a support of the group of ideas, applicable to an undivided estate amongst males. No rules are provided for the regulation of a joint female property, and the Vyavhâra Mayûkha, Ch. IV. Sec. 8, pp. 9 and 10 (Stokes, H. L. B. 86,) says that in the case of a plurality of widows or daughters, they are to divide it and take equal shares.

(*c*) The importance of this from the Hindû point of view consists in this, that the "unobstructed" right is the fullest conceivable, not being obstructed or deferred as ownership by the existence of the present possessor.

(*d*) *See* Smṛiti Chandrikâ, Ch. IX. 13, 15.

dicting the Mitâkshará, which recognizes her constant dependence.(a) In *Kâtama Nâtchiâr* v. *The Raja of Shivagunga*, (b) however, the Privy Council say: "The passages in the Mitâkshará contained in clauses 2 and 3 of Section 1, Chapter I.....when examined, clearly appear to be mere definitions of 'obstructed' and 'non-obstructed' heritage, 'and to have no bearing upon the relative rights of those who take in default of male issue,'" and consistently with this Jagannâtha points out (c) that if "obstructed" inheritance gives but a defective ownership as some authors have contended as a ground for cutting down the estate of a female successor, the principle must apply to a daughter's son, a pupil, and the other remote heirs in whose cases no such limitation is admitted. Notwithstanding the cases that rest on a different interpretation, the high native authorities just referred to seem to place it beyond reasonable doubt that the Mitâkshará intended rightly or wrongly to give a woman full ownership by inheritance, and to make her the source for property thus taken of a new line of succession. (d) Still the decisions have gone so far and are now so numerous in a sense opposed to this construction that it cannot properly be acted on. In the case of the *Widow of Shanker Sahai* v. *Raja Kashi Pershad* (e) the Judicial Committee refused to limit a widow's estate to a mere life interest, but in *Brij Indur Bahadur Singh* v. *Rance Janki Koer* (f) their Lordships said:—

"It is unnecessary to determine whether immoveable property acquired by a woman by inheritance is 'woman's property.

(a) Mit. Ch. II. Sec. I. 25.

(b) 9 M. I. A. 539, 613.

(c) Coleb. Dig. Bk. V. T. 420, Comm. II.

(d) *See* also above, page 272, note (a), which makes it clear that property inherited by an unmarried woman passes on her death to her heirs as such, according to the express rule of the Mitâkshará for that case.

(e) L. R. 4 I. A. at p. 208.

(f) L. R. 5 I. A. 1.

It has been decided that a woman cannot, even according to the Mitâkharâ, alienate immoveable property inherited from her husband, and that after her death it descends to the heirs of her husband and not to her heirs, *Musst. Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A. 175." (*a*) And still more recently it has been pronounced (*b*) "impossible ..... to construe this passage [of the Mitâkharâ] as conferring upon a woman taking by inheritance from a male a Strîdhana estate transmissible to her own heirs."

While this has been the course of the decisions of the Privy Council in cases from Bengal and Madras, (*c*) another development by inference from the restrictions on a widow has been arrived at in Bombay. The absolute estate of a woman is necessarily her Strîdhana, (*d*) and as she can deal with it as she pleases (*e*) so it, if any thing, must be inherited as hers by her heirs. So also as to a sister according to the law of the Mayûkha and with the same consequences. (*f*) In Bengal and in Madras where the restrictions on women's inheritance are thought consistent with the doctrine of the Mitâkharâ the daughter succeeding as such has but the same limited interest as the widow and transmits no rights to her own heirs. (*g*) Jagannâtha recognizes it as incongruous that

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(*a*) P. C., in *Brij Indur Bahadur Singh* v. *Ranee Janki Koer*, L. R. 5 I. A. at p. 15.

(*b*) *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, L. R. 8 I. A. at pp. 108, 109.

(*c*) In Madras as well as in Bengal, contrary to the law as construed in Bombay (above, p. 106), it is said that daughters once excluded as being married at the father's death succeed in turn as the father's heirs. On the same principle after their death the father's heir should be sought again. *See* above, p. 106, notes (*f*) (*g*).

(*d*) *See* above, p. 297 ss.

(*e*) *Venkatrâma's* case, I. L. R. 2 Mad. 333.

(*f*) *Vináyak Anundráo* v. *Lakshmibái*, 1 Bom. H. C. R. at p. 124.

