HINDU FAMILY LAW
HINDU FAMILY LAW

AS ADMINISTERED IN BRITISH INDIA.

BY

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HINDU FAMILY LAW.

INTRODUCTION.

HINDU law, as the term is understood by British admin- istrators of justice, consists of the rules of law which are believed to have been generally binding on Hindus in matters to which they relate, at the time of the commence- ment of the British dominion, with such variations as have been made by British legislation, or by the established custom of any tribe, caste, family, or locality.

Sir H. S. Maine says:—

"Indian law may be in fact affirmed to consist of a very great number of local bodies of usage, and of one set of customs reduced to writing, pretending to a diviner authority than the rest, exercising consequently a great influence over them, and tending, if not checked, to absorb them. You must not understand that these bodies of custom are fundamentally distinct. They are all marked by the same general features; but there are considerable differences of detail."

To use the words of a learned Brahmin judge of the High Court of Bengal, "Hindu law is a body of rules intimately mixed up with religion, and it was originally administered for the most part by private tribunals. The system was highly elastic, and had been gradually growing up by the assimilation of new usages and the modification of ancient text law under the guise of interpretation, when its spontaneous growth was suddenly arrested by the administration of the country passing into the hands of the English, and a degree of rigidity was given to it which it never before possessed."

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1 I.e. the law of Sastrus, post, p. 6, as interpreted by the Digests and Commentaries, post, pp. 7-15.
2 Maine's "Village Communities," pp. 52, 53.
3 I.e. Hindu.
4 This refers to the law of the Sastras, post, p. 6.
6 Sir H. S. Maine ("Village Communities," pp. 44, 45) says, "At the touch of the judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East
In three matters Hindu law differs from other systems of law, viz. in the family law, which arises from what is called by English lawyers the joint family system; secondly, in the law of adoption; and thirdly, in the law of succession and inheritance.

Throughout British India, questions relating to the succession, inheritance, and marriage of Hindus, to caste, and to Hindu religious usages or institutions, are decided according to Hindu law.¹

Although there is a variation in their language, the several enactments, which prescribe the law to be administered in the Courts established in British India, are in substantial agreement in making this provision.

The following is a list of such enactments—

High Court of Bengal.

The High Court of Bengal, in the exercise of its ordinary original civil jurisdiction.

High Court of Madras.

The High Court of Madras in the exercise of its ordinary original civil jurisdiction.

High Court of Bombay.

The High Court of Bombay in the exercise of its ordinary original civil jurisdiction.

21 Geo. III. c. 70, s. 17, read with the Letters Patent, 1862, s. 18, and the Letters Patent, 1865, s. 19.

37 Geo. III. c. 142, s. 13, read with 40 Geo. III. c. 79, s. 5, and Letters Patent, 1862, s. 18.

37 Geo. III. c. 142, s. 13, read with 4 Geo. IV. c. 71, s. 9.²

There is in the above enactments no express reference to questions of marriage, caste, or religious usages and institutions, but the Supreme

in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law books. Under the hand of the judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened, and contracted a rigidity which they never had in real practice.” See article by Mr. Justice Nair of Madras in Contemporary Review for May, 1906.

¹ I.e. any usage or institution connected with religious ceremonies; see post, p. 4.

HINDU LAW.

Courts and High Courts have always dealt with such questions according to the personal law of the individuals concerned.¹

The Presidency Small Cause Courts have to determine all questions according to the law administered by the High Courts in the exercise of their ordinary original civil jurisdiction.²

Bengal (outside Calcutta), the United Provinces, and Assam.

The Courts of the Madras Presidency (outside the town of Madras), except the tracts respectively under the jurisdiction of the agents for Ganjam and Vizagapatam.

The Bombay Presidency (outside the island of Bombay).

This section is as follows: "The law to be observed in the trial of suit shall be Acts of Parliament, and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appear, the law of the defendant; and in the absence of specific law, and usage, justice, equity, and good conscience alone."

The Punjab.

This enactment describes the topics of Hindu law to be dealt with by the Courts as "succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution." Although this description is more detailed than is to

¹ See In re Kabandas Narandas (1890), 5 Bom. 154, at pp. 166, 167, 170.
² Act XV. of 1882, s. 16.
³ See Act VIII. of 1890, s. 17
⁴ Except in questions of marriage, dower, divorce, and adoption, the age of majority has been fixed by Act IX. of 1875.
be found in the other enactments, the other Courts in practice apply Hindu law to all these cases when the status, act, or right of a Hindu is in question.

Oudh.—Act XVIII. of 1876, s. 3.

This section contains provisions similar to those in force in the Punjab.

The Central Provinces.—Act XX. of 1875, s. 5.

In this enactment the topics of Hindu and Mahomedan law are described in the same way as for the Punjab, except that "divorce" is not included. In the few Hindu cases in which the question of divorce arises, the question would probably be held to be included in the expression "marriage."

Burma, except the Shan States.—Act XIII. of 1898, s. 13.

British Beluchistan.—Reg. III. of 1890, s. 89.

Ajmere and Merwara.—Reg. III. of 1877, s. 4.

The wording of this section corresponds with that of Act IV. of 1872, s. 5.3

Questions of caste and of religious usages and institutions can only be determined by the Civil Courts where their determination is necessary for the purpose of deciding a suit "of a civil nature."

A suit in which the rights to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.3

In the Bombay Presidency (outside the Island of Bombay) the Courts are prohibited from deciding caste questions, except in a suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.4

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1 Post, p. 58.
2 Ante, p. 3.
3 C. P. C. 1908, s. 9; Act XIV. of 1882, s. 11. See the cases collected in the note to that section in O'Kinealy's "Civil Procedure Code." Venkatachala-pati v. Subbarayudu (1890), 13 Mad. 293; Krishnasami v. Virasami Chetti (1886), 10 Mad. 133; Krishnasami Ayyangar v. Samaram Singrochariar (1906), 30 Mad. 158; Lokenath Misra v. Dasarathi Thewari (1905), 10 C. W. N. 505. See Sadagopa Chariar v. Rama Rao (1907), 34 I. A. 93; 30 Mad. 185; 11 C. W. N. 585.
4 Bom. Reg. II. of 1827, s. 21. See Girdhar v. Kula (1880), 5 Bom. 83; Nemchand v. Saivchain (1866), 5 Bom. 84, note.
HINDU LAW.

The High Courts of Bengal, Madras, and Bombay, in the exercise of their ordinary original civil jurisdiction, are also required to administer the Hindu law in all matters of contract and dealing between Hindus, except where such matters have been the subject of legislative enactment.

So far as it goes, the Indian Contract Act has superseded the Hindu law of contracts; but it may sometimes be necessary to refer to Hindu law as to matters of contract or dealing. For instance, the Hindu law of gifts is to some extent still applied to gifts by Hindus, and it has been held that the law of dāndupat, by which no greater arrear of interest can be recovered at any one time than what will amount to the principal sum, applies to the Presidency towns.

In some of the enactments above referred to the Courts are required to administer the Hindu law only in cases where the defendant is a Hindu, and in some of them in cases where the parties are Hindus. In either case the question as to whether the Hindu law is to be applied depends rather upon whether the person whose inheritance, succession, etc., is in dispute was a Hindu, or the persons, whose dealing is in question, were Hindus, rather than upon the accident of the arrangement of the parties in the litigation.

As to the application of their personal law to Hindus, apart from legislative enactment, see In re Khandas Narrandas (1880), 5 Bom. 154, at pp. 166, 167, 170.

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1 IX. of 1872.
2 Madhub Chunder Poramanick v. Rajoomar Doss (1874), 14 B. L. R. 76; 22 W. R. C. R. 370.

*See law to be administered in High Courts in the exercise of their ordinary original civil jurisdiction, ante, p. 2.*

5 This seems to be the effect of the following cases. Asemunnissa Begum v. Dale (1871), 6 Mad. H. C. 455, at pp. 474, 475; Ali Sahib v. Shabji (1895), 21 Bom. 85; Lakhamandas Sripandand v. Darwat (1880), 6 Bom. 168, at pp. 183, 184; Sarkies v. Prosomoneye Dossie (1881), 6 Calc. 794, at pp. 805, 806; 8 C. L. R. 76, at pp. 86, 87.
SOURCES OF HINDU LAW.

Although in theory Hindu law is ultimately based upon the Vedas, which are said to have been of Divine origin, in matters of law the Vedas are of no greater authority than the Smritis (things heard by the Rishis, or sages of antiquity), or codes of revealed law. For all practical purposes it is unnecessary to trace the law earlier than the Dharma Sastras, which expression, although comprehending both the Vedas and the Smritis, is technically used to refer only to the Smritis.

In modern practice the Dharma Sastras are of less authority than the Commentaries and Digests, which are based upon them, and the views expressed in the Commentaries and Digests in their place give way to the decisions of the Judicial Committee of the Privy Council and of the High Courts of British India.

The principal Codes or Sanhitas constituting the Dharma Sastras are—

1. The Code or Institutes of Manu.

This is undoubtedly the most important of the Dharma Sastras. Its authorship is unknown, and there is great uncertainty as to its age. It was translated by Sir William Jones, who considered it was written in the thirteenth century B.C. Other authorities have placed it much later, Max Müller going so far as to consider that the work was composed not earlier than the second century B.C.

2. The Code or Institutes of Vajnavalkya.

This code is second in importance to that of Manu. It was apparently written in one of the early centuries of the Christian era. The Mitakshara is a commentary upon this code.

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1 Law or duty.
2 Teacher.
3 In Warren Hastings’ plan for the administration of justice it was provided that Hindus should be governed by the laws of their Shastras, with regard to inheritance, marriage, caste, and religious usages. Upon this rule are based the several provisions above mentioned, caste, pp. 2-4.
4 For a list of all the Sanhitas (collections or institutes), see Sircar’s "Vyavastha Darpana," preface, and Bhattacharya’s "Hindu Law," 2nd ed., p. 25.
5 Poet, p. 11.
3. The Code or Institutes of Narada.

The translator (Dr. Jolly) of this code fixes its earliest possible date at about 400 or 500 A.D.

The next step in the development of Hindu law consisted in the composition of a number of Commentaries and Digests based upon the Smritis.

The authority of the several commentators necessarily varied in different districts, and thus arose the schools of law, which are operative in different parts of India.\(^1\)

The differences between these schools are said to have arisen in the main from the different views expressed by the commentators who were of authority in the districts which were governed by the schools respectively. Difference of the custom of districts may also have helped to differentiate the schools both directly and indirectly by influencing the opinions of the commentators.

The two principal schools\(^2\) of Hindu law are—

1. The Mitakshara\(^8\) school, which prevails throughout India, except where the Bengal school prevails.

This is the orthodox system of Hindu law.

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\(^1\) See Collector of Madura v. Moottoo Ramalinga Sathupathy (1868), 19 M. I. A., 397, at p. 435; 1 B. L. R. P. C. 1, at p. 11; 10 W. R. P. C. 17, at p. 31; G. D. Banerjee’s “Law of Marriage,” 2nd ed., p. 5. H. T. Colebrooke (Strange’s “Hindu Law,” i. p. 316) says, “The written law, whether it be Sutri or Smriti, direct revelation or tradition, is subject to the same rules of interpretation. These rules are collected in the Mismes, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law. In the eastern part of India, viz. Bengal and Bahar, where the Vedas are less read, and the Mismes less studied than in the south, the dialectic philosophy, or Nyaya, is more consulted, and is there relied on for rules of reasoning and interpretation on questions of law, as well as upon metaphysical topics.” Dr. Jogendra Nath Bhattacharya (“Hindu Law,” 2nd ed., pp. 28, 29) considers that the Commentaries and Digests were the outcome of a desire to reconcile the Smritis at the time when Brahminism had regained its ascendancy.

\(^2\) This expression has been objected to, but it was defended by Colebrooke (Strange’s “Hindu Law,” vol. i. p. 319) who originated it. See G. D. Banerjee’s “Law of Marriage,” 2nd ed., pp. 6, 7; Rajkumar Sarvadhikari’s “Law of Inheritance,” pp. 343–346.

\(^8\) So named after the treatise by Vijnaneshvara (post, p. 11), which is of authority throughout India, except where superseded by other works in Bengal and Western India.
2. The Bengal or Daya-bhaga school, which prevails where the Bengali language is spoken by the inhabitants of the country.

This school was founded by Jimutavahana and Raghunandana in the fifteenth century.

The Mitakshara school is subdivided into four minor schools, viz.—

1. The Benares school.

This school prevails in Behar, in the district of Benares, and in Central and North-western India, and in the whole of Northern India, except that in the Punjab it is considerably modified by customary law.

2. The Dravida or Dravira school.

This school prevails in the Madras Presidency, i.e. in the southern portion of the peninsula. It was founded in the thirteenth century by Devananda Bhatta.

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1 Sometimes called the Gauriya school.
2 That is, the Revenue divisions of the Presidency of Bengal, Rajshaya, Dacca, Burdwan, and Chittagong, Manbhum, the Assam Valley districts, Sylhet and Cachar.
3 Post, p. 10.
4 Post, p. 10.
5 Oriasa is said, in Morley’s “Digest” (Introduction, p. exc.), to be governed by this school. In a note to Birbena-pirea Manu v. Sogundu (Rames) (1801), 1 Ben. Sel. R. 37, at p. 39, note (2nd ed., 49, at p. 51, note), Mr. Macnaghten states that “the authorities followed in Oriasa are the same with those of Bengal”; but the opinions of the pundits in this case were not founded on Bengal authorities, and as Mr. Mayne points out (7th ed., p. 11, note), in another Oriasa case mentioned in Macnaghten’s “Hindu Law,” II. 306, the opinion of the pundits was founded on the Mitakshara. In Raghumadha (Sri) v. Brazo Kishoro (Sri) (1876), 8 I. A. 154; 1 Med. 69; 25 W. R. C. R. 291, which was a case from Ganjam, which was included in the ancient Hindu kingdom of Oriasa, the law of the Dravida school was applied apparently without question. Mr. Mayne (“Hindu Law,” 7th ed., p. 11) suggests that the Court applied the system of law with which it was most familiar. In Raghunandu Doss v. Asthu Chunr Doss (1879), 4 Calc. 425; 3 C. L. R. 534, the Mitakshara law was applied to a case from Oriasa. See also Koho Pudo Banerjee v. Choitum Fundah (1874), 22 W. R. C. R. 214; Jogendra Bhupati Hurri Chandun Mataputra (Raja) v. Nityanand Manasingh (1890), 17 I. A. 128; 18 Calc. 151. In Purabi Kumari Debi (Srimati Rani) v. Jagadis Chunder Dhabol (1909), 29 I. A. 82; 29 Calc. 432; 6 C. W. N. 490 the decision of the Court in India showed that Oriasa was governed by the Mitakshara, but the question was not decided by the Judicial Committee.
SCHOOLS.

Mr. Morley says that the Dravida school "may be subdivided into Subdivision of three districts, in each of which some particular law treatises have more Dravida school weight than others; these districts are: Drávida, properly so called,3 Karñátaka,3 Andhra."4

3. The Maharashtra school.

This school prevails where the Mahratta language is spoken as a vernacular.

4. The Mithila school.

This school prevails in what was in ancient times the Province of Mithila, or Tirhoot,6 and in the adjoining districts. It was founded by Chandeshwar, 1314 A.D., and Vachaṣpati Misra, who flourished in the fifteenth century.9

Sastri Golap Chunder Sircar7 adds to this enumeration a school which Punjab school he calls the Punjab School. This school is not recognized by other text writers, and is not referred to in the authorities by that name. There may be many differences between the Hindu law as administered in the Punjab and that which is administered in the other provinces, but such differences arise from the existence of local customs, upon which the law is there based,8 and do not, as in the case of the other schools9 arise from differences of opinion as to the true construction of texts.

The geographical limits of these schools cannot be accurately defined.10 Where there is a dispute as to which school prevails in a particular locality the question must be determined upon evidence.

The redistribution of districts or other arbitrary divisions of land by the Government does not render the inhabitants of the locality dealt with liable to be subject to a different school of law.11

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2 Where the Tamil language is spoken.
3 Where the Kanarese language is spoken.
4 Where the Telegu language is spoken. See Navaḵumud v. Bulaṟumackarus (1863), 1 M. H. C. 420, at p. 425.
5 “The district of Tirhoot, which is a corruption of the Sanskrit name Ṭrubbhakti, is, as the name implies, bounded on three sides by three rivers, namely, by the Gandak on the west, the Kosi on the east, and the Ganges on the south.” G. C. Sircar’s “Law of Adoption,” p. 446.
6 See map of ancient Mithila annexed to P. C. Tagore’s translation of the Vivada Chintamani.
7 Bhattacharya’s “Hindu Law,” 2nd ed., p. 49.
11 Ante, p. 7.
13 Prithhee Singh v. Court of Wards (1875), 23 W. R. C. R. 272. This decision was after remand by the Judicial Committee in Sheo Sendoories
The following are the principal works of authority in the Bengal School:


Nothing is known of the author. He probably lived in Bengal in the fifteenth century. This work was translated by Mr. H. T. Colebrooke. It is the highest authority in Bengal.

2. Raghunandana’s *Smritis.*

This author is said to be of the highest authority in Bengal except in matters of inheritance. The portion of the work relating to inheritance (Dayatatwa) in general strictly follows the Daya-bhaga. Raghunandana seems to have flourished in the latter half of the fifteenth century or beginning of the sixteenth century.


This is a treatise on the law of inheritance, following the Daya-bhaga, and apparently written early in the eighteenth century. It was translated by Mr. P. M. Wynch in 1818.


The translator (Mr. Sutherland) ascribed the authorship of this work to Devanda Bhatte, the author of the “Smriti Chandrika,” but it is now taken to be the work of a Bengal Pandit. It has been suggested that this work was forged for the purpose of a particular suit, but the
MITAKSHARA SCHOOL

Judicial Committee has treated the "Dattaka Chandrika" as of great authority in questions of adoption in Bengal.¹

The Mitakshara is also of high authority in Bengal in matters where it does not conflict with the above-named works.³

In the Mitakshara school the guiding authority⁵ is the work from which the name of the school has been taken, viz. the Mitakshara, which is a commentary on Yajnavalkya,¹ by Vijnaneswara Jogī.

The author is said to have lived at the end of the eleventh century. "Vijnaneswara's views and opinions are eminently practical. The high authority which his work enjoys almost throughout India is due partly to that reason and partly also to the fact that he was the councilor of the most powerful Hindu king of his time."⁶ He lived at Kalyāna (probably the modern Kalyān in the Nizam's dominions), which was the capital of Vikramādiśya VI., or Vikramanka, king of the Chalukya kingdom of the Deccan from 1078 for about half a century.⁵

The schools, which are subdivisions of the Mitakshara school, give preference to certain treatises and commentaries which control and explain passages of the Mitakshara. Thus arise the differences between those subdivisions.⁷

Where there is no consensus of opinion among the commentators or established usage, the doctrines of the Mitakshara prevail.⁶

⁵ V. A. Smith's "Early History of India," p. 329.
⁷ See Kajuk Gramany v. Ammaní Ammal (1908), 29 Mad. 358.
The following are the principal works of authority in those schools: 1—

1. *Vira Mitrodaya.* 2

This work was written by Mitra Misra, who probably lived in the sixteenth century, for the purpose of refuting the arguments of Jimuta Vahana, 3 and the other writers of the Bengal school. 4

The *Vira Mitrodaya* is of very high authority in the Benares school, 5 but cannot be followed where it conflicts with a clear statement in the *Mitakshara.* 6

2. *Nirnaya Sindhu.*

This work was written by Kamalakara, and was completed in 1612 A.D.

3. *Dattaka Mimansa.*

This is a treatise on adoption by Nanda Pandita, who lived at Benares in the seventeenth century. It has been translated by Mr. Sutherland. The authority of this work has been emphasized by the Judicial Committee on more than one occasion. 7

In the Dravida school, 8

1. *Smriti Chandrika,* by Devananda Bhut.

The author lived in Southern India about the thirteenth century. 9 The authority of this work is second only to that of the *Mitakshara.* 10 It has been translated by T. Krishnaswamy Iyer.

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3 *Ante,* p. 10.
6 Babu Singh v. Sarasvati Kuswar (1895), 19 All. 215, at p. 231.
10 Jolly’s “Lectures,” 20, 21.
2. Parasara Madhavya.

This is a commentary on the Parasara Smriti by Madhava, who was Prime Minister of Bukka, the third King of Vijayanagara, whose reign commenced about 1361. It is said to be “in high esteem in Benares and in the Southern and Western schools.”

3. Sarasvati Vilasa.?

This work was written by Pratapa Rudra Deva, a King of Orissa, early in the sixteenth century. It has been translated by Mr. Foulkes.

4. Vyavahara Nirnaya.

This was written by Varadaraja about the end of the sixteenth century. It has been translated by Dr. Burnell.

5. Dattaka Chandrika.?

The application of this work to Southern India is said to have been due to a mistake made by the translator in attributing the authorship to the author of the Smriti Chandrika; but as it has been treated by the Judicial Committee as an authority in Southern India, the effect of this mistake, if it be one, cannot be altered.

The Judicial Committee has also affirmed the Vira Mitrodaya to be a work of authority in Southern India, but it is submitted that that work is only of secondary authority elsewhere than in Benares.

In the Maharashtra school.

1. Vyavahara Mayukha.

This was composed by Nilkantha Bhatta about the beginning of the seventeenth century. It is of paramount authority in Gujarati, in the Northern Konkan, and in the island of Bombay. In the Maharatta

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1 Bhattacharya’s “Hindu Law,” p. 31. The portion relating to inheritance (Daya-viḥaka) has been translated by Dr. Burnell.
2 Lit.: the recreations of the goddess of learning.
3 Ante, p. 10.
4 See Jolly’s “Lectures,” p. 23.
5 See cases ante, p. 11, note 1.
6 Ante, p. 12.
8 See post, p. 14.
9 See West and Bühler’s “Hindu Law,” 2nd ed., p. 3.
10 Sakkaram Sadashiv Adhikari v. Sikdubai (1879), 3 Bom. 355, at pp. 365 et seq.
country its authority is inferior only to that of the Mitakshara.¹

Throughout Western India it is of high authority.² It has been

translated by Mr. Borradale, and again by Mr. V. N. Mandlik.

"Questions on the Hindu law of inheritance to property in the island

of Bombay are to be determined in accordance with the Mitakshara,

subject to the doctrine to be found in the Mayukha, where the latter

differs from it. But as laid down by Telang, J., in Gojabai v. Shrinath

Shahajirao Maloji Raje Bholie,³ 'Our general principle should be to

construe the Mitakshara and the Mayukha so as to harmonize with

one another wherever and so far as that is reasonably possible.'" ⁴

2. Nirmaya Sindhu.⁵

3. Dattaka Mimansa.⁶

4. Samskara Kaustaba.⁷

This work is by Anantadeva. It is said to belong to the same period

as the Nirmaya Sindhu.

In the introduction to West and Bühler's "Hindu Law" ⁸ it is stated

that the Viramārdaya ⁹ and the Dattaka Chandrika ¹⁰ are also

authorities in Western India. The latter is an authority in Western

India on the subject of adoption,¹¹ but the former is, it is submitted,

rather a Benares than a Bombay authority.¹²

In the Mithila school.

1. Vivada Chintamani.

¹ Bal Krishna Bapaji Apte v. Lakshman Dinkar (1890), 14 Bom. 605.
³ (1892) 17 Bom. 114, at p. 118.
⁴ Keserbai (Bai) v. Umraj Moraji (1908), 83 I. A. 175, at p. 187;
30 Bom. 491, at p. 442; 10 C. W. N. 802, at p. 807.
⁵ Ante, p. 12.
⁹ Ante, p. 12.
¹⁰ Ante, p. 12.
This work was written by Vachaspati Misra, who flourished in Tirhout in the beginning of the fifteenth century. It is the work of highest authority in this school. It has been translated by Prosono Coomar Tagore.

The Vyavahara Chintamani and the Dwaïta Nîrûnaya, both by the author of the Vivada Chintamani are also authorities in the Mithila country.

2. Vivada Ratnakara.

This is an older compilation, but of less authority than the Vivada Chintamani. The writer was Chandesvara Thakkura, Prime Minister of Hara Sinha Deva, King of Mithila. He flourished at the end of the thirteenth or beginning of the fourteenth century. This work has recently been translated by G. C. Sircar and Digamvar Chatterjee.

3. Dattaka Mimansa.¹

Sudhîniveka, by Rudradhara, Dwaïta Parishista, by Keshav Misra,² and Vivada Chandra, by Lachmadevi,³ are also authorities in this school.

The Bengal and the Mitakshara systems differ in two main particulars,⁴ viz.—

1. As to the persons who are coparceners, and their rights, as such, in property held in coparcenary, i.e. as a joint Hindu family.

Under the Mitakshara system rights in family property are acquired by birth and lapse by death.⁵ In Bengal, rights in joint property are acquired by inheritance or will. In consequence of this difference, the law as to the power to alienate differs under the two systems.

2. As to inheritance.

The Mitakshara system prefers agnates to cognates generally. The Bengal school founds rights of inheritance upon the principle of the amount of religious efficacy which the person claiming can give by an offering to the manes of the person, whose property is in dispute, or of his ancestor.

³ Bhattacharya’s “Hindu Law,” 2nd ed., p. 49.
⁵ Post, pp. 231, 243, 244.
The subdivisions of the Mitakshara school differ between themselves, and from the Bengal school, as to the right of a widow to adopt a son to her deceased husband,¹ and in certain other matters connected with adoption. They also differ in some questions of inheritance.

The Maharashtra school differs from all other schools in conferring rights of inheritance upon certain female relations, and in giving greater powers to female owners.

The decisions of the English Courts of law have played a considerable part in ascertaining, developing, and sometimes in crystallizing Hindu law. The Courts in India necessarily follow without question the decisions of the Judicial Committee of the Privy Council, and of the High Courts, if any, to which they are subordinate. Now that the volume of reported decisions upon questions of Hindu law has become so large, judicial decisions, in most cases, provide an answer to the questions which arise.

By the following enactments the Legislature has made some alterations in those portions of the Hindu law which the Courts are required to administer:—

1. Act XXI. of 1850 (Freedom of Religion).
2. Act XV. of 1856 (Hindu widows remarriage).
3. Act VII. (Bom. C.) of 1866 (Hindus liability for ancestor's debts).
5. Act. IX. of 1872 (Contracts).²
6. Act IX. of 1875 (Majority).
8. Act III. (B. C.) of 1904 (Settled Estates Act).

To whom Hindu Law is Applicable.

The expression "Hindus," in the enactments above referred to, includes not only persons who profess what is called the Hindu religion,³ but also such of their descendants as have not openly abjured that religion.⁴

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¹ Post, pp. 120–127. (1895), 19 Bom. 785, at p. 788.
² See ante, p. 5.
³ Banerjee's "Law of Marriage,"
CASTES.

"In doubtful cases conformity to the manners and observances of the Hindus is a safe guide for concluding that a particular family is to be governed by the Hindu law."  

Hindus are divided into the following four main divisions, or, as they are usually called, "castes":—
1. The Brahmins, or priestly caste.
2. The Kshatriyas, or warrior caste.
3. The Vaishyas, or agricultural caste.
4. The Sudras.

When caste first originated in the Epic Age, the pure Hindus were members of the first three of these divisions, and the members of those divisions are now styled regenerate, or twice-born, having regard to the ceremonies of initiation which are peculiar to them. Each of these castes is now divided into a number of sub-castes. In the case of the Sudras nearly every occupation has its caste.

In the absence of a special custom, Hindu law is applied to Jains and Sikhs.

Degradation from caste, or a departure from orthodoxy in the matter of diet or ceremonial, does not prevent the application of Hindu law.

Except so far as the Hindu law may be inconsistent with the Hindu law, may be inconsistent with

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2 This word is derived from the Portuguese “casta,” race, species.
3 See Run Murdun Syn (Chotorya) v. Sukh Purshand Syn (1857), 7 M. I. A. 18, at p. 46; 4 W. R. F. C. 132, at pp. 155, 156.
4 Shro Singh Rai v. Dukho (Mussumut) (1878), 5 I. A. 87; 1 All. 688; S. C. in court below (1874), 6 N. W. P. 382; Chotay Lall v. Chumro Lall (1879), 6 I. A. 15; 4 Calc. 744; 3 C. L. R. 465; Ambadei v. Gomind (1890), 23 Bom. 257; Amarnath v. Mahadwaarda (1898), 22 Bom. 416, at p. 418; Rukhbar v. Chunialid Ambeshet (1891), 16 Bom. 547; Mohobber Parhad (Lolla) v. Kundun Koresor (Mussumut) (1887), 8 W. R. C. R. 116; Bhagondas Tejmal v. Rajmal (1875), 10 Bom. H. C. 241, at p. 258; Bacholi v. Makkon Lal (1880), 3 All. 55.
6 Act XXI. of 1850.
7 Bhagooam Koor (Ran) v. Jogendra Chandra Bose (1903), 30 I. A. 249, at p. 257; 31 Cala. 11, at p. 33; 7 C. W. N. 885, at p. 908.
with the new religion (if any) adopted by persons who have renounced the Hindu religion, such law continues generally applicable to such persons and to their descendants, if they do not elect to abandon their subjection to Hindu law.

But except on proof of a well-established custom, and then only with regard to succession and inheritance, converts to the Mahomedan religion, which in itself regulates the devolution of property, are bound by the Mahomedan law.

Such custom has been fully established in the case of the Khoja Mahomedans, the Cutchi Memons, and the Suni Borah Mahomedan

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1 As, for instance, persons converted to Christianity cannot retain the practice of polygamy. *In re Millard* (1887), 10 Mad. 318; *Lopes v. Lopes* (1885), 12 Calc. 708, at p. 722; *Emperor v. Laxar* (1907), 80 Mad. 550.

2 *Abraham v. Abraham* (1883), 9 M. I. A. 199, at pp. 240-242; 1 W. R. P. C. 1, at pp. 5, 6 (a case of conversion to Christianity); *Ponnusami Nadan v. Dorasami Ayyan* (1880), 2 Mad. 209 (ditto); *Bhogem Koer (Rani) v. Jogendra Chandra Bose* (1903), 30 I. A. 249, at pp. 256, 257; 31 Calc. 11, at p. 33; 7 C. W. N. 895, at p. 908 (a case of an alleged Brahmo); *Kusum Kumari Roy v. Satyaranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784 (a case of a Brahmo). In *Francis Ghosai v. Gabri Ghosai* (1906), 31 Bom. 25, differing from *Tellis v. Saldanha* (1886), 10 Mad. 69, it was held that partnership can be a part of the law governing the rights of Christian family, converted from Hinduism. In *Raj Bahadur v. Bishen Dayal* (1882), 4 All. 348, at p. 347, it is said, “A Hindu or Mohammedan who becomes a convert to some other faith, is not deprived *ipso facto* of his rights to property by inheritance or otherwise. *Primâ facie* he loses the benefits of the law of the religion he has abandoned, and acquires a new legal status according to the creed he has embraced, if such creed involves with it legal responsibilities and obligations.”


4 *See Ahmedbhoi Husbibhoy v. Casamboi Ahmedbhoi* (1889), 13 Bom. 534, and cases there cited.

5 *Mahomed Sidick v. Haji Ahmed* (1885), 10 Bom. 1, and cases there cited; *Sabor Sidick (Haji) v. Ally Mahomed Jan Mahomed* (1904), 30 Bom. 270.
community of the Dhandhuka Taluka in Gujerat, and the Molesalem Girasias.

The illegitimate children of Hindu parents are within the expression “Hindus.”

It has been held that the illegitimate children of a Hindu mother by a European father are to be treated as Hindus, if they have been brought up as such, but there is authority that where the mother is a non-Hindu the children cannot be treated as Hindus, even though the father is a Hindu.

The Indian Succession Act has brought under its provisions all native Christians, whether they have or have not elected to remain subject to the Hindu law, but does not affect rights of survivorship to coparcenary property.

The mere circumstance that a man calls himself a Hindu is not sufficient to entitle him to the application of Hindu law, but in some cases, where the parties have followed the rules of Hindu law, that law may be applied as a rule of equity and good conscience.

As the Hindu law is a personal law, a Hindu is presumed to be governed by the school of law which governs the locality in which he resides.

If a Hindu migrates from one part of the country to another, the presumption is that he retains the laws and customs as to succession and family relations prevailing in

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1 Baiji (Bai) v. Santok (Bai) (1894), 20 Bom. 53.
2 Fatesangji Joratsangji (Maharana Shri) v. Harisangji Fatesangji (Kumar) (1894), 20 Bom. 181; Joomas Noormi (Moosa Hajii) v. Abdul Rahim (Hajii) (1905), 30 Bom. 197.
5 Act X. of 1865, s. 331.
6 Dagres v. Pocotti San Joo (1895), 19 Bom. 783; Ponnusami Nadan v. Dorasami Ayyan (1880), 2 Mad. 209;
7 Joseph Vathiar of Nazareth (1872), 7 Mad. H. C. 121.
9 Raj Bahadur v. Bhishen Dayal (1882), 4 All. 343, at p. 348.
10 Ibid. See also Abraham v. Abraham (1863), 9 M. I. A. 199, at p. 243; 1 W. R. P. C. 1, at p. 6.
the Province, from which he came,¹ at the time of the migration,² and is not subject to the particular Hindu law administered in the place to which he migrates, or to the customs prevalent there.³

Such presumption may be rebutted by proof that the individual or his ancestors had adopted the law, usages, or religious ceremonies of the country of his residence.⁴

“'It is not by looking merely at the performance of occasional local festivals that we can judge by what rule the family is governed. But we must look to the more important rites and ceremonies which are performed by them, namely, to those which attend births, marriages, and deaths in the family.”⁵


² See Vasudhavan v. Secretary of State (1887), 11 Mad. 157, at p. 162.


Jains would ordinarily be governed by the Mitakshara school, but Jains, it has been held that in the absence of evidence the Hindu law applicable in that part of the country in which they dwell would apparently be applicable. Sastri G. C. Sircar says, "The Jainas of Bengal . . . are governed by the Mitakshara law of the country of their origin, and not by the Dayabhaga school prevailing here."

**CUSTOM.**

In administering the Hindu law, the Courts are required to give effect to a custom, i.e. to a rule which in a particular family or in a particular caste or class, or in a particular district, has from long usage obtained the force of law. "Under the Hindu system of law clear proof of usage will outweigh the written text of the law."

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5. For instance, the customs of the Nambudri Brahmins; see **Vasudaran v. Secretary of State** (1887), 11 Mad. 157.
6. A local custom is called Desdhar. Such custom is only applicable to persons domiciled in the place where it is in force; see **Pudam Kumari v. Suraj Kumari** (1906), 29 All. 458.
8. In **Narasingh v. Balaramachari** (1863), 1 Mad. H. C. 420, p. 424, Holloway, J., said, "A very short experience will suffice to satisfy any judge that a pundit will always overcome a passage of Hindu law too stubborn for other manipulation by the often baseless allegation of custom." He proceeds to say, "And in our judgment no custom, how long soever continued, which has never been judicially recognized, can be permitted to prevail against distinct authority." It is submitted that this last proposition cannot be supported.
In the following enactments this principle has been recognized by the Legislature:

Bom. Reg. IV. of 1827, s. 26; Madras Civil Courts Act (III. of 1873), s. 16; Lower Burma Courts Act (XI. of 1889), s. 4; Central Provinces Laws Act (XX. of 1875), s. 5; Oudh Laws Act (XVIII. of 1876), s. 3; Punjab Laws Act (IV. of 1872), s. 5, as amended by Act XII. of 1878, s. 1.

The Courts cannot give effect to a custom unless it be ancient,2 definite,3 continuous,3 notorious,4 and reasonable.5 It is invalid if it be opposed to an express enactment of

"Mayukha," chap. i. s. 1, para. 13. Dr. J. N. Bhattacharya ("Hindu Law," 2nd ed., pp. 50, 51) contends that according to the true translation of Manu's Code, custom does not prevail against an express provision of law.


the Legislature, to morality, to public policy, or to justice, equity, and good conscience. A custom must be established by clear and unambiguous proof, and must be construed strictly.

With the exception of an old decision in Calcutta by Grey, C.J., Ancient which fixed 1773, the date of the Act of Parliament which established the Supreme Court, and 1793 the date when Regulations commenced to be registered as the time for the commencement of legal memory in Calcutta and the Mofussil respectively, there is no decision which has

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\[1\] As for instance when the dedication of minors as dancing-girls of a pagoda amounts to an offence under ss. 372 and 373 of the Indian Penal Code (Act XLV. of 1860). *Ex parte Padmanabha (1870), 5 Mad. H. C. 415; Queen Empress v. Ramanna (1889), 12 Mad. 273; Srinivasa v. Anna Sami (1892), 15 Mad. 272; Reg. v. Jall Bhanin (1869), 15 Bom. H. C. Cr. C. 60.

\[2\] Chimna Ummai v. Tegarai Chetti (1876), 1 Mad. 168. *Cases, post, p. 25. See also Sankaralingam Chetti v. Subban Chetti (1894), 17 Mad. 479; Ghasiti v. Umrao Chak (1893), 20 I. A. 193; 21 Calc. 149; This is expressed by “Man,” chap. visi, para. 41, as “if they be not repugnant to the law of God.”

\[3\] See Varnam Valior (Roja) v. Rari Varnam Mutha (1876), 4 L A. 78; 1 Mad. 235. Oudh Laws Act (XVIII of 1876), s. 8; Punjab Laws Act (XII of 1878), s. 1. As to marriage brocage contracts, see post, p. 47.


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\[6\] Clarke’s “Reports,” pp. 113, 114. Sircar’s “Vyasavastha Darpana,” 2nd ed., p. 314. The reason for this decision was that from the dates mentioned the powers of making laws were vested in the British Legislature. Sir G. D. Banerjee (“Law of Marriage,” 2nd ed., p. 224), questions the correctness of the above-mentioned decision of Grey, C.J., and adds, “We may at any rate fairly say, that in the Hindu law, not only is it unnecessary to trace back the existence of a custom to any definite date, but even the indefinite condition of being ancient may, in favour of some classes of customs, have to be dispensed with.”
professed to define the expression "ancient." That expression is apparently coincident with the expression "from time immemorial." 1

"What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is, satisfactory proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or district of country." 2 Such proof raises a presumption that the usage was an ancient one. 3

So far as continuity is concerned there seems to be a distinction between a family custom and a local custom. In the former case it is competent to the family to discontinue the custom, or it may have been accidentally discontinued. 4 In the latter case the omission of individuals to follow the custom could not have the effect of destroying it, as it is a part of the lex loci, and binds all persons within the local limits in which it prevails. 5

When the custom has been proved the burden is upon the party alleging the discontinuance to prove that fact. 6

A family custom that property should remain impartible, is not necessarily destroyed by a new grant being made by the Government to a member of the family, 7 but where a new tenure is created, and there is nothing in the circumstances under which the new grant was made to lead to the inference that the Government had in view in making the new grant the creation of an impartible zemindari as an exception to the ordinary rule of the Hindu law, the ordinary rules of Hindu law apply. 8

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3 See Ramakami v. Apparai (1887), 12 Mad. 9, at p. 14; Nanatu Utpat (Bhau) v. Sundrabai (1874), 11 Bom. H. C. 249.


8 Merangi, Zemindar of, v. Satra- charis Ramobhadraba Bazu (Sri Rajah) (1891), 18 I. A. 45, at p. 53; 14
A family custom is personal, and does not apply to subsequent owners of the land held by the family.  

The following are illustrations of customs which have been held void for immorality:

A custom allowing a woman to remarry during the lifetime of her husband and without his consent.

A custom for dancing-girls to adopt daughters under circumstances which would amount to a traffic in minors as prohibited by ss. 372 and 373 of the Indian Penal Code; but except where the recognition of the rights alleged would countenance such a traffic, or the usage is in itself immoral, the Courts will give effect to the rights of dancing-girls attached to Hindu temples in respect of endowments for their support, and also to the peculiar usages of the dancing-girl and prostitute classes with regard to adoption and succession.

A custom will not be applied unless those following the custom are convinced in conscience that they are acting in accordance with law.

Judicial recognition is not a condition precedent to the validity of a custom, but such recognition may be of great value as evidence of the existence of that custom.

In the case of persons governed generally by the Hindu law, the burden of proving a custom derogatory to that law lies upon the person who asserts it.

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Mad. 237, at p. 245; Venkata Narasimha Appa Row Bahadur (Rajah) v. Narayya Appa Row Bahadur (Rajah) (1879), 7 I. A. 38; 2 Mad. 128; 6 C. L. R. 153.


2 Post, p. 30.

3 Act XLV of 1860.

4 Chinnu Ummayi v. Tegarai Chetti (1876), 1 Mad. 188.


6 Post, pp. 165, 166.


10 See Act I. of 1872, s. 42.

In the case of a tribe or family which are not originally Hindu, but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu law is upon the person who asserts that it was so governed.\footnote{As, for instance, the law of adoption, \textit{Purnendra Deb v. Rajendra Dass} (1885), 12 I.A. 72, at p. 81; 11 Calc. 483, at p. 476.}

As to the mode of proof of a custom, see Act I. of 1872, ss. 13, 32, 42, 48, 49. \textit{Rama Nand v. Surgiani} (1894), 16 All. 221.

As to proof of the devolution of an impartible Raj, see \textit{Mohesh Chunder Dhal v. Satrughan Dhal} (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459.

As to proof of the customs of Jains, see \textit{Harnab Pershad v. Mandil Dass} (1899), 27 Calc. 379.
CHAPTER I.

HUSBAND AND WIFE.

MARRIAGE.

The relationship of husband and wife is created by a marriage, entered into by two persons, who are each competent, according to Hindu law, to enter into the state of marriage, and who are not debarred by that law from intermarrying, such marriage being performed with the ceremonies prescribed by that law.

According to Hindu ideas, marriage has for its object the performance of religious duties. It is a sanskar, that is, an essential ceremony, held indispensable to constitute the perfect purification of a Hindu. It is the last of the ten sanskars necessary for the regeneration of males of the twice-born classes and is the only one prescribed for women and for Sudras.

Marriage is essential to a Hindu in order that by begetting a son he may be delivered from the hell called put, to which the shades of a soulless man are, according to Hindu ideas, doomed, that he may repay the debt he owes to his forefathers, and that he may be able to perform some of the most important religious acts.

It is the imperative religious duty of a father, or other guardian, to cause a girl to be married, before she attains duty of

1 Post, pp. 28–32.
2 Post, pp. 32–40.
3 Post, pp. 53–56.
6 Colebrooke’s “Digest,” vol. iii., p. 95. See Venkatacharyulu v. Ranga-
7 “Mann,” chap. ix. para. 138;
8 Dattaka Mimanasa,” chap. i. para. 5; Colebrooke’s “Digest,” vol. iii., pp. 158, 293, 294.
9 “Dattaka Mimanasa,” chap. i. para. 5.
10 Bhattacharya’s “Hindu Law,” 2nd ed., p. 81.
11 As to the persons upon whom the duty devolves, see post, pp. 41, 42.
puberty, to a suitable husband, capable of procreating children.\(^1\)

Although the law permits the marriage of boys who have not attained majority,\(^2\) such marriages do not seem to have been contemplated by the sages and early writers on Hindu law.\(^3\) There is not, therefore, any moral or religious obligation upon a parent, or other guardian, to provide a wife for a boy, although there may be a right to provide for his marriage.\(^4\)

### WHO MAY MARRY.

Unless expressly prohibited by a provision of the Hindu law, any male Hindu is competent to marry, and every unmarried Hindu female is competent to be given in marriage.\(^5\)

The Hindu law regards the bridegroom as the person who marries, and the bride as the person who is taken in marriage.\(^6\)

Physical and mental defects, even if they be such as to cause exclusion from inheritance,\(^7\) do not invalidate a marriage.\(^8\)

Unsoundness of mind does not invalidate a marriage.

Pundits both in Bengal\(^9\) and Bombay\(^10\) have given opinions that it does

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\(^2\) Post, p. 29.


\(^4\) Govindaraju Narasimham v. Devarajadhula Venkatanarasaya (1903), 27 Mad. 206, see post, p. 48.


\(^7\) As to the physical defects which cause exclusion from inheritance, see Bhattacharya's "Hindu Law," 2nd ed., 349-351; Sircar's "Hindu Law," pp. 232-235; Mayne's "Hindu Law," 7th ed., pp. 806-809, and cases there cited; post, pp. 235-237.


\(^9\) See Venkatacharyulu v. Ranga Charyulu (1890), 14 Mad. 316, at p. 318; Debashwain Mitter v. Radhakurn Mitter (1817), 2 Morl. Dig. 99.

\(^10\) West and Bühler's "Hindu Law," 2nd ed., p. 274.
not invalidate a marriage. Sir G. D. Banerjee points out that "there are indications in the law from which it would appear that lunatics are considered competent to marry," but he also says that, as a lunatic is incompetent to accept the gift of a bride, it is not easy to understand how his marriage can be regarded as marriage at all.

The ancient authorities permitted a eunuch to marry on the ground of impotence. That his wife could raise up a son to him by a man legally appointed, but now that the system of niyoga is obsolete, it may be a question whether the Courts will not declare the marriage of an impotent person to be void.4

Except that in the case of the twice-born classes marriage cannot take place before investiture with the sacred thread, a male Hindu of any age can marry.7

A female Hindu of any age can be given in marriage.8

The Hindu religion requires a girl to be given in marriage before she attains the age of puberty, but there is nothing in the Hindu law to invalidate the marriage of a woman who has attained puberty.10

As to the necessity for the consent of a guardian in the case of the marriage of minors, see post, pp. 41-46.