(*g*) See *Chotay Lal* v. *Chunoo Lal*, L. R. 6 I. A. 15; *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, L. R. 8 I. A. 99.

the daughter who is postponed as heir to the widow should have a larger power of alienation. (*a*) It did not occur to him that entrance to the family by birth or marriage made a difference. But lastly the Judicial Committee in *Mutta Vaduganadha* v. *Dorasinga* (*b*) say "how impossible it is to construe the passage (Mit. Ch. II. Sec. XI. para. 2) as conferring upon a woman (in that case a daughter) taking by inheritance from a male a Strîdhana estate transmissible to her own heirs. The point is now completely covered by authority." Hence it seems a female heir must be regarded as taking in no case more than a life estate before that of the other heirs of her own predecessor, and it appears that the distinction made in Bombay can hardly be maintained. In the great case of *Katama Natchiar* v. *the Rajah of Shivagunga* (*c*), the estate of a Zamindâr was adjudged to belong to the daughter of the deceased owner in preference to his nephew, and it thus "passed from the line of Muttu Vaduga," the nephew, after being held by him, his two sons, and his grandson in succession. The wife and daughter were pronounced the immediate heirs, though the heirs of the last male owner still had an interest, according to the doctrine of reversion. (*d*) The daughter died, and then it was adjudged that, not her children, but the eldest grandson of her father, through her half-sister, was entitled next in succession to the whole estate, it being impartible. (*e*)

Now in the case of *Tuljárám Morárji* v. *Mathurádás and others* (*f*) it is said that all females entering a family by

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(*a*) Coleb. Dig. Bk. V. T. 399, Com.

(*b*) L. R. 8 I. A. at p. 108.

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

(*d*) See *Periasami et al* v. *The Representatives of Salugai Tevar*, L. R. 6 I. A. 61.

(*e*) In the Multan district, it is observed, any property inherited by a woman passes on her death to her family of marriage and not of birth. Panj. Cust. Law, II. 272; see *Muttu Vaduganadha Tevar* v. *Dorasinga*, L. R. 8 I. A. 99.

(*f*) I. L. R. 5 Bom. 662.

marriage and becoming heirs through that connexion are subject to the same restrictions as a widow of the propositus, that is, they take moveable property absolutely, but in immoveable property only an estate *durante viduitate*. Other female heirs, as daughters, it is said take absolutely. This is an intelligible distinction, and the rule as to the daughters is generally followed in Bombay, (*a*) but the opposition is not one made by any Hindû authority. In *Vináyak Anundráo* v. *Lakshmibai*, (*b*) Arnould, J., says, "there is no difference made by the texts in the quantum of estate taken by a mother and by a son." The daughters succeeding take absolutely as the Sâstris agreed in the *Devacooverbái's* case, (*c*) and "as the daughters take absolutely so do the sisters." (*d*) But "from these authorities [the Mitâkshará and the Mayûkha] it would appear that a widow takes an absolute interest in her husband's estate." (*e*) The Śâstris referred to said she could expend even the immoveable property, though only for proper purposes. Hence Sir M. Sausse concluded to "a mere life use of the immoveable estate" and "an uncontrolled power over the moveable estate" as descending to a widow. The limitation of the widow's estate is thus evolved from Kâtyâyana's restriction as to her use of the property, (*f*) but without the widow's estate being made as in Bengal a type of all inheritance by females. (*g*) By the recent decision it is made a type of all female inheritance in the family of marriage but not of birth; but if the restriction is to be construed as proposed, and applied to any others than

(*a*) *See* Bk. I. Ch. II. Sec. 7.

(*b*) 1 B. H. C. R. at p. 121.

(*c*) *Ib.* at p. 132.

(*d*) *Ib.* at p. 124.

(*e*) *Ib.* at p. 132.

(*f*) Vyav. May. Ch. IV. Sec. VIII. paras. 3, 4; Coleb. Dig. Bk. V. T. 399, 402; Dâya-Krama-Sangraha, Ch. I. Sec. II. paras. 3–6; above, pp. 301, 306.

(*g*) *See* above, p. 311; Coleb. Dig. Bk. V. T. 420.

the widow, who alone is mentioned by Kâtyâyana as bound to economy of the estate taken from her husband, there seems to be no good reason why it should not be applied to all female heirs as well as to some of them. If the Mitâkshará doctrine is accepted all take a complete estate, especially the widow who, it is elaborately proved, takes the whole estate of her deceased husband. (*a*) If the views of other lawyers prevail no woman takes an absolute estate by inheritance. An instance of the former doctrine already given shows well how it was understood by the principal commentators on the Mitâkshará. The grandmother enters the family by marriage and the property inherited by her is, as we have seen, regarded as Strîdhana, or maternal estate, devolving on her daughters and daughters' sons as heirs in priority to her sons. (*b*) A daughter may thus inherit while many male agnates of the family remain, who, by her taking an absolute estate are deprived of their succession. (*c*)

(*a*) Mit. Chap. II. Sec. I. paras. 3–39.

(*b*) Mit. Chap. II. Sec. IV. para. 2, note.

(*c*) So the allotment retained for the wife by her husband in a partition goes to her daughters as Strîdhana; Mit. Ch. I. Sec. VI. para. 2. It thus passes away to their heirs, and leaves their family of birth, except in the particular case of their dying before their marriage is completed. In that case their brothers of the full blood alone take as heirs; the property does not blend again with the general family estate. Mit. Ch. II. Sec. XI. para. 30.