A Hindu may at his pleasure marry any number of wives, although he has a wife or wives living.11

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3 P. 37.
5 "Dasya Bhaga," chap. v. para. 18.
6 Post, pp. 106, 139.
8 The rule is that the investiture of a Brahmin should take place in the eighth, that of a Kshatriya in the eleventh, and that of a Vaisya in the twelfth year from his conception, "Manu," chap. ii. para. 36.
10 Sir G. D. Banerjee ("Law of Marriage," 2nd ed., 40) says, "Ordinarily the lowest age for marriage is eight years, but Manu allows a girl to be married even before the proper age, if a proper union is secured" ("Manu," chap. ix. para. 88, and note by Kulluka).
11 Apte, p. 27.
13 Even if he has at one time professed Christianity, 3 Mad. H. C., App. vii.
No effect can be given to an agreement purporting to avoid a marriage on the taking of a second wife during the lifetime of the first, and apparently an agreement not to enter into such second marriage would be against the policy of the Hindu law.

Contracting a second marriage during the lifetime of the wife is called *adhibedana*, or supersession, but does not in any way imply that the first wife is deserted.

The Hindu writers prescribe that a present (*adhibedantika*) should be given to the wife as compensation for her supersession, but they do not agree as to the amount. Such compensation could not apparently be claimed in a court of law.

A Hindu, who has become a Christian, cannot take to himself another wife while his wife is alive.

A woman cannot marry another man while her husband is alive.

Although the Courts will not recognize a custom which permits a wife at her pleasure to desert her husband and marry another man, at any rate where the first husband did not consent to the second marriage, it would apparently give effect to a custom permitting such remarriage on desertion by the husband. A custom authorizing such remarriage

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1 Sitaram v. Aheera Heranahce (Mussamrat) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.
2 See ibid., per Kemp, J., 11, B. L. R., at p. 135; 20 W. R. C. R., at p. 50. Would it not be, from the Hindu point of view, an agreement in restraint of marriage, and therefore void under s. 28 of the Indian Contract Act (IX. of 1872)?
3 See "Mitakshara," chap. ii. s. 11, paras. 2 (note) and 35; Emperor v. Laxar (1907), 30 Mad. 550.
4 See Banerjee’s "Law of Marriage," 2nd ed., p. 130; "Mitakshara," chap. ii. s. 11, para. 35; "Dayakrama Sangrahas," chap. vi. para. 31; Colebrooke’s "Digested" vol. iii. p. 561.
8 See Khemkor v. Umakshankar Ranekhar (1873), 10 Bom. H. C. 381.
REMARRIAGE.

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in case of the husband's leprosy might also be valid. 1 No effect could be given to the decision of a panchayet or of a caste which authorizes a remarriage, 2 except, perhaps, where by custom a valid divorce could be effected by such decision. 3

Where divorce is permissible by custom, 4 or where a divorce has been decreed under Act XXI. of 1866, 5 a woman can remarry.

The marriage of a girl, who has been betrothed 6 (but not married) to another man, is valid. 7

A widow can remarry. 8

Except in the case of a special custom 9 the remarriage of widows was prohibited by the Hindu law, which was in force at the time of the passing of Act XV. of 1856. 10

Act XV. of 1856, which empowers Hindu widows to remarry, provides as follows 11—

“All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, 12 or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall, upon her remarriage, 13 cease and determine, as if she had then died, and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.”

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1 See Roy v. Sambhu Raghu (1876), 1 Bom. 347, at p. 352.
3 See post, pp. 58, 59.
4 Post, p. 58.
5 Post, p. 60.
6 Post, p. 53.
8 Act XV. of 1856, s. 1.
11 S. 2.
12 Thus she forfeits property inherited from a son. Vithu v. Govinda (1898), 22 Bom. 321.
A widow does not by remarriage lose her rights to succeed thereafter to her son or other lineal successor of her husband.\footnote{See Banerjee's "Law of Marriage," 2nd ed., p. 101.}

There is a conflict of opinion as to whether the above section has any application to the case of widows, who are by the custom of their caste entitled to remarry. The Allahabad High Court\footnote{Banerjee's "Law of Marriage," 2nd ed., p. 41; Bhattacharya's "Hindu Law," 2nd ed., p. 85) says that this rule is imperative.} considers that it has no such application, but the High Courts at Calcutta,\footnote{For a discussion of these rules, see Sircar's "Hindu Law," pp. 57–60.} Madras,\footnote{In his "Udavhatattwa," Raghunandana lived at the end of the fifteenth century A.D.; see Bhattacharya's "Hindu Law," 2nd ed., 36.} and Bombay\footnote{Bhattacharya's "Hindu Law," 2nd ed., 36.} have taken the opposite view.

The Hindu law placed certain restrictions upon marriage by rules, which are now treated as operating only as moral injunctions.

Impurity arising from the birth or death of a relation was treated as a disqualification.\footnote{Sircar's "Hindu Law," p. 56.}

The marriage of a younger brother before an elder brother,\footnote{Sircar's "Hindu Law," pp. 37–38.} or of a younger sister before an elder sister,\footnote{Sircar's "Hindu Law," pp. 37–38.} was prohibited.

For other instances, see Banerjee's "Law of Marriage," 2nd ed., pp. 52, 54; Bhattacharya's "Hindu Law," 2nd ed., pp. 85, 86.

**WHO MAY INTERMARRY.**

The following rules\footnote{See Banerjee's "Law of Marriage," 2nd ed., p. 101.} as to identity of caste, exogamy, and prohibited degrees have been deduced from texts of the sages by Raghunandana,\footnote{In his "Udavhatattwa," Raghunandana lived at the end of the fifteenth century A.D.; see Bhattacharya's "Hindu Law," 2nd ed., 36.} who is said to be the highest authority in Bengal in all matters excepting inheritance,\footnote{Bhattacharya's "Hindu Law," 2nd ed., 36.} and are reiterated by Kamalakara Bhatta in the *Nitynaya Sindhu*,\footnote{Sircar's "Hindu Law," p. 56.} which is said to be of authority in the Benares.
school, in the Bombay Presidency, and in Southern India.

1. Intermarriage between persons not belonging to the Identity of caste is void.

This rule only prevents intermarriage between the four primary castes. It does not prevent marriage between persons belonging to different subdivisions of the same primary caste.

In the case of the marriage of an illegitimate person, who, strictly speaking, belongs to no caste, he or she must be treated as belonging to the caste the members of which have recognized him or her as a caste fellow.

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4 Fodam Kumari v. Saroj Kumari (1906), 28 All. 458; Meleam Nudol v. Thanoorun Banum (1868), 9 W. R. C. R. 552; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Steele, pp. 26, 29, 30; Colebrooke's "Digest," vol. iii, p. 141; "Vyasatha Darpana," 856; Strange's "Hindu Law," vol. i, 40; "Mitakshara," chap. i, s. 11, para. 2, and note. See Ram Lal Shuklal v. Akhoy Charan Mitra (1903), 7 C. W. N. 619. In that case the judges assumed that Vaidyas were Vaisyas. As to the position of Vaidyas, see Bhattacharya's "Hindu Castes and Sects," pp. 159-171; Risley's "Tribes and Castes of Bengal," vol. i, pp. 46-50.

2 Ante, p. 17.


7 In the matter of Ranukumari (1891), 18 Calc. 264. As to the daughter of a bastard, see Inderun Valungyopooly Tazer v. Ramasawamy Pandia Talaver (1869), 13 M. I. A. 141; 3 B. L. R. P. C. 1; 12 W. R. P. C. 41; S. C. in Court below. Pandaiya Talaver v. Puli Talaver (1863), 1 Mad. H. C. 478.
Marriages between members of different castes may be recognized by local custom.¹

2. A member of one of the twice-born classes cannot marry the daughter of an agnate, i.e. of a person belonging to the same gotra,² or primitive stock, as himself.³

This will prevent a marriage between persons who are connected with a common ancestor entirely through males.

In this connection the expression gotra “means a family descended from one of the several patriarchs, who are, according to some, twenty-four, and according to others, forty-two in number.”

There seems to be no certainty as to what are the gotras at the present day. Apparently there are eight primitive gotras descended from the seven Rishis, Viswanatra, Jamadagni, Bharadvaja, Gotama, Attri, Vasistha, Kasyapa, together with Agastya. The remaining gotras are possibly subdivisions of these eight, but are not all identifiable with them.⁴

“The theory of the gotra, as latterly described by Brahmanic writers, denies that either a Kshatriya, or a Vaisyas, or a Sudra has a right to say that he belongs to a special gotra in the proper sense of the term.”⁵ Kshatriyas and Vaisyas have adopted the gotras of the spiritual guides or family priests of their remote progenitors.⁶ It is also said that a man is prohibited from marrying a girl belonging to a gotra having the same pravarsas or principal sages as his own.”⁷

3. A Hindu may not marry⁸—

(a) A female descendant as far as the seventh degree

¹ See Ram Lal Shookool v. Akhoy Charan Mitter (1908), 7 C. W. N. 619. As to this case, see 7 C. W. N. pp. ccxxvii. and ccxxviii.

² Lit. cow, pen, i.e. a place in which cows were kept or protected from plundering attacks. Bhattacharya’s “Law of the Joint Family,” p. 113. For a discussion as to the origin of the term, see Max Muller’s “Chips from a German Workshop,” vol. ii. p. 28; Banerjee’s “Law of Marriage,” 2nd ed., pp. 54, 55; Sircar’s “Hindu Law,” p. 40.


⁸ See Minakshi v. Ramamadhas (1887), 11 Mad. 49, at p. 53. These rules are taken from Banerjee’s “Law of Marriage,” 2nd ed., pp. 64–66. In Bhattacharya’s “Hindu Law,” 2nd ed., p. 98, diagrams illustrating these rules will be found.
from his father or from one of his father’s six paternal ancestors in the male line.  

Sastri G. C. Sircar, in his “Law of Adoption,” says, “In fact the prohibited degrees for marriage are considered by the Sanskrit writers to constitute sapindas for the purpose of marriage, and they are different according to different sages. For instance, Vasiṣṭha declares that a man may marry a girl who is fifth and seventh on the mother’s and father’s sides respectively, whilst Pārīśniṇāsi says that a damsels may be espoused who is beyond the third on the mother’s and fifth on the father’s side. But seven degrees on both sides appears to be prohibited by Manu, for he declares that a man must not marry a girl who is sapinda to his mother, and lays down generally in another place that sapinda relationship ceases with the seventh ancestor.”  

(b) A female descendant as far as the seventh degree from his father’s bandhus or from one of their six ancestors, through whom such female is related to him. 

These six ancestors would be the bandhu’s mother, mother’s father, mother’s father’s father, mother’s father’s father’s father, mother’s father’s father’s father’s father, and mother’s father’s father’s father’s father. It does not include mother’s mother, &c., as “a line of female ancestors is not regarded as a line in the Hindu law.” 

(c) A female descendant as far as the fifth degree from his maternal grandfather or from one of his maternal grandfather’s four ancestors in the male line.

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2 P. 386.

3 “Mitakshara,” chap. ii. para. 53.

4 Chap. iii. para. 5.

5 Chap. v. para. 60.

6 A bandhu is a sapinda, related through females. This expression includes the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. See “Mitakshara,” chap. ii. s. 6, para. 1.


In the Presidency of Madras marriage with the daughter of a maternal uncle or of a paternal aunt is recognized by custom.\(^1\)

According to some authorities a man cannot marry the daughter of anagnate of his maternal grandfather.\(^2\)

\((d)\) A female descendant as far as the fifth\(^3\) degree from his mother’s bandhus,\(^4\) or from one of their four ancestors through whom such female is related to him.\(^5\)

Where the bandhu in question is the son of the mother’s maternal or paternal aunt, these four ancestors would be the bandhu’s mother, mother’s father, mother’s father’s father, and mother’s father’s father’s father, and where the bandhu is the son of the mother’s maternal uncle the four ancestors would be the father, father’s father, father’s father’s father, and father’s father’s father’s father.\(^6\)

Exceptions.

In spite of the above rules, a man may marry a girl who is removed by three gotras\(^7\) from him, although she be related within the above degrees.\(^8\)

"The three gotras in the case of the descendants of a bandhu are always to be counted from his (the bandhu’s) own gotra. So also in the case of the descendants of the ancestors of a bandhu, who is the father’s or the mother’s maternal uncle’s son, they are to be counted from the bandhu’s own gotra. But in the case of the descendants of the ancestors of each of the other bandhus, the gotras are to be counted from his (the bandhu’s) maternal grandfather’s gotra."\(^9\)

In practice these rules are, apparently, among all classes, not taken to exclude a sapinda girl beyond the fifth degree on the father’s side, and the third degree on the mother’s side,\(^10\) but in strictness this relaxation of the rule is said to

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\(^2\) "Manu," chap. iii. para. 5. There seems to be a difference of opinion with regard to this note; see Bhattacharyya’s "Hindu Law," 2nd ed., pp. 91, 92; Sirca’s "Vyavastha Darpan," 2nd ed., p. 658.

\(^3\) See ante, p. 33.

\(^4\) See ante, p. 35, note 6. This includes the son’s of his mother’s maternal aunt, the sons of his mother’s paternal aunt, and the sons of his mother’s maternal uncle.

\(^5\) "Udvyahatitwa," Raghunan-


\(^7\) I.e. three females have intervened in the line between the man and the girl in question.


be limited to the Kshatriyas in all the forms of marriage, and to the other classes only in the Āśura,1 or other inferior forms of marriage.2

The above rules are enunciated by Sir G. D. Banerjee in his “Law of Origin of Marriage and Stridhan.” They are based upon the interpretation put by Raghunandana upon the text of Manu. As so interpreted, the text prohibits a man from marrying a girl who is a sapindas3 of his father or of his maternal grandfather.4 This sapinda relationship ceases after the fifth or seventh degree from the mother and father respectively.5 Jaynavaikya6 also requires that a man should not marry his sapinda. This rule is common to all schools, but there is a diversity between the view entertained by the Mitakshara school7 and that entertained by the Bengal school8 as to the meaning of sapinda relationship.

According to the Mitakshara9 school a man cannot marry a girl if, their common ancestor being traced through his or her father, such common ancestor is not beyond the seventh10 in the line of ascent from him or her, or, their common ancestor being traced through their mothers, such common ancestor is not beyond the fifth in the line of ascent from him or her.

Dr. J. N. Bhattacharya says,11 “I must note also the fact that those who are governed by the Mitakshara school practically exclude, for purposes of marriage, only the four lines12 that are considered ineligible by the Bengal school.”

1 Post, p. 50.
3 “Manu,” chap. iii, para. 5.
4 See Bhattacharya’s “Hindu Law,” 2nd ed., 88.
6 1, 52.
7 According to the “Mitakshara” all the descendants of a common ancestor are sapindas, except that after the fifth ancestor on the mother’s side, and after the seventh on the father’s side, the relationship ceases. Bhattacharya’s “Hindu Law,” 2nd ed., 89.
8 According to the Bengal school the expression means connected by the offering of the funeral cake, but “For purposes relating to marriage, Raghunandana,” who is the chief authority in that school on the subject of marriage, “has not given any importance to the definition of the term ‘Sapinda.’ He has relied upon express texts to exclude girls within the seventh degree on the father’s side, and the fifth degree on that of the mother. There are, however, passages in the ‘Udvyahatattwa,’ in which the term ‘Sapinda’ is taken to include in its denotation all agnates and cognates within the aforesaid limits.” Bhattacharya’s “Hindu Law,” p. 91.
9 See Bhattacharya’s “Hindu Law,” 2nd ed., p. 90.
10 In this computation both the common ancestor and the person in question must be taken into consideration.
12 The first of these lines include girls belonging to the same gotra.

A man cannot marry his stepmother’s brother’s daughter, or daughter’s daughter.¹

The prohibition is based on a text of Sumantu,² which specifies these persons. According to a reading of the text, the Western schools exclude also the stepmother’s sisters and their daughters, and some persons hold that sapinda relationship in the case of the stepmother is the same as in the case of the natural mother up to the fifth degree.³

Sastri G. C. Sircar treats this rule of exclusion of certain of the stepmother’s relations as being one of merely moral obligation, and as having no legal force.⁴

There are other rules of restriction on intermarriage, which are now considered to be of mere moral obligation, and which are not universally observed.

The paternal uncle’s wife’s sister, and her daughter, and the wife’s sister’s daughter were excluded.⁵ In all of these cases the marriage is valid in law.⁶

In former times a man could not marry the daughter of his spiritual guide or pupil,⁷ or a girl bearing his mother’s name,⁸ or a girl older than him in age.⁹

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¹ (e.g., p. 34). The second includes girls belonging to the gotra of the maternal grandfather of the bridegroom (e.g., p. 35). The two lines are comprised in the above rules.
³ “Bhattacharya’s “Hindu Law,” 2nd ed., 95. Sumantu was the author of one of the Smritis.
⁵ “Hindu Law,” p. 56.
⁹ “Yajnasangala,” i. 52. In practice this rule is never departed from. Banerjee’s “Law of Marriage,” 2nd ed., p. 67; Steele, 161.
Relationship by marriage does not *per se* operate as an Affinity impediment to a marriage. Thus a man can marry any relation of his wife whom he could have validly married if he was then marrying for the first time.  

A son adopted according to the Dattaka form cannot *Adopted son.* marry any one of the persons whom he would have been prohibited from marrying if he had remained in his natural family. It is unsettled whether he is also prohibited from marrying any one of the girls, whom he could not have married, had he been a legitimate son of his adoptive father, or whether he is only prohibited from marrying a girl who belongs to the *gotra* of his adoptive father, or is within three degrees of descent from the adoptive father and his two paternal ancestors.

The latter view has been accepted by Nanda Pandita in the “Dattaka Mimanasa,” and it is therefore to be supposed that it would be acceptable to the Benares and Mithila schools.

Where an adoption has been made by a widow, or by a wife in conjunction with her husband, an adopted son is prohibited from marrying a girl whom he could not have married had he been a legitimate son of his adoptive mother.

Whether he is prohibited from marrying in the family of a wife of

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1 See *Ragamendra Reu v. Jayaram Reu* (1897), 20 Mad. 283, where it was held that a marriage between a Hindu and the daughter of his wife’s sister is valid. Banerjee’s “Law of Marriage,” 2nd ed., p. 64; G. C. Sircar’s “Law of Adoption,” p. 319; G. C. Sircar’s “Hindu Law,” p. 95.

2 *Fosh,* Chap. iii.


4 Bhattacharya’s “Hindu Law,” 2nd ed., pp. 95, 96.

5 This view is taken in Banerjee’s “Law of Marriage,” 2nd ed., 63, following the “Dattaka Chandrika,” s. 4, paras. 7-9.

6 This view is taken in G. C. Sircar’s “Law of Adoption,” 387, following the “Dattaka Mimanasa,” s. 4, paras. 32-38.

7 S. vi. paras. 32-38; see “Vyavahara Mayukha,” chap. iv. s. 5, para. 30.

8 *Anfe,* pp. 12, 15.

his adoptive father, who has not joined in the adoption, seems unsettled.¹

As the Hindu law does not recognize the remarriage of widows, there are necessarily no rules providing for the case.

It would seem that a widow cannot marry a person whose relationship to her is such that she could not have married him if she had never been married. It is said² that in order to ascertain what relatives of her first husband are forbidden to her in marriage reference should be made to the rules as to penance and appointment (niyoga), and to some special texts which pronounce certain relations as equal to mothers.

The rules in “Manu” as to penance would exclude a man from marrying the widow of his father,³ of his son,⁴ and of his guru.⁵

The application of the ancient rules of niyoga would apparently prevent a man from marrying the widow of his paternal or maternal grandfather, his father’s widow, his father’s or mother’s sister, the widow of his paternal or maternal uncle, his father-in-law’s widow, his sister or his daughter, his son’s widow or daughter, or the widow of his guru.⁶

Vrihaspati ⁷ pronounces as equal to mothers, the mother’s sister, the paternal and maternal uncle’s wife, the father’s sister, the mother-in-law and the wife of an elder brother.

Among the Jats of the North-West Province, marriage between a widow and her husband’s brother is allowed.⁸

Void marriage. A marriage made within the prohibited degrees is void.⁹

The woman is entitled to receive maintenance from the man.¹⁰

The Hindu law did not permit a woman whose marriage was void on account of identity of gotra, or as being within the prohibited degrees, to marry again, even if the marriage was not consummated.¹¹

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² See Bhattacharya’s “Hindu Law,” 2nd ed., 97. In Lachman Kuar v. Mardan Singh (1896), 8 All. 143, the Court held that, in the absence of a special custom, the marriage of a Hindu with his cousin’s widow was valid.
³ “Manu,” chap. xi. paras. 55, 104-107.
⁴ Ibid., chap. xi. para. 59.
⁵ Ibid., chap. xi. paras. 49, 252.
⁸ Poorunnudi v. Toossee Ram (1889), 3 Agra. 350.
Where the marriage was void on account of difference of caste, the Hindu law, according to some authorities, allowed the woman to remarry if the error was discovered before the ceremony of garbhadana, but not otherwise. The case is unlikely to occur, but if it did, the Courts might decline to consider that a void marriage is any impediment to a subsequent marriage.

Who may Give in Marriage.

The gift of a female minor in marriage must be by or with the consent of her father or other guardian in marriage. The consent of the guardian is also necessary in the case of the marriage of a male minor.

Where there is a gift by or with the consent of a legal guardian, and the marriage rite is duly solemnized, and where the marriage of a male minor takes place with the consent of such guardian, the marriage is irrevocable.

For the purposes of marriage the age of majority, according to the Bengal school, is the end of the fifteenth year, and according to the schools of law based on the Mitakshara, the end of the sixteenth year. The age of majority for the purpose of marriage is not affected by the Indian Majority Act.

The right, and duty, of giving a boy or a girl in Devolution of guardianship in marriage.

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1 A ceremony performed on the first appearance of the menses, and popularly called the second marriage.
2 Banerjee’s “Law of Marriage,” 2nd ed., 191; Steele, 29, 30, 166.
3 See Banerjee’s “Law of Marriage,” 2nd ed., 191. Aumjena Dasi v. Prabod Chandra Ghose (1870), 6 B. L. R. 243, at pp. 253, 254; 14 W. R. C. R. 403, at p. 405. If this view be not accepted, then, on the death of the husband, the woman could take advantage of the Hindu widow’s remarriage Act (XV. of 1856, ante, p. 31).
8 Act IX. of 1875, s. 2.
9 See Macnaghten’s “Hindu Law,” vol. ii. p. 204.
marriage devolves upon the following persons in succession:

1. The father.
2. The paternal grandfather.
3. The brother.
4. Other paternal relations up to the tenth degree of affinity in order of proximity.

According to the Mitakshara school, the right then devolves upon the mother, and, failing her, upon the maternal grandfather, maternal uncle, and other maternal relations in order of proximity. According to the Bengal school, the right of the mother is postponed to that of the maternal grandfather and maternal uncle.

Where a relative, other than the father, seeks to exercise a right to give in marriage, it is his duty to consult the mother, and if her objection be not unreasonable, to allow it.

A stepmother has no right to give in marriage.

A minor cannot be married or given in marriage against his or her will.

Although it would rarely happen that a Hindu girl would be consulted as to the choice of a bridegroom, and although the form of a Hindu

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6 As to the right of the paternal uncle, see Brindabun Chandra Kumhoar v. Chandra Kumhoar (1885), 12 Calc. 140, at p. 142; Shridhar v. Hiridal Vithal (1887), 12 Bom. 480, at p. 484.
mariage contemplates a gift of the girl by her father or other guardian rather than a contract between the parties to the marriage, a bridegroom cannot be forced upon an unwilling bride.1 The gift is made merely in discharge of the duty of the guardian, and not in exercise of any right of property in the girl.2

A father can,3 expressly or by implication,4 delegate his authority to another person.

It is submitted that no other guardian can delegate his right, except, perhaps, to a person on whom the right might eventually devolve, as in the case of Ram Bunsee Koonwears (Maharanee) v. Soobh Koonwears (Maharanee),5 where the nearest male kinsman assented to the paternal grandmother giving the girl in marriage.

A father or other guardian loses his right to give in marriage when he has neglected to exercise the right for a long time, or has in other ways waived the right.6

The conviction of the father for theft does not necessarily destroy his right to give his daughter in marriage.7

A father or other guardian in marriage can enforce his right by suing for an injunction to prevent the marriage of his ward to a person of whom he does not approve,8 and the Court will in a suitable case grant an injunction pendente lite to restrain such marriage.9

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2 See Khushalchand Lalchand v. Bai Mani (1888), 11 Bom. 247, at p. 255.
6 See Khushalchand Lalchand v. Bai Mani (1886), 11 Bom. 247; King v. Kutsama Naick (1814), 2 Str. N. C. 89; 1 Norton L. C. 1; Madho- sodum Mookerjee v. Jadub Chunder Banerjee (1865), 3 W. R. C. R. 194; Ghazi v. Sukru (1897), 19 All. 515; Buliyat (Bose) v. Jeychund Kewal (1843), Bellasis, 43; 1 Morl. (N. S.) 181. The fact that the father had given up worldly affairs, and had become a recluse would be evidence that he had waived his rights of guardianship.
7 See Nanabhai Ganpatrao Dhairyavan v. Janardhan Vasudev (1886), 12 Bom. 110.
9 Nanabhai Ganpatrao Dhairyavan v. Janardhan Vasudev (1886), 12 Bom. 110.
The order of the Court may be subject to restrictions upon the exercise of the rights of the guardian.  

The Court will restrain a guardian from an improper exercise of his authority; but the Court will not, except in a case of gross misconduct, interfere with the exercise of the discretion by a father.  

Where a guardian of the person or property of a minor has been appointed by a High Court, or by a Civil Court acting under the powers contained in Act VIII. of 1890, the rights of the guardian in marriage are subject to the control of the Court appointing a guardian, and such Court can, it is submitted, give all necessary directions with regard to the marriage of the ward.  

Where a minor is a ward of the Bengal Court of Wards, the leave of such Court must be obtained before the marriage.  

Whoever without the previous consent of the Court of Wards abets the marriage of a minor ward of the Madras Court of Wards is liable on conviction before a Court of Session to a fine not exceeding Rs. 2000, or to imprisonment for a term not exceeding six months, or to both.  

The Hindu law permits a girl to choose a husband for herself, if there be no available relation having a right to give her in marriage, or if her guardian in marriage has neglected to provide a husband for her for, at any rate, three years after she has attained a marriageable age.  

In the former case the Hindu law required the girl to obtain permission from the King before selecting a husband for herself. Although the Law Courts now exercise the functions relating to

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1 See Shridhar v. Hiraul Vithal (1887), 12 Bom. 480.  
3 See Act VIII. of 1890, s. 43.  
4 See Act VIII. of 1890, s. 43; Trevelyan’s “Law of Minors (3rd ed.),” pp. 176, 177, 291. Doubtless in Divecchi (Bai) v. Moti Karson (1896), 22 Bom. 508, at p. 513.  
5 Court of Wards Rules, s. viii. (e) rule 5. The only penalty, apparently, for a disobedience of this rule is that the Court might refuse to authorize payment of the expenses of the marriage out of the ward’s funds.  
6 Act I. (M. C.) of 1902, s. 67.  
ABSENCE OF CONSENT. 45

minors, which were formerly exercised by the Sovereign in person, no such application to the Court seems to be contemplated by modern practice.

The case would not be likely to occur, but effect would apparently be given to a marriage entered into by a girl who has no relations entitled to give her in marriage, provided the marriage be in other respects unexceptionable.

In the case of the guardian neglecting to give the girl in marriage, the right of the guardian next in order would apparently accrue, rather than that the girl should be able to select a husband for herself. It is said that, if a girl chooses a husband for herself, she cannot take with her any ornaments which have been given to her by her father, mother, or brothers.

A marriage, otherwise legally contracted, and performed with the necessary ceremonies, is not rendered invalid by the mere absence of the consent of the guardian in marriage, or by the circumstance that it was contracted in disobedience of an order of a Civil Court.

The Courts have power to declare that a marriage, which has been entered into without the consent of the guardian, is on that account invalid, and would probably do so, at any rate if the marriage has not been consummated, in a case where the interests of the child had been disregarded, and where a person having no pretence of authority had disposed of the child in marriage.

Where the marriage has been induced by force or fraud,

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1 See ante, p. 42.
2 See Strange’s “Hindu Law,” i. 38.
4 Ghazi v. Sukru (1897), 19 All. 515; Mulchand Kuber v. Bhudia (1897), 22 Bom. 812; Diwali (Bai) v. Moti Korson (1898), 22 Bom. 509; Venkatacharyulu v. Rangacharyulu (1890), 14 Mad. 316; Khushalchand Lalchand v. Mani (Bai) (1886), 11 Bom. 247; Brindabun Chandra Kurmokar v. Chandra Kurmokar (1885), 12 Cal. 140; Mohdhoosuddin Mookerjee v. Jadub Chunder Banerjee (1885), 3 W. R. C. R. 194; Rulyat (Baga) v. Jeypur Kewal (1843), Bellasis 43; 1 Morl. Dig. N. S. 181.
6 Diwali (Bai) v. Moti Korson (1898), 22 Bom. 509.
8 I.e. fraud on the person marrying, or being given in marriage. Mere fraud on the guardian, such as in Venkatacharyulu v. Rangacharyulu (1890), 14 Mad. 316, where the
it would on that account be declared to be invalid, apart from any question as to the want of consent by the guardian.\textsuperscript{1}

There would be great difficulties in setting aside a marriage which had been consummated, and in any case it would be difficult to obtain a bridegroom for a Hindu girl who had already gone through the form of marriage with another person.

A minor\textsuperscript{2} widow whose marriage has not been consummated cannot remarry without the consent of her father, or, if she has no father, of her paternal grandfather; or if she has no such grandfather, of her mother; or, failing all these, of her elder brother; or failing also brother, of her next male relative. Marriages made without such consent may be declared void by a Court of Law, but the consent is to be presumed until the contrary is proved, and no such marriage can be declared void after it has been consummated.\textsuperscript{3}

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent is sufficient consent to constitute her marriage valid.\textsuperscript{4}

It is unsettled whether a father or other guardian can enforce an agreement to recompense him in consideration of the marriage of his child or ward.

The Bombay High Court has refused\textsuperscript{5} to enforce such a claim on the ground that it is opposed to public policy, but the Madras High Court has in the case of a marriage in the asura form taken a different view.\textsuperscript{6}

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\textsuperscript{1} Venkatacharyulu v. Bangacharyulu (1890), 14 Mad. 311, at p. 320; Aunfoma Das v. Prahlad Chandra Ghose (1870), 6 B. L. R. 243, at p. 254; 14 W. R. C. R. 403, at p. 405.

\textsuperscript{2} i.e. minor according to “Hindu Law,” ante, p. 41.

\textsuperscript{3} Act XV. of 1856, s. 7.


\textsuperscript{5} Viswanathan v. Saminathan (1889), 13 Mad. 83. In that case the father of the bride sued the uncle of the bridegroom on a bond for the amount payable on a marriage in the asura form; Wilkinson, J. (at p. 85),
\end{flushleft}
In a Bengal case, the judges of the High Court expressed differing views, but the question did not directly arise in that case.

It is submitted that where the marriage is between Brahmmins or Kshatriyas such agreement is void. In other cases, such agreement might, it is submitted, be enforced, if it be fair and reasonable, and the marriage be contracted in the interests of the child. The asura form of marriage itself contemplates a payment to the guardian.

There is no objection to a payment of money by the guardian of a girl to the proposed bridegroom in consideration of the marriage.

The father, or other guardian, can recover money which he has paid as the consideration for a marriage which has not taken place.

A contract, whereby a person undertakes for reward to bring about a marriage, cannot be enforced.

The property of a joint family governed by the Mitakshara school of law is liable for the reasonable expenses of said, “In the present state of Hindu society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his daughter in marriage is in every case without distinction immoral or contrary to public policy. Each case must be decided on its own merits.” Approved of in Baldeo Sahai v. Jumna Kaur (1901), 23 All. 495. See Vaithyathanath v. Gangarasu (1893), 17 Mad. 9.


2 See Battacharya’s “Hindu Law,” 2nd ed., pp. 101, 109. “Manu” says (iii. 51), “Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring,” but the practice is very common.

3 Post, p. 50.

4 See Act IX. of 1872, s. 85, illus. (a).


7 In Vaithyathanath Ammangar v. Kallapiren Ayyangar (1902), 26 Mad. 497, the Court only allowed the expenses of ceremonies which invariably formed part of the marriage ceremonies, and disallowed the expenses of ceremonies which were usually,
the marriages of the daughters of male members of such family, including the daughters of those who are excluded from inheritance.

The expenses of the marriage of a male member of a family will not justify a sale of property, although they would be properly payable out of income.

In the case of a joint family governed by the Bengal school of law the marriage expenses of, at any rate, the daughters of the co-sharers, and of persons who are excluded from inheritance, and possibly also those of other unmarried female members of the family, such as daughters of adult sons of co-sharers, would apparently be payable out of the family property.

A father is not, in the absence of a contract, under a legal liability to pay the marriage expenses of any of his children, but after his death the reasonable expenses of the marriages of his daughters are payable out of his estate.

Such expenses create a charge upon the property to the same extent as rights of maintenance create a charge, and to such extent only.

There is also authority that the estate of a deceased Hindu is liable for the expenses of the marriage of the daughter of a son who pre-deceased him.

Where a ward has separate property a guardian would be entitled to pay thereout the reasonable expenses of his ward’s marriage.
FORMS OF MARRIAGE.

The only forms of marriage now recognized by the general Hindu law are the Brahma form and the Asura form. Both forms are now applicable to all classes.

The ancient Hindu law allowed the following eight different forms of marriage. The first four of these were considered approved forms.

1. The Brahma.

This form of marriage originally contemplated the gift of the girl by her father to a man learned in the Vedas, and was, therefore, peculiar to Brahmans.

It is the only one now left of the four approved forms of marriage, and is now suitable for all classes.

2. The Daiva.

In this form, which was peculiar to Brahmans, the maiden was given Daiva, in marriage to the officiating priest.

3. The Arsha.

In this form the father gave his daughter in consideration of one or two pair of oxen. It was peculiar to Brahmans.

4. The Prajapatiya or Kaya.

In this form the bridegroom was an applicant for the bride. It was Prajapatiya, peculiar to Brahmans.

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2 So called because peculiarly fit for Brahmans. Colebrooke’s “Digest,” vol. iii. p. 604.

3 “Manu,” chap. iii. para. 27.


5 Lit. divine: so called as being a ceremony proper for the Goda.


7 Lit. scriptural, anything for which a Rishi is an authority; Wilson’s “Glossary,” p. 32.

8 “Manu,” chap. iii. para. 29.

9 So called as being the ceremony of the Kas or Prajapati, the lords of created beings or progenitors of mankind; “Manu,” chap. i. para. 34; chap. iii. para. 30.

10 See Banerjee’s “Law of Marriage,” 2nd ed., p. 78.
5. The Asura.  

In this form the bridegroom purchased the bride from her father. The only difference between this form and the Arsha form is that in this form property other than cattle is taken by the father of the bride. The mere giving of a present to the bride does not render the marriage an Asura marriage.

This form of marriage was permissible to Vaisyas and Sudras, but not to the two highest classes. It is now applicable to all classes, and seems to be commonly practised throughout India. It is said to be, in fact, the most common form of marriage at any rate among Sudras in Southern India, and members of the Bhandari and other inferior castes in Western India.

6. The Gandharba.

This form depended solely upon the mutual consent of the parties marrying. It was confined to the Kshatriyas or military class, and seems to have been effected by mere consummation. Although this form of marriage is not recognized by the general Hindu law, a form of that name is permitted in some cases by family usage. In a case decided by the Bengal Sudder Court in 1817, a marriage by a member of the military class in this form was recognized, and the same Court, in 1853, upheld a similar marriage by a Rajah of Julpigoree, who

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1 Lit. demonical; Wilson's "Glossary," p. 37. "It is called the Asura form, as being the ceremony of the Asuras, or the aboriginal non-Aryan tribes of India," Banerjee's "Law of Marriage," 2nd ed., p. 79.
2 "Manu," chap. iii. para. 31.
9 Vijiarangam v. Lakhshman (1871), 8 Bom. H. C. O. C. 244.
10 The name is taken from that of "a kind of inferior divinity, attendant upon Indra and Kuvera, and distinguished for musical proficiency." Wilson's "Glossary," p. 104.
11 See "Manu," chap. iii. paras. 32, 41.
14 Morurund Deb Roobut v. Bima-sures (Rane), Ben. S. D. A. 1833, p. 159.
belonged to an aboriginal tribe, which had to some extent adopted Hindu customs.¹

This form of marriage is said to still exist in the family of the Tipperah Rajahs,² and it was recently asserted to have taken place in a family in Ganjam.³ A religious ceremony is now as necessary in a marriage in this form as when the marriage takes place in the ordinary forms.⁴ The Gandharbas form of marriage as now celebrated, and the ancient form seem, therefore, to resemble one another in name only.

7. The Rakshasa.⁵

This was a marriage by capture,⁶ and would in the present day be Rakshasa. dealt with by the criminal law.⁷ It was peculiar to the Kshatriyas, or warrior class.⁸

8. The Paisacha.⁹

In this form the Hindu law for the sake of the woman and her Paisacha. offspring treated as a marriage a seduction by fraud.

Where by immemorial and continuous custom¹⁰ a form of marriage, which is not repugnant to the fundamental principles of Hindu law, is invariably practised by a

¹ See Purnendra Deb Bhakat v. Rajenwar Das (1885), 12 I. A. 72; 11 Calc. 463.
⁵ Lit. a fiend-like marriage. See Wilson’s “Glossary,” p. 436.
⁶ “The seizure of a maiden by force from her house while she weeps and calls for assistance, after her kinsmen and friends have been slain in battle or wounded, and their houses broken open, is the marriage styled Rakshasa.” “Manu,” chap. iii. para. 33.
⁷ Indian Penal Code (Act XLV. of 1860), s. 366.
⁹ Lit. diabolical. Wilson’s “Glossary,” p. 389. “When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage called Paisacha is the eighth and basest.” “Manu,” iii. para. 34.
¹⁰ See Gatha Ram Mistres v. Mookita Kochin Atteah Domoones (1875), 14 B. L. R. 298; 13 W. R. C. R. 179; “Manu,” iii. 35. As to the necessary conditions for the validity of a custom, see ante, pp. 22-25.
particular class of persons or family, a marriage in such form is valid.

In the case of a family or race which is not Hindu by origin, but which has gradually, or otherwise, more or less adopted Hindu customs or Hindu law, a custom at variance with Hindu law would be upheld, provided that it were not repugnant to general ideas of morality.

The following forms of marriage peculiar to individual families have (amongst others) been recognized by the Courts:

In the Raj family of Hill Tipperah, marriage takes place in the Gandharbha or Santigritha form, but the wife married in that form seems to be inferior to a wife married in accordance with the ordinary form.

A Rajah of Orissa can marry a girl of a different caste in what is called the phulbha form, which consists in putting a garland round the neck of the woman, or in an exchange of garlands.

The Sagai form, by which widows of the Namosudra caste, and of the Koiris and other low castes in Behar, and of the Hulwae caste, remarry.

The Kurao Dhureecha, or the marriage of a widow with her deceased husband's brother, is common among Jats and the Lodh caste in the North-West.

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1 See Prinindra Deb Raha v. Rajeswar Das (1885), 12 I. A. 72; 11 Calc. 469.
2 See ante, p. 51.
3 Lit. one who receives holy water.
5 As to the customs of the Urry Rajahs and Chiefs, see the Pachis Sival, or twenty-five questions put by the superintendent of the Tributary Mehas in 1814 to the leading Rajahs in those Mehas. These answers have been recognized by the Courts, e.g. see Prindhur Roy v. Ramchender Mongraj, Ben. S. D. A. 1861, p. 16; Durrap Sing Deo v. Busurhdun Roy (1863), 2 Hay. 355; Runquadhr Nwendra Maradf Rajahpattar v. Juggurnath Bhromurbo Roy (1877), 1 Shome's "Law Reporter," C. R. 92, at p. 95. The substance of the answers is given in Banerjee's "Law of Marriage," 2nd ed., pp. 231, 233.
6 In this form the main ceremony consists in putting a red or Sinchur mark on the bride's forehead in the presence of assembled friends and relatives. Bissurom Koire v. Empress (1878), 3 C. L. R. 410.
8 Bissurom Koire v. Empress (1878), 3 C. L. R. 40.
9 Kally Churn Shava v. Dakker Biba (1879), 5 Calc. 692.
11 Kesaree v. Samurdhan (1873), 5 N. W. P. 94.
The Serai Udiki form, by which wives, deserted by their husbands, can remarry according to the custom of the Lingaites of South Canara.

As to the Sikh form of marriage, see Juggomohan Mullick (Doe dem) v. Sawncooman Bebee (1815), 2 Morl. Dig. 43.

As to forms of marriage which are recognized by local, tribal, or family custom, see Banerjee's "Law of Marriage," 2nd ed., Lecture VI.; Bhattacharya's "Hindu Law," 2nd ed., pp. 105, 111, 112; Risley's "Tribes and Castes of Bengal"; Crooke's "Tribes and Castes of the North-Western Provinces and Oudh"; Mayne's "Hindu Law," 7th ed., pp. 120-128.

As to the marriage of Hindus domiciled in the Madras Presidency following the Marumakkatayan or the Aliyasantana law of inheritance, see Madras Act IV. of 1896.

Where "a new Hindu sect comes into existence, and, New sect. from religious scruples, adopts a form of marriage somewhat different to the ordinary form, it would be going too far to hold that these marriages are void, and thus to bastardize a whole community, simply because the sect and its practices are of recent origin." 3

MARRIAGE CEREMONIES.

It is usual, but not necessary, that marriage should be Betrothal. preceded by a betrothal, or formal promise by the father, or other guardian,4 to give the girl in marriage.5 Such betrothal is revocable,6 and is not, in law, any obstacle to a marriage with another man.7

A promise of marriage cannot be enforced by a suit for specific Effect of performance,8 but a refusal to complete a betrothal, or a promise of breach of promise.

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1 Giving a cloth.
2 Virasangappa v. Rudopppa (1885), 8 Mad. 440.
3 Banerjee's "Law of Marriage," 2nd ed., p. 224. As to the marriage of Brahmes, see ibid., pp. 99, 100, 253, and Somalwasi v. Vishnuprasad Kariyprasad (1903), 28 Bom. 597, where a bigamous marriage of members of the Brahmo Samaj was held to be invalid.
4 Ante, pp. 41, 42.
5 This is called tādhana, or gift by word. Banerjee's "Law of Marriage," 2nd ed., p. 82. Wilson's "Glossary," p. 538.
7 Ante, p. 31.
8 Act I. of 1877, s. 21, cl. 5. See illustration to that section, "A contract to marry B." See In the matter
marriage, by an actual marriage would give to the injured party a right to recover from the person making the promise compensation for the loss, if any, sustained by the breach of promise. In case of such breach, a father, or guardian, would be entitled to recover money properly expended in contemplation of such marriage. Such suits cannot be brought in a Provincial Small Cause Court.

Death of bride. Should the betrothed damsel die before the marriage, the bridegroom is entitled to recover back the presents given by him to her, subject to paying such expenses as have been incurred.

Necessity for ceremonies. There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies.

Even when the gandharba form of marriage is permissible by custom the Courts will not recognize it unless religious rites have been performed, although the gift of the bride is in a marriage in that form unnecessary.

Hindu law does not recognize a marriage contracted by a Hindu, otherwise than with Hindu ceremonies, as, for instance, while he is a convert to another religion.

The ceremonies vary according to local or family usage. The ceremonies which are usually performed are


"Mitakshara," chap. ii, s. 11, para. 28; Rambhat v. Timmayya (1892), 16 Bom. 673; Jogerwar Chakrabatti v. Pano Kauri Chakrabatti (1870), 5 B. L. R. 995.

Act IX. of 1887, Sched. II., art. 35; Kali Sunker Das v. Koyalash Chunder Das (1888), 15 Calc. 833.

"Mitakshara," chap. ii, s. 11, paras. 29, 30.


Ante, pp. 51, 52.


(1866) 3 Mad. H. C. App. vii.

These ceremonies are observed whether the marriage be strictly in the Brahma form, or whether, in consequence of a payment having been made to the bride's family, the marriage is in the Asura form; Banerjee's "Law of Marriage," 2nd ed., p. 87; Venkatacharyulu v. Rangacharyulu (1890), 14 Mad. 316, at p. 319.
described in detail by H. T. Colebrooke,1 and in lesser
detail in Banerjee's "Law of Marriage"2 and in Bhattacharya's
"Hindu Law."3 See also Risley's "Tribes and
Castes of Bengal," vol. i. pp. 148-152.

The ceremonies usually commence with the performance of the Usual cere
monies, mandimukh, or vriddi shrudra, by the bride's father in honour of his
ancestors,4 and the ceremonious bathing of the bride. On the bride-
groom coming to the house he is ceremoniously received, and certain
ceremonies, the most important of which is the gift of the bride to
the bridegroom,5 are observed. On the night of that day, or on the
day following, the operative marriage ceremonies are performed by the
bridegroom and bride. This is called panigrahana, or the acceptance of
the bride's hand by the bridegroom. The sacred fire is kindled and
oblations are made. The bridegroom takes the bride's hand, she steps
on a stone. The bridegroom recites a fixed text. A hymn is
chanted. The bride and bridegroom walk round the fire, and then
comes the most material of the marriage rites. The bride is conducted
by the bridegroom, and directed by him to step successively into seven
circles, a text being recited at each step. This is called Saptapadi.
On the taking of the seventh step, and not until then, the marriage is
complete and irrevocable.6 The bride thenceforth becomes a member
of her husband's family.7

Other ceremonies which are not essential to the validity of the marriage
are subsequently performed.8

Sata (exchange) marriage, which, according to the custom of the Conditional
Kudva Kundi caste, is conditional upon the bridegroom's father pro-
viding a girl to be married to the son of the bride's father, does not
take effect until the condition has been performed, although the
marriage ceremonies have been completed.9

Whatever words spoken, ceremonies performed, or Remarriage of
widow.

1 Essay III. on the religious cere-
monies of the Hindus and of the
Brahmins especially, "Asiatic Re-
2 2nd ed., p. 90.
3 2nd ed., chap. viii.
4 The performance of this sradda is
not essential; Brindabun Chandra
Kurmoker v. Chandra Kurmoker
(1885), 12 Calc. 140, at p. 142.
5 This transfers the guardianship of
the girl.
6 Brindabun Chandra Kurmoker v.
Chandra Kurmoker (1885), 12 Calc.
140, at p. 143. See Venkatacharyulu
v. Rangacharyulu (1890), 14 Mad.
316, at p. 318. Colebrooke's "Essay
on the Religious Ceremonies of the
p. 303. Strange's "Hindu Law,"
pp. 487, 488.
7 Bhattacharya's "Law of the
8 For instance, see Vakuntam
Ammangar v. Kallapiran Ayyangar
(1902), 26 Mad. 497.
9 Ugri (Bai) v. Purshottam Bhu-
dar (Patel) (1892), 17 Bom. 400.
engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage can be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow. ¹

Although certain ceremonies are usual when the wife attains puberty, consummation is not necessary to the validity of a Hindu marriage. ²

There may be a custom by which a ceremony is necessary on the wife obtaining puberty. ³

Whatever ceremonies had been performed, force or fraud practised upon one of the parties to induce a marriage would justify a Court, at the instance of the aggrieved party, in declaring the marriage to be void. ⁴

DISPUTES AS TO MARRIAGE.

The Courts have power to determine the validity of a marriage either in a suit properly constituted for that purpose, or in a suit or proceeding in which the question incidentally arises. ⁵

For instance, the question may arise in a suit for the possession of property, or for the restitution of conjugal rights, or in a proceeding relating to the guardianship of a minor, or as to the right to letters of administration, or in a criminal prosecution for bigamy, or adultery, or for enticing away a married woman.

A suit will lie for a declaration that the defendant was not, as he or

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¹ Act XV. of 1856, s. 6.
² Administrator-General of Madras v. Anandachar (1886), 9 Mad. 466, at p. 470; Dadaji Bhikaji v. Rukumbari (1886), 10 Bom. 301, at p. 311; Strange's "Hindu Law," vol. lii. 32, 33.
⁴ See Venkatacharyulu v. Rangacharyulu (1890), 14 Mad. 316, at p. 320; Aumjona Dasi v. Prabhad Chandra Ghose (1870), 6 B. L. R. 243, at p. 254; 14 W. R. C. R. 403, at p. 405; Mulchand v. Bhuddha (1897), 22 Bom. 812, at pp. 817, 818. As to fraud on a guardian, see ante, p. 45.
⁵ See Aumjona Dasi v. Prabhad Chandra Ghose (1870), 6 B. L. R. 243; 14 W. R. C. R. 403.
she alleged himself or herself to be, the husband, or wife of the plaintiff.¹

A decision as to the fact or validity of a marriage can only bind only bind the parties to the litigation,² and then only if the case complies with the conditions prescribed by s. 11 of the Civil Procedure Code, 1908.³

Where it has been proved that marriage has been celebrated there is a presumption that it is valid in law,⁴ and that all the necessary ceremonies were performed.⁵

It has been held by a Bench of the Bengal High Court⁶ that this presumption, although it applies to questions of inheritance, does not apply to a suit for restitution of conjugal rights, and that in such a suit the performance of the ceremonies must be strictly proved, but in an earlier case another Bench of the same Court⁷ applied the presumption to a similar suit. It is submitted that there is no valid reason for making this distinction. Evidence of treatment is sufficient to prove a marriage, even in a suit for restitution of conjugal rights, where the parties are not subject to the Indian Divorce Act,⁸ which, of course, Hindus are not, so, à fortiori, evidence of the marriage having been celebrated would, it is submitted, be sufficient.

This presumption applies also in the case of the remarriage of Widow.⁹

It has no application when a former valid subsisting marriage has been proved.¹⁰

¹ See Mir Asmat Ali v. Mahmud-al-isna (1897), 20 All. 96.
² See Brohabenoyee v. Kashi Chandr Sen (1881), 8 Calc. 266; 10 C. L. R. 91.
³ Act XIV. of 1882, s. 13. See Evidence Act (I. of 1872), s. 45.
⁴ Inderu Valungapooey Tacor v. Ramassuwe Pandha Tulnar (1869), 13 M. I. A. 141, at p. 158; 3 B. L. R. P. C. 1, at pp. 3, 4; 12 W. R. P. C. 41, at p. 42; Fakirgonda v. Gangi (1896), 22 Bom. 377, at p. 279. As to the proof of a marriage, see Lachmi Koir v. Raghunath Das (Chowdhry Mohun) (1900), 27 I. A. 142; 27 Cal. 971; 4 C. W. N. 685. Act I. of 1872, s. 50.
⁵ Brindabun Chandra Karmokar v. Chandra Karmokar (1885), 12 Calc. 140, at pp. 142, 143. Administrator-
⁶ General of Madras v. Anandachari (1886), 9 Mad. 460, at pp. 469, 470. "If the evidence was sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they are duly completed, until the contrary is shown." Divali (Bai) v. Moti Karson (1896), 22 Bom. 509, at p. 512.
⁷ Surijamoni Dosi v. Kalikanu Das (1900), 28 Calc. 37, at p. 50; 5 C. W. N. 185, at pp. 204, 205.
⁸ Brindabun Chandra Karmokar v. Chandra Karmokar (1885), 12 Calc. 140, at pp. 142, 143.
⁹ Act I. of 1872, s. 50.
¹⁰ Luchim Kuar v. Mardan Singh (1886), 8 All. 148.
¹¹ In re Millard (1887), 10 Mad. 218, at p. 221.
There is also a presumption that the marriage was according to one of the approved forms. As the Brahma form is the only one remaining of such forms, it follows that there is a presumption that the marriage was in accordance with the Brahma form.

In prosecutions under ss. 494, 495, 497, and 498 of the Indian Penal Code the fact and validity of the marriage must be strictly proved.

Divorce is unknown to the general Hindu law.


Where it is allowed by custom, a divorce by mutual agreement is recognized by law.

Although matters of divorce are frequently adjudicated upon by a panchayet, or assembly of a caste, such panchayet has no power to

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2 Act XLV. of 1860.

3 Empress v. Pitanhure Singh (1879), 5 Calc. 566; 5 C. L. R. 597.

4 See Dunesh Shikku v. Tofir Mandal (1902), 7 C. W. N. 143.

5 Act I. of 1872, s. 50.

6 Kudomoos Dossee v. Joteeram


8 Sankuralingam Chetti v. Sakkam Chetti (1894), 17 Mad. 479. This was a case of members of the potters’ caste in Tinnevelly.
declare a marriage void or to give permission to a woman to remarry.\(^1\) In such castes a divorce is generally not effectual, except with the authority of the panchayat.\(^2\)

It is incompetent to Hindus at the time of their marriage to arrange that the marriage be void in certain events,\(^3\) whether divorce be or be not permissible in the particular caste.

Except under the circumstances provided for in Act XXI. of 1866, the Courts have no power to decree a divorce.\(^4\) A dissolution of marriage is not effected by the adultery\(^5\) of the husband or wife.

The only remedy which a blameless wife has against an offending husband is to obtain a decree for her separate maintenance,\(^6\) such decree being practically equivalent to a decree for judicial separation.\(^7\)

It is unsettled whether the Indian Divorce Act\(^8\) has any application to a Hindu marriage contracted before the conversion of the parties to Christianity. The High Court of Bengal has held that it applies,\(^9\) but the High Courts of Madras\(^10\) and the North-West Provinces\(^11\) have taken a different view. It is submitted that the latter view is correct.

The change of religion\(^12\) or excommunication from caste\(^13\) of either party does not effect a divorce.

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2. See Rahi v. Govind Valad Teja (1875), 1 Bom. 97, at p. 114.
4. The Courts seem formerly to have granted divorces. See Kacaram Kripam v. Umbaram Hureschund (1811), 1 Borr. 387.
5. Subbaraya Pillai v. Ramasami Pillai (1899), 23 Mad. 171, at pp. 177, 178.
6. Post, p. 76.
8. IV. of 1869.
10. Thapita Peter v. Thapita Lakshmi (1894), 17 Mad. 235; Perianayakam v. Pottukanni (1890), 14 Mad. 382.
13. See Queen v. Marimatu (1881), 4 Mad. 243; Administrator-General of Madras v. Anandachari (1886), 9 Mad. 466; Bisheshur v. Mata Ghom (1870), 2 N. W. P. 300; contrô Sinammal v. Administrator-General of Madras (1885), 8 Mad. 169.
Where a Hindu husband or wife is deserted or repudiated on the ground of his or her conversion to Christianity, a decree for divorce can, under the provisions of Act XXI. of 1866, be made in favour of the person so deserted or repudiated, and the parties can marry again as if the prior marriage had been dissolved by death.\textsuperscript{3}

\textsuperscript{1} See the procedure provided by that Act. \textsuperscript{2} S. 19 of the Act.
CHAPTER II.

HUSBAND AND WIFE (continued).

RECIPROCAL RIGHTS AND DUTIES.

The parties to a marriage cannot by arrangement or Agreement varying rights, otherwise vary the rights, duties, and other incidents which the law attaches to the state of marriage. An anti-nuptial agreement, by which the husband agreed never to remove his wife from the parental abode, has been held not to be binding on him. Similarly, no effect can be given to an agreement which provides that, on the husband taking another wife, the first marriage should be void.

RIGHTS TO SOCIETY AND Guardianship.

A husband is entitled to the society of his wife. He can require her to live with him wherever he may choose to reside, and to submit herself obediently to his authority.

1 Tekait Mon Mohini Jemadai v. Basanta Kumar Singh (1901), 28 Calc. 751; 5 C. W. N. 673; Paigi v. Sheonarain (1885), 8 All. 78, at pp. 79, 80.

2 Sikaram v. Abeer Heerahoe (Musamud) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

3 Binda v. Kansila (1890), 13 All. 126; Gatha Ram Mistree v. Moshita Kochin atteah Domesee (1875), 14 B. L. R. 398, at p. 300; 23 W. R. C. R. 179.


Effect cannot be given to an arrangement between a husband and wife that they should separate, and that neither of them shall sue for restitution of conjugal rights, unless the agreement indicates a state of circumstances which would be an answer to a suit for restitution of conjugal rights.¹ An arrangement for a separation to commence at a future date would be contrary to public policy.²

A husband, even if he has not attained the age of majority,³ is the lawful guardian of the person of his minor⁴ wife,⁵ in preference to her parents or other relations, unless, according to the custom of the caste or community to which he belongs, he be precluded from such custody until the wife be fit for marital intercourse.⁶

It is the practice among the Hindu community in the Madras Presidency for a wife to be left with her parents until she attains puberty. The husband is only entitled to the custody of her person when such custody is necessary in her interests.⁷

After the husband’s death the guardianship of his minor widow, and the management of her property, devolve upon the husband’s heirs generally, or upon those who are entitled to inherit his estate after her death,⁸ in preference

³ Act VIII. of 1890, s. 21.
⁴ I.e. minor within the meaning of the Indian Majority Act (IX. of 1875).
⁵ Act VIII. of 1890, ss. 19, 41 (d).
⁸ Arunaga Mudali v. Viraaghava Mudali (1900), 24 Mad. 255.
even to her own father. On failure of her husband's heirs the widow's paternal relations are her guardians, and failing them, her maternal kindred.

Having regard to the custom of the country that women, at any rate in the higher positions of life, are secluded in the zenana, a Hindu husband would apparently be entitled to exercise, within reasonable limits, a certain amount of restraint upon his wife, even if she be an adult, so as to keep her at home.

"The Hindu law, while it enjoins upon the wife the duty of attendance on, obedience to, and veneration for, the husband, inculcates that the husband must honour the wife and treat her with affection and courtesy." 4

In spite of early texts, which give a husband power to correct his wife, it is clear that he is no way justified in chastising or assaulting her. The Indian Penal Code does not exempt a husband from liability for an offence committed against his wife's person, except that it provides that sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape.

A wife is entitled to live with and to be maintained by her husband in his house.

The mere fact that she has been excluded from caste does not make the wife a trespasser when coming to her husband's house. If she has been expelled from his house for proper cause, she might be treated as a trespasser on returning without his leave.

The right of a husband to the society of his wife, and that of a wife to the society of her husband, may be enforced of right to society.

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3 See Matangini Dasi v. Jogendra Chunder Mullick (1891), 19 Calc. 84, at pp. 90, 91.
4 Matangini Dasi v. Jogendra Chunder Mullick (1891), 19 Calc. 84, at p. 90.
5 "Manu," chap. viii. paras. 299, 300.
6 Act XLV. of 1860.
7 S. 375. See Queen-Empress v. Hurree Mohun Myttos (1890), 18 Calc. 49.
8 See Binda v. Kamalika (1819), 13 All. 126, at pp. 132, 133; Gatha Ram Mistree v. Mookita Kochin Attekh Dominges (1875), 14 B. L. R. 298, at p. 300; 23 W. R. C. R. 179.
9 See post, pp. 75-77.
10 Queen v. Marimuttu (1881), 4 Mad. 248.
enforced against the other party to the marriage\(^1\) by a suit for restitution of conjugal rights.\(^2\)

A suit for the purpose of obtaining possession of the person of a wife will not lie against the wife;\(^3\) but such suit might be treated as in substance one for restitution of conjugal rights.\(^4\)

The circumstances which justify desertion are an answer to a suit for the restitution of conjugal rights.\(^5\)

In *Dadaji Bhikaji v. Rukmabai*\(^6\) the Court said, "It may be advisable that the law should adopt stringent measures to compel the performance of conjugal duties; but, as long as the law remains as it is, Civil Courts, in our opinion, cannot, with due regard to consistency and uniformity of practice (except, perhaps, under the most special circumstances), recognize any plea of justification other than a marital offence by the complaining party, as was held to be the only grounds upon which the Divorce Courts in England would refuse relief in Scott v. Scott."\(^7\)

The circumstances which justify desertion are—

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1. As to the remedy against a third person for detaining a wife, see post, pp. 71, 72.

3. *See Binda v. Kaunsilai* (1890), 14 All. 126, at p. 163.


12. *See Binda v. Kaunsilai* (1890), 14 All. 126, at p. 163.


16. *See Binda v. Kaunsilai* (1890), 14 All. 126, at p. 163.


1. Cruelty, whether physical or moral, in a degree rendering it unsafe for the wife to return to the power of her husband.\(^1\)

Cruelty to a less degree,\(^2\) as, for instance, an unfounded imputation upon the wife's chastity,\(^3\) or taking her jewels from her,\(^4\) or mere unkindness or neglect,\(^5\) short of cruelty, would not seem to be an answer to a suit for restitution. In a case where a husband, a Brahmin, having expelled his wife, was living in his house with a low caste prostitute, he was refused restitution.\(^6\)

There seem to be no reported decisions in India on the subject, and it is unlikely that any cases would occur, but there seems to be no reason why cruelty by the wife should not be an answer to a suit by her for restitution of conjugal rights.

2. The fact that the person suing for restitution of conjugal rights is suffering from a loathsome disease.\(^7\)

Thus a decree was refused to a husband suffering from leprosy and syphilis.\(^8\) It would follow that the communication of a noxious disease would justify a wife in declining to consort with her husband.\(^9\)

If the principle laid down in *Dadaji Bhikaji v. Rukmabai*\(^10\) be correct, diseases, which are not the result of marital offences, would be excluded from consideration.

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10. *Ante*, p. 64.
ADULTERY, LOSS OF CASTE. [CHAP. II.

3. Adultery by the wife\(^1\) in a suit by the wife.\(^2\)

As to adultery by a husband, see post, p. 68.

Loss of caste.

It is unsettled whether mere loss of caste is an answer to a suit for restitution of conjugal rights.

Under the ancient law a wife could not be compelled to live with an outcast husband.\(^3\) The High Courts at Agra\(^4\) and Allahabad\(^5\) have declined to accept loss of caste as an excuse for refusal to cohabit, but in another Allahabad case\(^6\) the High Court made return to caste a condition precedent to a decree. The right to the society of the wife would, it is submitted, be a right within the meaning of Act XXI. of 1850,\(^7\) but the Court would, it is also submitted, have to inquire into the reasons for the degradation, in order to satisfy itself that a decree would not inflict unnecessary hardship upon the wife. Where the loss of caste is capable of expiation the course adopted in the above case was, it is submitted, correct.\(^8\) Where the loss be such as to involve no moral turpitude, the Court would not treat it as an excuse for desertion.

It is not easy to say, in the present state of Hindu society, what offences justify a degradation from caste.\(^9\)

It is also unsettled whether the adoption of another religion by the person seeking restitution is an answer to the suit. It would apparently be an answer in most cases.\(^10\)

The matter stands to some extent on the same footing as the case of degradation from caste. It would undoubtedly have been under the ancient law a ground for desertion. In the case of a conversion to

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\(^1\) Colebrooke’s “Digest,” vol. ii. p. 415.

\(^2\) As to a suit by the husband, see Surjyamoni Dasi v. Kalikanta Das (1900), 28 Calc. 37, at p. 47; 5 C. W. N. 195, at p. 203.

\(^3\) Colebrooke’s “Digest,” vol. ii. p. 413.


\(^5\) Sahadur v. Rajeevanta (1904), 27 All. 96.

\(^6\) Paigi v. Shonenrain (1885), 8 All. 78. See Surjyamoni Dasi v. Kalikanta Das (1900), 28 Calc. 37, at pp. 47, 48; 5 C. W. N. 195, at p. 203.

\(^7\) Cf. Muchoo v. Arsoon Sahoo (1866), 5 W. R. C. R. 235.

\(^8\) Cf. Jina (Bai) v. Khawar Jina (1907), 31 Bom. 366.


\(^10\) See Muchoo v. Arsoon Sahoo (1866), 5 W. R. C. R. 235, at p. 236. See, however, In re the wife of P. Streevovass, 1 Norton L. C. 13, where the Court ordered the wife of a converted Brahmin to be restored to him on a writ of habeas corpus. If the rule adopted in Dadaji Bhikaji v. Rukmabai (ante, p. 64) be correct, change of religion would be no answer.
Christianity the procedure provided by Act XXI of 1866 would by implication prevent a Court from forcing cohabitation upon a party refusing it on the ground of the conversion of the person seeking it to Christianity. In the case of a conversion to Mahomedanism it would be impossible to enforce cohabitation. The mere abandonment of Hinduism without any formal exclusion from caste would scarcely be an answer. A return to Hinduism after performance of the prescribed expiation would dispose of an objection to cohabitation on the ground of conversion.

As to the effect of a change of religion upon the marriage tie, see ante, p. 59.

Conduct which has been condoned is no answer to a Condonation. suit for restitution, unless it has been revived by subsequent misconduct. 2

A decree for restitution of conjugal rights cannot be refused on any of the following grounds:—

1. The fact that the marriage has not been consummated. 3


The minority of the husband can be no answer to a suit by him, as he is ordinarily entitled to be the guardian of his wife’s person, 4 and it can scarcely be an answer to a suit against him. The minority of the wife would be no answer to a suit by the husband, except under circumstances which would disentitle him to act as guardian of her person, 5 but it might in some cases be proper to put him upon terms; for instance, that she should be placed by him in charge of a female member of his family. 6 The minority of the wife could be no answer to a suit by her.

3. The unsoundness of mind of the plaintiff, whether it Insanity. commenced before or after the marriage. 7 The Court would not, however, make a decree, obedience to which might be a danger to the defendant.

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1 Sc. 16-18.
2 See Jogendronmudini Dosses v. Hurry Doss Ghose (1879), 5 Calc. 500; 5 C. L. R. 65.
3 Dadaji Bhikaji v. Rukambai (1888), 10 Bom. 301, at pp. 310, 311.
4 Ante, p. 62.
5 Ante, pp. 65, 66.
7 See Binda v. Kaurnsila (1890), 13 All. 126, at p. 155; Sircar’s “Vyavastha Chandrika,” p. 489; note. Cf. Indian Divorce Act (IV. of 1889), s. 33; Hayward v. Hayward (1858), 1 Sw. & Tr. 81.
Sir William Macnaghten¹ considered that the insanity of the husband justified his wife in deserting him. He relies on a text of *Manu*,² which has been otherwise interpreted.³ There is a text to the effect that the insanity of the wife is a ground for excluding her from the husband's bed, and from pilgrimage, but from nothing else.⁴ Mental infirmity short of insanity can clearly be no answer to a suit for restitution.⁵

4. A second marriage by the husband.⁶

5. Adultery by the husband.⁷

Where the husband is actually living in adultery,⁸ or his conduct has been such as to prevent his wife from returning to him without loss of caste (see ante, p. 66) or injury to her self-respect and religious feeling,⁹ the Court might refuse a decree.¹⁰

It is submitted that the impotence of the plaintiff¹¹ originating after marriage is no answer to a suit for restitution.

Whether it is an answer when it was existing at the time of the marriage would, it is submitted, depend upon whether the Court would set aside the marriage on that account.¹² *Manu* makes no distinction between impotence arising after and impotence arising before marriage,

¹ "Hindu Law," vol. ii. p. 62. As insanity at the time of marriage does not invalidate the marriage (ante, pp. 28, 29), it could not be an answer to a suit for restitution.
² "Manu," chap. ix. para. 79.
⁵ *Binda v. Kaunsiilal* (1890), 13 All. 126, at p. 161.
⁷ *Binda v. Kausiliul* (1890), 13 All. 128, at p. 164; *Paigi v. Sheonarain* (1885), 8 All. 78, at p. 81;

⁸ *Paigi v. Sheonarain* (1885), 8 All. 78, at p. 81. See *Dular Koer v. Dwarakanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510, ante, p. 65; and *Dular Koer v. Dwarakanath Misser* (1904), 32 Calc. 234, at p. 239; 9 C. W. N. 270, at p. 274.
⁹ *See Gobind Prasad (Lala) v. Doulab Batti* (1870), 6 B. L. R. App. 85; 14 W. R. C. R. 451.
¹⁰ See, however, case No. 457 of 1884, 20 Mad. 474.
¹¹ The impotence of the defendant is no answer, see *Parsotamdas Maneklal v. Mani (Bai)* (1896), 21 Bom. 610. *Devala* permitted a wife to desert her impotent husband. Colebrooke's "Digest," vol. ii. p. 470.
¹² See ante, p. 29.
but the text by which he is said to permit a wife to abandon an im-\textit{portant} husband has been differently interpreted.\(^1\)

Where it would be manifestly unjust to order restitution of conjugal rights, the Court can refuse to make such order.

For instance, in \textit{Moola v. Nundy},\(^2\) where, in consequence of the misconduct of the husband, a \textit{panchayet} had adjudged a separation, and the parties had lived apart for thirteen years, the Court declined to make an order.

A right of suit for restitution of conjugal rights arises on a refusal, express or implied, to return to cohabitation.

A formal demand, and refusal, to return to cohabitation is not a condition precedent to such suit,\(^3\) but there must be a willingness on the part of the plaintiff to resume cohabitation.

In England a rule of Court\(^4\) prevents a suit being brought for restitution of conjugal rights without a demand before suit to return to cohabitation. There is no such rule in India, although the Limitation Act\(^5\) has assumed that such demand is necessary.

A second suit for restitution based upon the continued disobedience Repetition of refusal, \textit{res judicata},\(^6\) but a second withdrawal from cohabitation would give a fresh cause of action.\(^7\)

The Limitation Act provides that a suit for the restitution of conjugal rights must be brought within two years from the time when restitution is demanded, and is refused by the husband or wife, being of full age and sound mind.\(^8\)

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\(^1\) See Colebrooke's "\textit{Digest}," vol. ii. p. 412; Sircar's "\textit{Vyasavtha Chandrika}," 489, note.

\(^2\) (1872), 4 N. W. P. H. C. 109.

\(^3\) \textit{Binda v. Kaunsila} (1890), 13 All. 126, at pp. 139 et seq. See \textit{Fakirsundar v. Gangi} (1898), 23 Bom. 307, at p. 310. For the purpose of jurisdiction the cause of action is considered to arise at the husband's house. \textit{Lalitagar Kesargar v. Suraj (Bai)} (1893), 18 Bom. 316.

\(^4\) Rule 175, see Brown and Powles on Divorce, 5th ed., pp. 135, 136.

\(^5\) Act XV. of 1877, Sched. II., art. 35.

\(^6\) The Court declined to decide this question in \textit{Keshalal Girdharlal v. Parvati (Bai)} (1893), 18 Bom. 327, at pp. 329, 331.

\(^7\) \textit{Keshalal Girdharlal v. Parvati (Bai)} (1893), 18 Bom. 327.

\(^8\) Act XV. of 1877, Sched. II., art. 35. See \textit{Fakirsundar v. Gangi} (1898), 23 Bom. 307, at pp. 309, 310.
It has been held by the Allahabad High Court that "in cases where the personal law of the parties does not require antecedent demand, nor deprives minors and persons of unsound mind of the conjugal right of cohabitation, No. 35 of the Limitation Act has no application, nor sec. 34, but that the suit would fall under the general provisions of No. 120 of the Limitation Act." The practical effect of this decision would be to exclude Hindus from the operation of this article. It is submitted that, where there has been a demand and refusal, the article applies. Where there has been no demand or refusal it may be that we have to look elsewhere for a period of limitation, and that there is "a continuing wrong" within the meaning of sec. 23 of the Act.

Where the wife is a minor, or insane, there seems to be no limitation to a suit by the husband for restitution of conjugal rights, although there is such limitation where the suit is brought against another person for recovery to the wife.

The decree should declare that the plaintiff is entitled to the restitution of conjugal rights, and that the defendant (if the wife) be directed to go to her husband's house. If the defendant be the husband the decree should direct him to restore such rights to his wife.

The Court may make a decree for restitution of conjugal rights upon conditions to be fulfilled by the plaintiff. In one case the decree was made subject to the husband being restored to caste. In another case

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1 _Binda v. Kaunsilia_ (1890), 13 All. 126, at p. 146. The Court declined to express an opinion on this question in _Fakirgouda v. Gangi_ (1898), 25 Bom. 307, at p. 311.

2 See ruling of Punjab Chief Court in _Sivas's "Limitation Act,"_ 3rd ed., p. 134; _Sari (Bai) v. Sankha Hirachand_ (1902), 16 Bom. 714, which followed _Henchand v. Shin_ Bom. P. J., 1883, p. 124. The latter case deals with Act XIV. of 1859, in which there were no provisions similar to arts. 34 and 35 of Sched. II. of Act XV. of 1877.

3 See _Surjyanoni Das v. Kalkanta Das_ (1900), 28 Cal. 47, at pp. 47, 48; 5 C. W. N. 195, at p. 203.


5 _Paige v. Shenarvin_ (1885), 8 All. 78. In _Surjyanoni Das v. Kalkanta Das_ (1900), 28 Calc. 47, of 1877.

the Court required "that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife." The Court might also require proper security to be taken for the protection of the wife.1

When the party, against whom a decree for restitution of conjugal rights has been made, has had an opportunity of obeying it, and has wilfully failed to obey it, the decree may be enforced by his or her imprisonment,2 or by the attachment of his or her property, or by both.

When the attachment has remained in force for one year, if the decree has not been obeyed, and the decree-holder has applied to have the attached property sold, the property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance (if any) to the judgment debtor on his or her application. If the judgment debtor has obeyed the decree, and paid all costs of executing the same, which he or she is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made or granted, the attachment should cease to exist.3 The Court can refuse execution, and may order periodical payments to the wife.

A husband who seeks to recover his wife from a person harbouring or detaining her, may sue such person to recover his wife,4 and may also sue for damages on account of her detention.

A suit for the recovery of a wife must be brought within two years Limitation from the time when possession is demanded and refused.6

The decree can be enforced by imprisonment and attachment.6 It cannot be enforced by physically placing the wife in the possession of her husband.7

Where the wife is within the Presidency towns of Summary remedies.

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2 Six weeks is the limit of imprisonment; C. P. C. 1908, s. 58. See Act XIV. of 1882, s. 342.

3 Civil Procedure Code, 1908, Sched. I., ord. xxi, rules 32, 33; Act XIV. of 1882, s. 260.

4 See Acts XIV. of 1882, s. 259, and XV. of 1877, Sched. II., art. 34.

5 As to the former practice, see *Lall Nath Misser v. Sheobur Pandey* (1873), 20 W. R. C. R. 92. Act XV. of 1877, Sched. II., art. 34. See ante, p. 70.

6 Civil Procedure Code (Act XIV. of 1882), s. 259; C. P. C. 1908, s. 51. The old practice was to make such an order, see *Hurka Shunkur v. Baseejee Munohur* (1809), 1 Borr. 353; 1 Morley Dig. 288.
Calcutta, Madras, and Bombay, the right of the husband may be enforced by an order of the nature of a habeas corpus.¹

Where the wife is confined under such circumstances that the confinement amounts to an offence, there is also, throughout India, a summary remedy by a magistrate's order.²

Where the husband has already had the custody of his minor wife, and she has left, or is removed from, his custody, there is also a remedy under sec. 25 of the Guardians and Wards Act.³

The husband is also entitled to recover damages from the person harbouring his wife or enticing her away,⁴ whether or not for improper purposes, and to obtain an injunction against such person from interfering with his wife rejoining him.

“Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him.”⁵

A suit for damages against a person committing adultery with a wife would also apparently lie.⁶

It is not possible to lay down any exact rule as to the measure of damages in these cases. The principles adopted in English cases might, to some extent, be applied. On the one hand, the Court should consider the loss of the wife's society, affection, services and assistance in domestic affairs, and the social injury (if any) which the husband is likely to suffer from the act complained of. On the other hand, the behaviour of the husband towards his wife may be taken into account.

¹ Criminal Procedure Code (Act V. of 1898), s. 491.
² Criminal Procedure Code (Act V. of 1898), s. 100.
³ VIII. of 1890.
⁴ See Hurka Shunkur v. Raceejee Munohur (1809), 1 Borr. 353.
The capacity of the defendant to pay damages is not generally (if ever) a circumstance for consideration.1

 RIGHTS OVER PROPERTY.

Except that in times of pressing need he may use his wife’s separate property,2 and that he has in certain cases a right of inheritance, a husband does not by marriage acquire any beneficial interest in his wife’s property.3 A wife is able to deal with what is called her stridhan property,4 whether acquired before, at, or after marriage, in the same way as if she had never been married.5

A Hindu wife is competent to contract,6 but unless she be an agent, either express or implied, of her husband, she does not thereby bind him or his property. She only renders liable the property over which she has a disposing power.7

There are cases to the effect that a wife’s liability is limited to the extent of her stridhan,8 whether she contracts separately or jointly with her husband,9 but there seems to be no reason why she should not be as fully liable as a male contractor.10 This question is not, however,

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1 See Kelly v. Kelly (1869), 3 B. L. R. O. C. 67.
4 I.e., property over which she has an absolute power of disposal, and includes all property which has come to her otherwise than by inheritance.
6 Indian Contract Act (IX. of 1872), s. 11. The Hindu law permitted her to contract, see Nathubhai Bhaial v. Javer Raja (1878), 1 Bom. 121, at p. 123; Strange’s “Hindu Law,” vol. i. p. 276.
7 See Nathubhai Bhaial v. Javer Raja (1876), 1 Bom. 121; Pusi v. Mahadeo Prasad (1880), 3 All. 122.
8 Above note 4.
9 Nathubhai Bhaial v. Javer Raja (1876), 1 Bom. 121; Govindji Khimji v. Lakmidas Nathuboy (1879), 4 Bom. 318; Narokom v. Nanka (1882), 6 Bom. 473. In re the petition of Radhi (1887), 12 Bom. 299.
10 See Bhalchand v. Bai Sheva (1882), 6 Bom. 470.
now of much importance, as a woman is exempt from imprisonment in execution of a money decree.  

Where the wife is living with her husband, or is living apart from him under such circumstances as would justify an order for separate maintenance, the Court would presume an authority to bind the husband for necessaries, but such presumption can be rebutted by evidence that the authority has been revoked.

A Hindu married woman can sue or be sued in her own name.

There is no presumption of law that transactions which stand in the name of the wife are the husband's transactions, although it may frequently happen that a husband buys property in his wife's name.

Except so far as she may be entitled to maintenance thereout, to a share on partition, and to rights of inheritance, a wife does not by marriage acquire any interest in her husband's property or any voice in its management.

A person who marries a Hindu widow is not, merely by reason of such marriage, liable for any of the debts of a prior deceased husband of such widow.

A husband may sue his wife, and a wife may sue her husband, in respect of any cause of action in the same way as if they were independent of one another.

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1 S. 245A, added to Act XIV. of 1882 by Act VI. of 1888, s. 2; C. P. C. 1908, s. 66.
2 Ante, p. 65.
4 Bhoirubchunder Dass v. Madhub-chunder Paramanic (1863), 1 Hyde, 281.
6 Post, p. 75.
9 See Bom. Act VII. of 1866, s. 4.
10 A different rule was, before the passing of that Act, applied by the Courts in the Mofussil of the Bombay Presidency.
There is nothing in the law to prevent a Hindu husband or wife from being convicted of theft of the property of the other, but having regard to the authority which, when husband and wife are living together, would necessarily arise from the married state, it would generally be difficult to prove a dishonest intention. Where the wife is acting in concert with her paramour the intention would be more obvious, as she would not in that case be likely to suppose that she had authority from her husband.  

MAINTENANCE.

A wife is entitled to receive from her husband food, raiment, lodging, and provision for religious or other duties incident to the status in life which she occupies.

As to maintenance out of property belonging to a joint family of which her husband is a member, see post, pp. 242, 272; and as to her right to a share on partition in lieu of maintenance, see post, pp. 329–334. She has no right to be maintained by her own or by her husband’s relations, unless they have property belonging to her husband in their hands.

Except where she has been guilty of infidelity, a husband may be required to maintain his wife, even though she cannot compel him to restore her to other conjugal rights.

Although under the Hindu law the right of a wife to be maintained by her husband does not depend upon the possession of any property by him, a wife would gain nothing by a suit against a penniless husband, and could only force him to maintain her by the fruits of his labour by a proceeding under the Criminal Procedure Code.

In a case where the wife has left her husband, and is right to pledge husband’s credit.

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1 See Queen - Empress v. Butchi (1893), 17 Mad. 401; Anonymous (1870), 5 Mad. H. C. App. xxi; Act XLV. of 1860, s. 378, illus. (n) and (o).
6 Post, p. 77.
7 See “Manu,” chap. xi. para. 189.
9 Post, p. 98.
justified by law in so doing, she may be entitled to pledge his credit for necessaries supplied for her support, but he can always by prohibition prevent her from so doing.

Although the husband may abandon Hinduism, he cannot thereby destroy his wife’s right of maintenance.

The Court can award maintenance to a wife whose marriage has been dissolved under the provisions of the Native Converts Marriage Dissolution Act, 1866. Where the husband is excluded from inheritance on the ground of some disqualification, his wife is, if chaste, entitled to maintenance out of the property to which he would have succeeded if he had not been so disqualified. If her sons succeed to the inheritance she has the right of a mother.

A wife would ordinarily be entitled to maintenance in her husband’s house, but when he, without excuse, refuses to allow her to reside with him, or when she is justified in residing apart from him, she is entitled to separate maintenance.

Except where there is such refusal or justification, a wife cannot enforce an arrangement for separate maintenance.

A wife cannot release her right of maintenance, but

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1 See Visweswari Chetti v. Appaswami Chetti (1863), 1 Mad. H. C. 375, at p. 379; Pusi v. Mahadeo Prasad (1880), 3 All. 122; Act IX. of 1872, s. 187.
2 See (1868) 4 Mad. H. C. App. iii.
3 Act XXI. of 1866, s. 26.
4 Post, pp. 235, 236.
8 Ante, pp. 65, 66.
10 See Gobind Perahad (Lalla) v. Doulat Batti (1870), 6 B. L. R. App. 85; 14 W. R. C. R. 451. As to the circumstances which justify her in declining to live with her husband, see ante, p. 65.
12 Rajjukhy Dabeey (Sm.) v. Bhootnath Mookerjee (1900), 4 C. W. N. 488.
an arrangement fixing the amount of her maintenance will, if fair, be upheld.¹

The right of a Hindu female to maintenance is one peculiarly needing protection.²

A wife who without just cause deserts her husband,³ or Loss of right refuses to live with him,⁴ or is unchaste,⁵ loses her right of maintenance.

An unchaste wife loses her right of maintenance, even if it has been secured by a decree,⁶ or by an agreement.⁷

As to the right of an unchaste wife to what is called "starving maintenance," see post, p. 81.

Persons entitled to maintenance do not lose the right by a mere loss of caste.⁸

A widow who succeeds to no property as heir to her husband, is (whether she has or has not a son)⁹ entitled to maintenance out of the property in which her husband was interested as owner¹⁰ or coparcener¹¹ at the time of

² Ibid., at p. 107; Lakshman Ramchandra Joshi v. Satyabhamabai (1877), 2 Bom. 494, at p. 505; Cumminoney Dosses v. Raminath Byschuck (1843), 1 Fulton, 189, at p. 203.
³ Virassami Chetti v. Appaswami Chetti (1883), 1 Mad. H. C. 375.
⁷ See post, pp. 88, 90. The decree cannot be altered in execution. There must be a fresh suit. Rannalaksangi Bhagwatsangji (Maharana Shri) v. Kundan Kuar (Bai Shri) (1902), 26 Bom. 707.
⁸ See Naganna v. Virabhadra (1894), 17 Mad. 392.
⁹ Act XXI. of 1850. Queen v. Marimutti (1881), 4 Mad. 345.
¹¹ Brinda Chowdhrain v. Radhica Chowdhrain (1888), 11 Calc. 493, at p. 494; Narbadabai v. Mahadeo Narayan (1880), 5 Bom. 99, at p. 106; Bhagabati Dasi (Srimati) v. Kananlal Mitter (1872), 8 B. L. R. 225. As to her maintenance out of property which has been devested on adoption, see Dhurm Das Pande v. Shamasonsirdi Dibah (1843), 3 M. I. A. 229, at p. 243; 6 W. R. P. C. 45, at p. 45.
¹² Golob Kueneur (Mussunmat) v. Collector of Benares (1847), 4 M. I. A.
his death, or in which he would have been so interested if he had not been disabled from inheritance.¹

This applies also to impartible property.²

A widow is not entitled to maintenance out of property belonging to her husband which had become forfeited to Government on his conviction for rebellion,³ but her right would be unaffected by a confiscation on account of the rebellion of her sons, or other heirs of her husband.⁴

A mother is entitled to be maintained by her son, and after his death out of his property,⁵ but with that exception, and also with the exception that a daughter-in-law may enforce a right to maintenance against the property of her father-in-law after his death,⁶ a widow has no legal right of maintenance against any of the relatives of her husband, unless they are in possession of property


⁶ Post, p. 215.
which belonged to her husband, or in which he was a coparcener.\(^1\)

In other words, when the husband or his branch is separated from the other members of a family governed by the Mitakshara school of law, or where the husband was governed by the Bengal school of law, the right of the widow to maintenance out of property belonging exclusively to relations of her husband would be confined to the property of her husband's male ascendants in the male line, and of her own male descendants in the male line.

The sale of ancestral property which would have bound her husband if alive, does not give a right against a father-in-law or other coparcener for maintenance.\(^2\)

As to her rights to a share on a partition between her sons or grandsons, see post, pp. 329–334.

Although an heir or other person in possession of property may be liable to a widow for her maintenance, he is not liable to other persons on contracts made by her, even on account of her maintenance.\(^3\)

A widow is ordinarily entitled to reside in her husband's family dwelling-house.\(^4\)

She cannot be ousted,\(^5\) except by a purchaser who has bought under a decree which binds her, or to whom the property has been sold for the purpose of satisfying claims which are paramount to her right of maintenance,\(^6\) such as for debts incurred for the benefit of the

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1 Ganga Bai v. Sita Ram (1876), 1 All. 170, at pp. 174–177; Khetramani Dasi v. Kashinath Das (1888), 2 B. L. A. C. 15, at p. 55; S. C. Kashinath Das v. Khetturnooe Desose (1888), 9 W. R. C. R. 413, at p. 422; Ramabai v. Trimbak Ganesha Desai (1872), 9 Bom. H. C. 283; Visatlachi Ammal v. Annasamy Sastry (1870), 5 Mad. H. C. 150; Savitribai v. Luximbai (1878), 2 Bom. 573; Apaji Chintaman Dovdhar v. Gangabhai (1878), 2 Bom. 632; Kalu v. Kashibai (1882), 7 Bom. 127; Kanhu (Bai) v. Jadav (Bai) (1883), 8 Bom. 15; Daya (Bai) v. Natha Govindal (1885), 9 Bom. 279. See, however, Timmappa Bhat v. Parmeshwaramma (1886), 5 Bom. H. C. A. C. 130, where Gibbs, J., said (p. 132), "Every Hindu widow, whether her husband was divided from the family or not, is entitled, when in needy circumstances, to claim from her husband's relatives."

2 Ganga Bai v. Sita Ram (1876), 1 All. 170, at p. 177.


4 Venkatamall v. Andiyappa Chetti (1882), 6 Mad. 130; Devkore (Bai) v. Sasunkhram (1888), 13 Bom. 101.

5 Dalesukhran Mahasukhrum v. Lallubhai Motichand (1883), 7 Bom. 282; Venkatamall v. Andiyappa Chetti (1882), 6 Mad. 130; Gawri v. Chandramani (1876), 1 All. 262; Tulemond Singh v. Kukimia (1880), 3 All. 555. See Parvati v. Kissoning (1882), 6 Bom. 567.

6 Jayanti Subbiah v. Alamelu Mangamma (1902), 27 Mad. 45; Manilal v. Tara (Bai) (1892), 17 Bom. 398. See Mohun Geer v. Tota
family, or perhaps when another suitable residence is found for her. The right of residence of Hindu females is ordinarily referable to the family house, and a purchaser may be presumed to have notice of that fact.  

An adult widow is not bound to reside with the relatives of her husband, and she does not forfeit her right to property or maintenance merely on account of her residing with her own family, or leaving her husband's residence from any other cause than for unchaste or improper purposes.

Where the husband has expressly directed that his wife's maintenance should be contingent on her residing in the family residence with his relatives, she would only be entitled to maintenance if she resided...
in the house in which her husband required her to be maintained, or if she from just cause abstained from residing in that house.

Where the family property is so small that the family cannot bear the strain of supporting the widow in a separate lodging, though it might be able to provide her with food in the family house, a Court might well in the exercise of its discretion refuse separate maintenance, or, at any rate, in fixing the maintenance might decline to allow any amount on account of the expenses of a residence.

A widow by unchastity forfeits her right of maintenance, even if such maintenance has been secured by agreement or decree.

Where the agreement for maintenance is made by way of compromise of a claim for something more than maintenance, unchastity would not, in the absence of express provision, destroy the right to maintenance.

It is unsettled whether an unchaste wife or widow, on returning to a moral life, is entitled to what is called "starving maintenance," that is to say, just sufficient food to keep her alive. It is submitted that she is so entitled. In Honamma v. Timannabhat the Bombay High Court allowed the right, but it was disallowed by the same Court in Valu v. Ganga. In Nogamma v. Virabhadra the Madras High Court


Nagamma v. Virabhadra (1894), 17 Mad. 392.

Vishnu Skambho v. Manjumna (1884), 9 Bom. 108; Daula Kaur v. Megha Tewari (1893), 15 All. 382; see post, p. 88.

Bhup Singh v. Lachman Kunwar (1904), 26 All. 321.

(1877), 1 Bom. 559.

(1883), 7 Bom. 84.

(1894), 17 Mad. 392.
held that there was no such right. In an earlier case the same Court considered the question unsettled. In Romanath v. Rajonimoni Dasi the Bengal High Court was inclined to allow the right. Earlier authority is in favour of the right.

It is clear that she is not entitled even to “starving maintenance,” so long as she persists in a vicious life, but it has been held that where “starving maintenance” has been allotted to her by decree, subsequent unchastity does not destroy the right.

Mere loss of caste does not involve a loss of a right of maintenance.

Where there is property liable for the maintenance of a widow, it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto.

For example, they may show that she resides separately from her husband’s family for immoral purposes, or that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance, or that she has other means of maintenance.

A wife or widow cannot transfer her rights to maintenance.

A right to future maintenance or an interest in the income of immovable property assigned by way of maintenance cannot be attached in execution of a decree, but there is nothing to prevent the attachment of arrears of maintenance.

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1 Visalatchi Ammal v. Annasamy Sastry (1870), 5 Mad. H. C. 150.
3 Kandasami Pillai v. Muruganamal (1895), 19 Mad. 6; Romanath v. Rajonimoni Dasi (1890), 17 Cal. 674, at p. 679; Doulai Kuari v. Mehu Tivori (1893), 16 All. 382; Mustammal v. Kamakshy Ammal (1885), 2 Mad. H. C. 337.
4 Honamma v. Timannabhat (1877), 1 Bom. 559.
5 Act XXI. of 1850. See Queen v. Marimutta (1881), 4 Mad. 243.
6 See Saboo Sidick (Haji) v. Ayesho-
Unless their rights are secured by an arrangement or by decree, it is submitted that a Hindu can by a transfer for consideration dispose of his property so as to deprive his wife or such other person whom he is legally bound to maintain of any right of maintenance against the property so disposed of, except where such transfer is made with the intention of defeating the right, and the transferee has notice of such intention.

As to an alienation pending suit, see post, p. 92.

Provided he leaves sufficient property for the maintenance of his widow and those whom by law he is legally bound to support, a Hindu can dispose of his property by gift or will, so as to free it from claims to maintenance.

A Hindu cannot by disposing of the whole of his property by will deprive his widow of her right to be maintained out of such property.

A concubine, who has been kept by a Hindu up to the time of his death, is entitled to maintenance from concubines.

1 Kudola Prosad Chatterjee v. jagi kar Koir (1899), 27 Calc. 194. See post, p. 88.


3 Nabobadrai v. Maladeo Narayan (1880), 5 Bom. 99; Janna v. Machul Shuh (1879), 2 All. 315; Sorolah Dosses. v. Bhoobun Mohun Neogy (1888), 15 Cal. 292, at p. 306. As to his power to deprive her of a share on partition, see post, p. 332.

the property (whether ancestral or self-acquired) of the deceased paramour, whether she have children or not, but loses the right by incontinence.¹

A woman with whom a Hindu has only had casual intercourse,² or one with whom he has carried on an adulterous intrigue,³ acquires no such right.

A discarded concubine has no right of maintenance against her paramour, or his estate.⁴

The right to maintenance cannot be enforced where the wife, or widow, or other person claiming it ⁵ has full independent means of support.⁶ Where there is independent means of support, it must always be taken into account in fixing the amount of maintenance.⁷

Jewels and other property which are unproductive of income need not be taken into account.⁸

A previous provision of maintenance must be taken into account,⁹ even though it may have been expended.¹⁰

It has been held that a widow cannot enforce her right against

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³ Shikki v. Venkatarayman Gounden (1875), 8 Mad. H. C. 144.

⁴ Shikki v. Venkatarayman Gounden (1875), 8 Mad. H. C. 144. In Khemkor v. Umashankar Ranchhor (1873), 10 Bom. H. C. 381, ante, note 1, the connection was apparently an adulterous one.

⁵ Ramanaran v. Buchamma (1899), 23 Mad. 282.

⁶ I.e. property in possession capable of providing maintenance, not a mere right of action. See Gobkai v. Lakhardas Khimji (1890), 14 Bom. 490.


⁸ See Mahesh Partab Singh v. Dirigpal Singh (1899), 21 All. 232.


¹¹ See Savitribai v. Laximibai (1878), 2 Bom. 573.
property in which her husband was a coparcener, if the husband’s separate property be sufficient for her maintenance.¹ No reasons were given for this proposition.

The amount which a wife is entitled to receive for her maintenance would ordinarily depend upon the position in life of the husband, the extent of his property, and the claims upon him being taken into consideration.

Yajnavalkya² fixed one-third of the husband’s property as the proper amount, and this view has been acted upon in Bombay,³ but the Courts will not now consider themselves bound by any such fixed rule.⁴

The conduct of the claimant to maintenance,⁵ and, it is said,⁶ the Conduct condu& of the husband, may be taken into consideration.

In fixing the amount of maintenance for a widow, provision must be made for her reasonable wants, namely, for the performance of charities and the discharge of religious obligations, in addition to reasonable provision for her food, raiment, and lodging, having regard to the amount of the estate which is liable for her maintenance, her position in life, and the circumstances of the family.⁷

The proper expenses incident to the death and funeral of her husband,³ and the expenses of such religious

¹ See Shib Duyee v. Doroya Pershad (1872), 4 N. W. P. 63, at p. 72.
⁵ See Juttendromohan Tagore v. Ganendromohan Tagore (1873), 1 A. Sup. Vol. 47, at p. 82; 9 B. L. R. 377, at p. 413; 18 W. R. C. R. 359, at p. 373.
⁷ Nitobikshoree Dosse v. Jogendro Nath Mullick (1873), 5 I. A. 55, at pp. 56, 57; Devi Persad v. Gunwantri Koer (1895), 22 Cal. 410, at p. 418; Baisn v. Bup Singh (1890), 12 All. 558; Hurry Mohun Roy v. Nyantvra (Sreemutty) (1876), 25 W. R. C. R. 474; Dael Kunwar v. Ambika Partap Singh (1903), 25 All. 266, at pp. 269, 270; Karoanamoyee Dabee (Sim.) v. Administrator-General of Bengal (1890), 9 C. W. N. 851. See Narhar Singh v. Dirgnath Kuwar (1879), 2 All. 407, where it was held that the fact that the widow had had a son made no difference in the amount to which she was entitled; Comulmoney Dosse v. Rammanath Bysack (1842), 1 Fulton, 189; Oojul Munnes Dass v. Jygapal Chowdhree, Ben. S. D. A., 1846, p. 491; Bheeloo (Mussummant) v. Phool Chund (1824), 3 Ben. Sel. R. 225, new edition, 298. ⁸ See Dael Kunwar v. Ambika Partap Singh (1903), 25 All. 288.
ceremonies as by custom it be proper for her to perform,¹ should be provided for.

The following has been held² to be the principle upon which maintenance is to be allotted to a widow:—

"Where a widow has asked for separate maintenance, you look first at the mode of life of the family during her husband's lifetime and you try to find out what amount will be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime. Then you see what the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate."

There is no general rule as to the amount of maintenance to be allotted to the person entitled thereto. The amount of the property available, the claims of the different persons entitled to maintenance thereout, and the reasonable wants of the claimant for the support of himself and his family in accordance with the position of the family must all be taken into consideration.³

"The amount of the property . . . is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position and conduct of the claimant . . . may reduce the maintenance.⁴

The necessities of the claimant are also not the sole criterion.⁵

The life of austerity in which, according to the Shasters, a Hindu widow is required to live, is not to be taken into consideration; but, on the other hand, a widow is not necessarily entitled to be maintained in such a way that she can live in the same style as she lived in when her husband was alive.⁶

Any saving that she may make by living with her own family is not to be taken into account.⁷

¹ See Sundarji Damji v. Dohisai (1904), 29 Bom. 316.
² Karoonamoyee Dobase (Sm.) v. Administrator-General of Bengal (1889), 9 C. W. N. 651, at pp. 652, 653.
³ See Mahesh Partab Singh v. Dirgyal Singh (1899), 21 All. 322.
⁸ Hury Mohun Roy v. Nyantara
A widow is not entitled to maintenance in excess of the annual proceeds of the share to which her husband would have been entitled on partition if he were living.\(^1\)

If the produce of such share be insufficient for her support, it might be necessary to sell the share, and support her out of the proceeds.

**Her funeral expenses**\(^2\) are also payable out of the estate chargeable with her maintenance.

The maintenance of a wife or widow is postponed to the payment of the debts of the husband, or of the family, as the case may be,

The right to maintenance does not operate on property which has been sold to pay the debts of the husband or of the family, even if the purchaser had notice of the claim of the widow.\(^3\)

It is not settled whatever debts take precedence of maintenance which is charged upon property by a decree or agreement. In two Allahabad cases,\(^4\) in which the question did not arise, the Court held that debts had such precedence. It is submitted that maintenance charged by a decree is on the same footing as a mortgage, and takes precedence of subsequent charges, and of all simple contract debts created by or entered into by the person against whom the decree is made, or his representatives. Maintenance charged by an agreement charged on property.

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would also, it is submitted, when there is no fraud upon creditors, take precedence of the debts of the person entering into the agreement, or his representative, when the agreement complies with the provisions of the Transfer of Property Act. The maintenance charged by a will would not take precedence of the debts of the testator.

Maintenance not a charge.

The maintenance of a wife or widow is in one sense a charge upon the property of the husband, whether ancestral or self-acquired, but it is not a charge in the fullest sense of the term, because it does not necessarily bind any part of the property in the hands of a purchaser. It becomes a complete charge if it is fixed and charged upon such property, or a portion thereof, by a decree or by agreement, or by a will.

Where a charge for maintenance has been imposed upon family property by a decree in a suit against the representative of the family, as such, a member of the family who was not a party to the suit

1 Act IV. of 1882, s. 59. See definition of "mortgage," s. 58.
5 See Beharilalji Bhagatprasadji (Shri) v. Rajbai (Bai) (1898), 23 Bom. 542.
cannot dispute the decree. It is otherwise in the case of a decree against the father, or other member of the family personally. A mere personal decree for maintenance does not create a charge.

By virtue of her right to maintenance a widow is entitled to contest Right to the factum of her husband’s will, or to dispute a contention that the will property passed by it, but she does not thereby acquire a right to dispute the will of her son.

The question as to whether a bonâ fide purchaser for valuable consideration is bound by a right of maintenance out of the property purchased by him has been the subject of considerable discussion in the Courts.

The 39th section of the Transfer of Property Act is as follows:—

"Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Illustration.

A, a Hindu, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband’s property; and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith,
without notice of the agreement. B is dispossessed of Sultānpur. She has no claim on the villages transferred to C.

The first portion of this section refers only to transfers made with the intention of defeating the right, but the latter portion, taken with the illustration, shows that it extends to other cases.

The following propositions seem to arise from the Act, and from the decisions:—

1. A purchaser would be bound by a decree charging the property with the maintenance, except where the purchase had been made in execution of a decree, which bound the widow, or which enforced a claim, which under the Hindu law takes precedence of a claim to maintenance.

"When the maintenance has been expressly charged on the purchased property, it will be liable, although it be shown that there is property in the hands of the heirs sufficient to meet the claim."

2. A purchaser would be bound by an agreement for maintenance which satisfies the conditions required for a mortgage under the Transfer of Property Act, or which had been followed by possession.

He would also, it is submitted, be bound by an agreement, which did not satisfy such conditions, but which was enforceable against the transferee, if he had notice of such agreement.

3. When the maintenance is not charged on the property by a decree, or by an agreement equivalent to a mortgage, the purchaser is bound by the right to maintenance if the transfer be made with the intention of defeating the right, and he has notice of such intention.

1 See Kuloda Prosad Chatterjee v. Jageshwar Koer (1899), 27 Calc. 194; Lakshman Ramchandra Joshi v. Satyabhamabai (1877), 2 Bom. 494, at p. 524.
2 Shamlal v. Banna (1882), 4 All. 296, at p. 300. Such, perhaps, as a debt incurred before the creation of the charge by the person out of whose property the maintenance is payable.
3 Shamlal v. Banna (1889), 4 All. 296, at p. 300.
4 IV. of 1882, ss. 58, 59, ante, p. 88, note 1.
5 See post, p. 91.
4. When the maintenance is not so charged, and there is no such intention, or if there be such intention, the purchaser has no notice thereof, a bonâ fide purchaser is not affected by the claim, whether he has notice thereof or not.  

In earlier cases it was held that a bonâ fide purchaser without notice was not affected by the claim, but that a purchaser with notice of the claim or, at any rate, with notice of the existence of a claim likely to be unjustly impaired by the proposed transaction, a notice that the right cannot be satisfied without recourse to the property purchased, was subject to it.

There is also authority that the widow must exhaust her remedies against the heir, or, at any rate, prove that there is no property of the deceased in the hands of the heir before recovering against the purchaser. The inconvenience of this doctrine has been pointed out by the Bombay High Court.

The Hindu law places on the same footing all the so-called charges

1. I.e., the property must be bought upon a rational and honest opinion that the sale was one which could be affected without any furtherance of wrong; Lakshman Ramchandra Joshi v. Satyabhamabai (1877), 2 Bom. 494, at p. 524.

2. Ram Kuswar v. Ram Dair (1900), 22 All. 392; Bhargup State v. Gopal Dair (1901), 24 All. 160. See Shamal v. Banna (1889), 4 All. 296; Soorja Koer v. Nath Bukshi Singh (1884), 11 Cal. 102. There are observations in Amrita Lal Mittler v. Manick Lal Mullick (1900), 27 Cal. 551, 4 C. W. N. 764, to the contrary effect, but that was a case of a transfer of an undivided share of the whole property, see post, p. 297–301.

3. See Bhagaboti Dosi (Simati) v. Konalal Mitter (1872), 8 B. L. R. 225; 17 W. R. C. R. 435, note. Adhiranee Narain Cooomy v. Shona Malee Pat Mahadoi (1878), 1 Cal. 365, and cases therein cited; Ruchawa v. Shivayogip (1883), 18 Bom. 679; Lakshman Ramchandra v. Saraspatibai (1875), 12 Bom. H. C. 89; Goluck Chander Bose (Baboo) v. Ohilla Daya (Ranees) (1876), 25 W. R. C. R. 100; Heera Lall v. Kousillah (Musunat) (1887), 2 Agra, 42. (In the last case the transfer was in terms subject to a specified sum for the maintenance of the widow.) Any fact which would put the purchaser upon inquiry would amount to notice. Thus possession by the widow of the family dwelling-house or of other property may amount to notice. See Ramanadan v. Rangamal (1888), 12 Mad. 280, at p. 272; Imam v. Balamma (1889), 12 Mad. 334.


on the inheritance,\(^1\) as debts,\(^2\) expenses of initiation of sons,\(^3\) and marriage of daughters.\(^4\) It could scarcely be that a \textit{bona fide} purchaser, even with notice of the existence of a claim in respect of any one of these so-called charges, should bear the burden of their payment.\(^5\) In a case where the money had been raised by purchase for the purpose of paying any of these charges it would follow that the purchaser would be under no liability.\(^6\) Would it be reasonable in any case, except where the transaction was intended to the knowledge of the purchaser to be a fraud upon the charge, to require a purchaser from an absolute owner to inquire as to the purposes for which the money was being raised? Moreover, the text gives a charge on the inheritance to wives as to widows, but a wife cannot enforce her maintenance against a purchaser from her husband.\(^7\)

“If there is an ample estate out of which to provide for the widow, so that she may get her claim fixed and secured, or if, knowing of the proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the coparcener in satisfaction of her claim; if she lives apart, and the estate is small and insufficient, it is the vendee’s duty before purchasing to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor.”\(^8\)

A right of maintenance is not affected by a transfer made during the pendency of a suit for maintenance,\(^9\)

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\(^1\) Strange’s “Hindu Law,” vol. i, chap. viii. In \textit{Bhartpur State v. Gopal Dei} (1901), 24 All. 160, at p. 168, the Court said, “In fact, a widow’s right to receive maintenance is one of an indefinite character, which, unless made a charge when the property, by agreement or by decree of the Court, is only enforceable like any other liability in respect of which no charge exists.”

\(^2\) “Mitakshara,” chap. ii. s. 11, para. 24; “Vyavahara Mayukha,” chap. v. s. 4, paras. 12, 14, 15, 17, 19.

\(^3\) “Vyavahara Mayukha,” chap. iv. s. 4, paras. 38-40; “Mitakshara,” chap. i. s. 7, paras. 3-6; Colebrooke’s “Digest,” bk. v. paras. cxxii., cxxv., cxxvi.

\(^4\) Colebrooke’s “Digest,” bk. v. para. cxxiv.

\(^5\) A creditor cannot follow the assets of an estate into the hands of a \textit{bona fide} purchaser. See \textit{Lakshman Ramchandra v. Sarasvati} (1875), 12 Bom. H. C. 69, at p. 78, and cases there cited.


\(^7\) See \textit{Lakshman Ramchandra v. Sarasvati} (1875), 12 Bom. H. C. 69, at p. 78. \textit{Ante}, p. 83.

\(^8\) \textit{Lakshman Ramchandra Joshi v. Satyabhanabai} (1877), 2 Bom. 494, at p. 517.

unless such transfer be effected for the purpose of paying off a debt, which has priority over the claim for maintenance. Where the suit for maintenance does not seek to charge specific property, the doctrine of *lis pendens* does not apply. An heir or coparcener, or devisee, or a purchaser with notice of her claim and possession, cannot ousted a widow from property which is liable for her maintenance, without securing her maintenance.

The possession would, if submitted, be in this case evidence of an arrangement charging the property. A widow may enforce her right of maintenance against the proceeds of the property in the hands of the heir. A right to maintenance cannot be defeated by a gift or devise of all the property, which is subject to the right.

As to the allotment of a share to a mother or grandmother in lieu of her maintenance in case of partition between her sons or grandsons, see *post*, pp. 330 *et seq.*

A widow may, for the purpose of securing her maintenance, sue to compel the persons in possession of the estate, out of which the maintenance is payable, to give security for the due payment of her maintenance, or to have it made a charge upon the estate, and may, in a proper case, obtain an injunction to restrain them from wasting or alienating the estate. If she does not wish

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8. *Gifft or devise of property*.
9. *Beoka v. Mothina* (1900), 23 All. 86. See ante, p. 83.
for such charge, she may sue for maintenance already due,¹ or for a declaration that it is payable, or she may combine a claim for arrears with a prayer for a charge or for security.

A decree for arrears is not of right, but is in the discretion of the Court.² Where the person claiming maintenance has been supported, without having incurred any expense or liability, the Court might well exercise its discretion by refusing to grant arrears.

A suit relating to maintenance cannot be brought in a Provincial Small Cause Court.³ A suit for maintenance payable out of immovable property cannot be brought in a Presidency Small Cause Court,⁴ but a suit on a bond or other personal contract for maintenance can be brought in such court.⁵

The Court should discourage a multiplicity of suits for the maintenance of one person, and should, if possible, where necessary, make a decree for future maintenance.⁶

The widow is not entitled to sue for possession of the property.⁷

A wife, who is entitled to separate maintenance, has apparently similar remedies.

When maintenance is fixed by an agreement, which is equivalent to a mortgage, it may be enforced by a suit under the Transfer of Property Act.⁸

The widow is entitled to sue all or any of the heirs in possession of property subject to her maintenance.⁹

When the right of maintenance has been made a charge by agreement

² Raghobans Kunwar v. Bhagwant Kunwar (1899), 21 All. 183. See cases, post, note 3.
⁴ Act XV. of 1882, s. 19 (9).
⁵ Pokala v. Murugappa (1886), 10 Mad. 114.
⁷ Omvrao Singh v. Man Kunwar (Must.) (1887), 2 Agra, 136. As to her right to remain in possession, see ante, p. 93.
⁸ IV. of 1882, ss. 58, 88, 100.
or decree the claimant may recover the amount from any person holding any portion of the property liable. The person paying it would have a right of contribution against other persons liable therefore.

The right to sue for maintenance commences when there has been a wrongful withholding of payment of the proper amount.

This withholding may be proved otherwise than by a claim and refusal. Part non-payment is prima facie evidence of such withholding.

The omission to claim maintenance apart from the effect of the law of liability will not prejudice the claimant when he is obliged from his wants or exigencies to demand it.

A suit for arrears of maintenance must be brought within twelve years from the time when the arrears are payable.

Thus past maintenance for twelve years, and no more, can be recovered by suit.

The right to maintenance is one accruing from time to time according to the wants and exigencies of the person entitled to be maintained.

A suit for a declaration of a right to maintenance must be brought within twelve years from the time when the right is denied.

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4. Yarlagadda Mallikarjuna Prasad Naidu (Baja) v. Yarlagadda Durga Prasada Nayudu (Baja) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.


6. Act XV. of 1877, Sch. II., art. 128.


Apparently when the right has been denied, and twelve years has elapsed from such denial, the right to maintenance is barred.1

Where the parties do not agree, it is for the Court to fix the rate of maintenance payable in future,2 and it may, by its decree, award arrears of maintenance.3

As to the principles upon which maintenance should be fixed, see ante, p. 86.

The Judicial Committee will not interfere with the exercise of the discretion by the Courts in India in fixing maintenance, except where strong grounds exist.4

The proper course for a Court in ordering maintenance is to make it a charge upon specific property,5 or to set apart a sum of money sufficient to yield the required allowance, and, if necessary, sell a part of the estate for that purpose.6 In some cases the Court might be satisfied with security given by the reversioners.

The allowance fixed by the Court for maintenance should cover all necessary expenses for maintenance and house rent.7

It is better to fix an annual sum, and not a share of the income of the estate.8

It has also been held that “in decrees where maintenance is awarded,

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1 Chhaganlal v. Bapubhai (1880), 5 Bom. 68. See Jiri v. Ramji (1879), 3 Bom. 207.
8 Jhunna v. Ramnarup (1880), 2 All. 777.
Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require. Such a course would, it is submitted, invite frequent litigation.

The amount of maintenance fixed by a decree may be altered by a decree in a subsequent suit, where the circumstances render an alteration necessary.

Such modification cannot be made in a proceeding in execution of a decree, unless the terms of the decree are such as to permit of such modification.

Maintenance may be cancelled if the wife or widow has become unchaste, or where, in the case of a wife, the circumstances have so changed that she should be called upon to return to her husband's house. The rate of maintenance may be diminished when there has been such a change in the circumstances of the wife or widow, or of the husband, or person liable for the maintenance, such change not arising from any fault of his own. Except where provision is made in the decree for that purpose, an order for maintenance cannot be cancelled or diminished in proceedings in execution.

The rate may be increased if the cost of food has become greater or the profits of the estate of the husband have materially increased.

Where the circumstances have changed, the Court can alter the amount of maintenance fixed by an arrangement.

Where the alteration in circumstances had arisen from “the act of

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2 Rannalsangji Bhagvatangji (Maharana Shri) v. Kundankuwur (Bai Shri) (1902), 26 Bom. 707. See Gopikobo v. Dattatraya (1900), 24 Bom. 386; Ramkalles Koer v. Court of Wards (1879), 18 W. R. C. R. 474.
3 Kandasami Pillai v. Murugammal (1895), 19 Mad. 6; Vishnu Shambhog v. Manjamma (1884), 9 Bom. 108, at p. 110. See ante, p. 81.

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2 In Ramkalles Koer v. Court of Wards (1879), 18 W. R. C. R. 474, it was held that the proper course is to apply for a review of judgment, but it is submitted that the provisions of the Civil Procedure Code, 1908, s. 114; Sched. I, order xvi, rule 1 (Act XIV. of 1882, s. 623), do not permit such application.

4 Rannalsangji Bhagvatangji (Maharana Shri) v. Kundankuwur (Bai Shri) (1902), 26 Bom. 307.


God," and not from the fault of the owner, maintenance chargeable on an estate by a will can apparently be reduced.¹

Where a decree directs the payment of future maintenance from time to time, it can be enforced by execution,² and for the purposes of limitation the decree is as to each year's annuity to be regarded as speaking on the day upon which from that year it became operative.³

A decree which merely declares a right of maintenance is not capable of execution.⁴

A decree declaring a right of maintenance out of property which had been transferred, cannot be executed personally against the transferees after the property had passed from them.⁵

A Hindu wife can also recover maintenance from her husband under the provisions of Chap. XXXVI. of the Criminal Procedure Code.⁶ The magistrate's order does not interfere with the jurisdiction of a Civil Court.⁷

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¹ See Gres Chund Roy (Maharajah) v. Sambhoo Chund Roy (1835), 5 W. R. P. G. 98.
² Ashutosh Banerjee v. Lukhimoni Debta (1891), 19 Calc. 139.
⁴ Venkamma v. Arikamma (1889), 12 Mad. 183.
⁵ Dharam Chand v. Janshi (1883), 5 All. 389.
⁶ Act V. of 1898.
⁷ Doraie Malinga Naiika v. Marati Kaveri (1907), 30 Mad. 400. A suit will not lie to restrain such proceedings. Ibid.
CHAPTER III.

RELATIONSHIP OF PARENT AND CHILD, AND ADOPTION.

The only children now recognized by the general Hindu law as legitimate, are those who are born during the existence of a lawful marriage between their parents, and also sons who have been adopted according to the dattaka form.

"The legal presumption in favour of a child born in his father's house of a mother lodged and apparently treated as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made, and the opposing case should be put to strict proof."

Children born out of wedlock, although illegitimate, have rights of maintenance, and, if they are not members of one of the three regenerate classes, then the illegitimate sons possess rights of inheritance.

In the country subject to the Mithila school of law, a son may be adopted according to the Kritima form.

There is nothing to prevent a Hindu from adopting a Palaka putra.

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4 Post, p. 213.

5 Post, pp. 159-161.
son, or even a daughter, in the sense that a son can be adopted by an Englishman, i.e. by treating him as a son, and giving or devising property to him, but in that case no rights of inheritance, or of performing religious ceremonies are created by the so-called adoption. The relationship is purely contractual, and is determinable at the option of either of the contracting parties. A son so taken is called a palaka putra.¹

In ancient times the Hindu law recognized the following descriptions of sons² as legitimate sons, viz.:—
1. Aurasa, or legitimate son by a wife.
2. Ksetraja, or son born of a wife duly appointed to raise issue for a husband on failure of any begotten by him.³ This was the son begotten under the practice of niyoga,⁴ by which a relative was appointed to raise up issue by the wife of a childless husband, or one deceased without leaving children.⁵
3. Putrika putra, or son of appointed daughter.⁶ In ancient times a man could appoint his daughter to raise up issue to him.
4. Kamina, or son of an unmarried woman.
5. Gudhaja, or secretly born son of an adulterous wife.
6. Paunarbhava, or son of a twice married woman. This included not only the son of a woman who had gone through the ceremony of marriage, but also the son of a woman who had connection with a man.
7. Sahodha, or son of a pregnant bride.
8. Nishada,⁷ or son of a member of one of the regenerate castes by a Sudra woman.⁸

² The order in which the several kinds of sons are placed by various authors varies, but necessarily all concur in giving preference to the aurasa son.
³ Wilson’s “Glossary,” p. 298.
⁴ Lit. appointment, a delegated duty or office, Wilson’s “Glossary,” p. 390.
⁵ Wilson’s “Glossary,” p. 380. This class of son apparently existed in certain places, such as Orissa, by virtue of a local custom. Banerjee’s “Law of Marriage,” 2nd ed., p. 171; note to Sutputas (Mâsunumâmum) v. Indranund Jha (1818), 2 Ben. Sel. R. 173 (2nd ed., 221); Macnaghten’s “Hindu Law,” vol. i. p. 102. This custom seems to be now obsolete, see Sarbadikhari’s “Hindu Law of Inheritance,” p. 528.
⁷ Lit. outcast.
⁸ “Saudra is the son of a twice-born by a Sudra wife: the names Nishada and Parasava are applied to
9. Dattaka, or son given in adoption.

10. Kriitima, or son made, i.e., where a man without parents accepts a proposal that he should be taken in adoption.

11. Kritaka, or son bought.¹

12. Apaviddha, or son forsaken by his parents, and taken in adoption.

13. Swayandatta, or son self-given. The only difference between this son and the Kriitima son seems to be that in the former case the offer comes from the adoptee, and in the latter case it comes from the adopter.

Of these the only sons that are now recognized by Hindu law are the Aurasa son, and the Dattaka son. According to the Mithila school a Kriitima son can be taken in adoption.² Adoption in this form is based upon recent works,³ and is not referable to the ancient practice of taking Kriitima sons.

Adoption According to the Dattaka Form.

An adopted son is a person capable of being adopted,⁴ Definition of adoption who is given by a person competent to give,⁵ to a person competent to receive in adoption,⁶ and who has been so given and received in the way prescribed by Hindu law.⁷

The adoption of a son is a matter of religious obligation to a childless Necessity for Hindu, who has no prospect of procreating male issue,⁸ although it may generally happen that adoptions originate “in the ordinary human desire for perpetuation of family properties and names.”⁹ It is said that originally the motives for adoption were secular, and that subsequently religious and secular motives were mixed.¹⁰

such sons of a Kshatriya and a Brahmana respectively; by some to the latter.” Sircar’s “Law of Adoption,” p. 23.

² Post, p. 159.
³ Post, p. 159.
⁴ Post, pp. 158-149.
⁵ Post, pp. 158-148.
⁶ Post, pp. 158 et seq.
⁷ Post, pp. 150-156.


⁹ See Guralingaswami (Sri Balus) v. Ramalakshamamma (Sri Balusu).


Jains are governed in matters of adoption by the ordinary rules of Hindu law. The *Dattaka* son is the only adopted son recognized by them, but as they do not accept the Hindu doctrine as to the spiritual efficacy of sons, they are influenced only by secular considerations in adopting.

The motive for the adoption does not affect its validity.

The fact that an adoption is made for the purpose of defeating an alienation will not affect its validity.

As to the motives of a widow for an adoption, see *post*, p. 119.

A family, or caste, custom prohibiting adoption is valid.

The burden of proving such custom lies on the person alleging its existence.

An agreement not to adopt would not apparently invalidate an adoption made in breach of it, but so far as property the subject of such agreement is concerned, it might bind the parties to it. It would not, under any circumstances, bind any one except the actual parties to it.

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2 *See Lakshmi Chand v. Gatto Bai* (1886), 8 All. 319, at p. 321.
3 *See Bhagwandas Tejmal v. Rajmal* (1873), 10 Bom. H. C. 241, at p. 243.
4 *See Rambhat v. Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 635.
7 *See Vandranan Jekisan (Patel) v. Mandil Chunilal (Patel)* (1891), 16 Bom. 470; *Verobhai Ajubhai v. Hiroba (Bai)* (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716.
8 *Verobhai Ajubhai v. Hiroba (Bai)* (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716.
9 *Surya Rao Bahadur (Sri Raja Rao Venkata Mahapatra) v. Gangadhara Rama Rao Bahadur (Sri Raja Rao Venkata Mahapatra)* (1886), 13 I. A. 97; 9 Mad. 499. Although this case was governed by the Mitakshara law, and under that law the son of one of the parties had acquired a right to the property by birth, the reason given for the decision that the effect of the terms of the arrangement would be to alter the law of descent would apply equally to a case governed by the Bengal school. See also *Rajender Dutt v. Sham Chund Mitter* (1880), 6 Calc. 106.
So far as self-acquired property is concerned, or in cases to which the Bengal school of law is applicable, a father might by a valid gift over, in case of a contemplated adoption by his son, put pressure upon such son to prevent or control his adopting, but the adoption would not be invalidated thereby.¹

The fact that an adoption was made in breach of an agreement to breach of adopt another boy, which was not carried out, does not render the agreement. adoption invalid.²

A girl cannot be given or taken in adoption.³ Adoption of girl.

Among the Nambudri Brahmans on the west coast of India, there is force a practice of giving a daughter in what is called sarvastravād- nam marriage, in order that the son born of her should be affiliated as the son of the father giving her.⁴ He does not inherit in the family of his father so long as other sons exist.⁵

As to the adoption of daughters by dancing-girls, see post, p. 165.

WHO MAY TAKE IN ADOPTION.

A male Hindu who has not a legitimate ⁶ or validly ⁷ who may adopted ⁸ son, son’s son, or son’s son’s son in existence

⁴ See Vaidyana v. Secretary of State (1887), 11 Mad. 157, at pp. 162, 163.
⁵ Kumaran v. Narayananan (1886), 9 Mad. 260.
⁷ An invalid adoption cannot influence the validity of a subsequent adoption, which would otherwise be legal, G. C. Sircar’s “Law of Adoption,” 189.
and capable of inheriting, may take a son in adoption, unless he be mentally incapable of understanding the nature of the act.¹

The existence of any other descendant is not a bar to an adoption.²

It is immaterial whether the adoptive father be hopeless of issue or not. The pregnancy of his wife does not, whether he be, or be not, ignorant of it, prevent a Hindu from adopting,³ and the adoption is not invalidated by the child of which the wife of the adopter is pregnant at the time of the adoption turning out to be a male.⁴

If the son be permanently incapable of performing religious rites by reason of congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, insanity, idiocy, or from any other reason, which involves an incapacity to inherit,⁵ he may be treated for this purpose as non-existent.⁶

There is authority that when a son absolutely renounces the world and all property, and enters a religious order, as by becoming a sannyasi, ascetic, or fakir, his existence is not an impediment to an adoption by his father.⁷

It has been suggested⁸ that this question may be affected by Act XXI. of 1850, but it is submitted that there is not in this case a question of a “forfeiture of rights or property,” or impairing or affecting any right of inheritance “by reason of his renouncing, or having been

² W. Macnaghten’s “Hindu Law,” vol. i. p. 66, note.
³ Nagabhushanam v. Sekhannaguru (1881), 3 Mad. 180; Daulat Ram v. Ram Lal (1907), 29 All. 310.
⁴ Hanmant Ramchandra v. Bhimacharya (1887), 12 Bom. 105. As to the effect of the birth of a son after an adoption, see post, p. 189.
⁵ Post, pp. 235, 236.
⁶ Strange’s “Hindu Law,” vol. i., p. 77; Sircar’s “Law of Adoption,” p. 196; Sutherland’s “Synopsis,” p. 212; W. Macnaghten’s “Hindu Law,” vol. i. p. 66, note; Rattigan on Adoption, p. 10.
⁸ Sircar’s “Law of Adoption, p. 196.
excluded from the communion of any religion, or being deprived of caste."

Where a son, natural or adopted, became an outcast, or renounces the Hindu religion, the Hindu law permitted an adoption, but the effect of Act XXI. of 1850 is to prevent the natural or previously adopted son from being ousted from any of his legal rights.  

When the question as to the validity of such an adoption shall arise, it may be that "the Courts would refuse to recognize an adoption which could confer no civil rights." Except in the case of an after-born son, to which different considerations apply, the co-existence of a natural son possessing civil rights as such, and an adopted son, does not seem to be in accordance with Hindu law as laid down by the Courts. The difficulty in adjusting the respective rights would lead to great inconvenience, but, on the other hand, it seems hard upon a father that he should be unable to regain the religious benefits, which are lost to him by the conversion, or degradation of his son.

Mr. Mayne says "that the question might become of importance on the death of the natural son without issue," but the subsequent death of the son would not render the adoption valid.

It is submitted that where a son has disappeared, and has not been heard of for many years, an adoption, if made, is not valid unless, at the time when the adoption is in question, it be proved that such son was dead at the date of the adoption.

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2 As, for instance, where he is a coparcener in a joint family governed by the Mitakshara law. Also he would not lose a right to succeed to collaterals, even if his father had disinherited him.


5 Post, p. 106.

Death of son. An adoption, which is invalid on account of there being a living son, is not rendered valid by the death of that son.\(^1\)

Consent of son. It has not been decided whether the assent of a natural or adopted son to a subsequent adoption can validate an adoption during the lifetime of such son,\(^2\) but it is clear that it would not do so unless such assent be completely free, and has been given with a full knowledge of the circumstances.\(^3\)

It is submitted that consent to the adoption would not prevent a son from disputing it,\(^4\) except where his conduct had amounted to an estoppel.\(^5\) Otherwise it would be difficult to adjust the respective rights of the legitimate and adopted son,\(^6\) except where an arrangement had been arrived at with regard to them. Sastrī G. C. Sircar\(^7\) treats the judgment in *Rungama v. Aitchama*\(^8\) as deciding that the consent of the son could render the adoption valid; but it has, it is submitted, no such effect.

The fact that a man is a bachelor\(^9\) or a widower\(^10\) does not prevent him from taking a son in adoption.

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\(^1\) *Basoo Camummad v. Basoo Chinnna Venkatara* Mad. S. D. A. 1856, p. 20; *Norton L. C.* vol. i. p. 78; *Vera-prashya v. Sunituraja* Mad. S. D. A. 1860, p. 168; *Norton L. C.* vol. i. p. 78. This is disputed in Sircar’s “Law of Adoption,” p. 190, but it seems clear that an adoption, which was, at the time it was made, invalid, cannot be rendered valid by a subsequent event, see post, p. 157.

\(^2\) “Dattaka Mimanṣa,” s. 1, para. 12, in explanation of the Vedik story of Sukanaspha Devarata’s adoption by Visvanitra, who was already the father of a hundred sons, and whose adoption of another son was ratified by the fifty younger sons. “Vasistha,” xvii. 33-35. Sircar’s “Law of Adoption,” pp. 189, 181.

\(^3\) See *Rungama v. Aitchama* (1846), 4 *M. I. A.* 1, at pp. 102, 103; 7 *W. R.* (P. C.) 51, at pp. 61, 62; *Sudanund Mohapatra v. Ponomalle* (1863), *Marsh.* 317, at pp. 321, 322; *2 Hay.* 205.

\(^4\) See post, p. 157.

\(^5\) Post, p. 174.

\(^6\) See post, p. 158.


\(^8\) (1846), 4 *M. I. A.* 1, at p. 103; 7 *W. R.* (P. C.) 57, at p. 62.


Provided that he has attained the age of discretion, a Adoption by minor is not incapacitated, as such, from taking a son in adoption, or giving permission to adopt.

There does not appear to be any case in the Reports, in which there has been an adoption by a Hindu, who has not attained the age of majority according to Hindu law.

The cases on the subject deal with the capacity to give permission to adopt, but the reasons given in those cases would apply as much to the capacity to receive in adoption, as to the capacity to give permission to adopt. These cases refer to the "age of discretion," which apparently means the age at which a Hindu is competent to perform religious ceremonies, but that age does not appear to be fixed.

Of the cases which are cited as authorities for the above proposition, in *Jumooona Dassya Chowdhriani v. Bamasooderai Dassya Chowdhriani*, the person giving the power had attained the age of majority according to the law to which he was subject; in *Patel Vandravan Jekison v. Patel Manital Chnital*, it was held that permission could be given by a person who was within two months of arriving at the age of majority; and in *Rajendro Narain Lahoree v. Saroda Soodnurse Debia*, the report does not specify the age, but the boy had apparently not completed his fifteenth year, as he was described as a minor.

In considering this question it may be remembered that a minor governed by the Mitakshara school would by adoption be acting to his temporal disadvantage, as he would thereby introduce a new coparcener into the family.

It may be that the age depends upon individual capacity, but such a conclusion would, if possible, be avoided, as it would make the title of the adopted son depend upon an uncertain foundation.

Sastri G. C. Sircar argues that an adoption by a minor is inconsistent with Hindu ideas. He points out that no case of adoption by a minor has as yet arisen. It is very unlikely that the question as to an adoption by a minor would arise. His capacity to give a power

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1 The Indian Majority Act (IX. of 1875) does not affect the capacity to adopt, s. 2.
5 This case was governed by the Bengal School of Law.
6 (1890), 15 Bom. 565, at p. 576.
7 (1871), 15 W. R. C. R. 548.
10 P. 212.
of adoption may stand on a different footing, as such power would be for his spiritual benefit, and may become necessary when he is on his deathbed.

In a case governed by the Maharsahtra school there seems no reason why the authority of the husband should not be implied, whatever was his age at the time of his death,\(^1\) and in a case governed by the Dravida school the authority of the saptāndas to authorize an adoption would not apparently be affected by the age of the husband at the time of his death.

The Hindu Wills Act\(^3\) provides rules for the execution of wills to which the Act is applicable, and in such cases prevents a minor from disposing of his property by will,\(^2\) but as section 3 of the Act declares that nothing therein contained shall affect any law of adoption, the question as to the capacity of a minor to give authority to adopt is apparently untouched by that Act.\(^4\)

It seems now to be impossible for a minor to execute a valid non-testamentary document conferring an authority to adopt, as a registering officer is required to refuse to register a document executed by a person who appears to him to be a minor.\(^5\) The Legislature has not provided for the case of a verbal permission given by a minor.

No adoption by a ward of the Bengal Court of Wards, or of the Court of Wards of Eastern Bengal and Assam,\(^6\) and no written or verbal permission to adopt given by any ward is valid without the consent of the Lieutenant-Governor, obtained either previously or subsequently to such adoption, or to the giving of such permission on application made to him through the Court of Wards.\(^7\)

Even if the necessary consent be given, a ward of a Court of Wards cannot adopt or give permission to adopt unless he be otherwise competent to do so.\(^8\)

A ward of the Madras Court of Wards cannot adopt or

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\(^2\) S. 46 of Act X. of 1865 applied by s. 2 of Act XXI. of 1870 to such Hindu wills as are affected by the Act.

\(^3\) Sastrti G. C. Sircar is of a different opinion ("Law of Adoption," p. 236), but if his view is correct, it follows, as he points out, "that an authority to adopt given by a minor to be valid must be given in words and not in writing."

\(^4\) Act III. of 1877, s. 35; see s. 17.

\(^5\) Act IX. (B. C.) of 1879, s. 61.

\(^6\) Act VII. of 1905, s. 3, read with Act IX. (B. C.) of 1879, s. 61.

\(^7\) For example, he cannot adopt unless he has arrived at the age of discretion, ante, p. 107.
give a written or verbal permission to adopt without the consent of the Court of Wards.¹

No adoption by a ward of the Court of Wards of the Central Provinces, and no written or verbal permission to adopt given by such ward, is valid without the consent of the Chief Commissioner, obtained either previously or subsequently to the adoption, or to the giving of the permission, on application made to him through the Court of Wards.²

A ward of the Court of Wards of the United Provinces cannot adopt, or give a written or verbal permission to adopt, without the consent of the Court of Wards, provided that the Court of Wards shall not withhold its consent if the adoption is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation. This restriction has no application to a proprietor who has applied to have his property placed under the superintendence of the Court of Wards.³

In the Punjab no ward can without previous sanction in writing of the Court of Wards adopt or give permission to adopt.⁴

There is no provision with regard to adoption in the Acts relating to Courts of Wards in Bombay⁵ and Ajmere.⁶

It is submitted that, at any rate in the case of Sudras,⁷ a person who is disqualified from inheriting by reason of a personal disability, such as congenital blindness,

² Act XVII. of 1885, s. 24.
³ Act III. (N. W. P.) of 1899, s. 34.
⁴ Act II. (Punj. C.) of 1903, s. 15.
⁵ Act I. (Bo. C.) of 1905.
⁶ Reg. I. of 1888.
⁷ In their case no religious ceremonies are necessary, post, p. 158.
impotence,\(^1\) or lameness,\(^2\) can nevertheless take a son in adoption.\(^3\)

Sastri G. C. Sirca\(^4\) says that Colebrooke's English translation of a passage\(^6\) in the "Mitakshara" is the only authority for denying to persons excluded from inheritance the right to adopt, and he gives a translation which has not such effect. The "Dattaka Chandrika" recognizes the right,\(^6\) and the same view was taken by Sutherland.\(^7\)

Change of religion, or degradation from caste, does not interfere with the capacity to take in adoption.\(^8\)

Where a man has not only renounced Hinduism, but has also adopted another system of religion with a personal law attached to it, such as Mohammedanism, he would lose a right which is alien to the system adopted by him.\(^9\)

In the case of members of the twice-born classes, a person suffering from virulent leprosy, and possibly one suffering from any other incurable disease,\(^10\) would apparently be incompetent to take in adoption,\(^11\) at any rate until he had performed expiation according to the Shastras.\(^12\)

In less serious cases of leprosy, it seems clear that there

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1. A registered eunuch cannot adopt. Act XXVII. of 1871, s. 29.
2. Post, pp. 235, 236.
5. Chap. ii. s. 10, para. 11.
6. S. 6, paras. 1-2. According to the "Dattaka Chandrika" (chap. ii. s. 10, paras. 9-11), the son has a right of maintenance. This is disputed by G. C. Sirca, "Law of Adoption," p. 419.
8. Act XXI. of 1850.
9. See ante, p. 18.
10. "Dayabanda," chap. v. paras. 7, 10-13. It would, however, be unlikely that Courts would extend the grounds for exclusion from inheritance beyond the decided cases.
11. See Sirca's "Law of Adoption," p. 206. In Bhagaban Ramamuj Das (Mohunt) v. Raghunandun Ramamuj Das (Mohunt) (1895), 22 I. A. 94, at p. 105, 22 Calc. 843, at p. 858, the Judicial Committee say, "in order to disqualify from making an adoption the leprosy must be of a virulent form." Their lordships in that case were dealing with an appointment by a mohunt of a chela to succeed him, and not with an adoption in the ordinary sense. In all the Courts it seems to have been assumed that incurable leprosy would prevent such appointment.
12. See Bhoobuneshwar Debia v. Gouree Doss Turkopunchanan (1893), 11 W. R. C. R. 555; 2 W. Macn. 201, 202. As to the power to delegate the performance of ceremonies, see cases, post, p. 156, note 6.
is no objection to adoption, at any rate after expiation.\(^1\)
In the case of Sudras, leprosy can be no disqualification for taking in adoption.\(^2\)

In the case of Sudras, as no religious ceremonies are necessary,\(^3\) an adoption by a person who is in a state of ceremonial impurity from the death or birth of a relation is not on that account invalid.\(^4\)

It is not settled whether among the twice-born classes a person can adopt when he is in a state of impurity arising from the death or birth of a relation,\(^5\) and has not performed the necessary expiation.

This question is not one of great importance, as a person in a state of impurity would be unlikely himself to perform ceremonies which would be of no religious efficacy. He is apparently competent to perform such ceremonies vicariously,\(^6\) and if they are performed the Court will uphold the adoption.\(^7\) There seems no doubt that ceremonial impurity can be removed by expiation. The Courts would probably be disinclined to give effect to a disability which can be cured by expiation.\(^8\)

In *Lakshmbai v. Ramchandra*\(^9\) it was said, "There is thus admittedly no authoritative Smriti text on the point, and whatever the efficacy of ceremonial strictness may be, the Courts which administer the law in British India must be guided by what is the received practice and custom of the country or the class to which the parties belong."

The fact that the adoptive father is ceremonially impure does not prevent his receiving in adoption, and he can postpone the religious ceremonies until the pollution has been removed.\(^10\)

\(^2\) *Subramari Beesa v. Ananta Malia* (1900), 28 Calc. 168.
\(^3\) *Post*, p. 153.
\(^4\) *Thangathammii v. Ramu Mudali* (1882), 5 Mad. 358.
\(^5\) In *Ramalinga Pillai v. Sadassiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. (P. C.) 25, it was assumed that a person who at the time of the adoption was impure in consequence of the death of a relative could not adopt. See *Ranganyakamma v. Alwar Setti* (1889), 13 Mad. 214, where the question was as to the adopting widow’s power to adopt. Strange’s “Manual,” 63, 2nd ed., p. 18.
\(^7\) *Rasij Vinayakram Jogannath Shankarsetti v. Lakshmbai* (1887), 11 Bom. 381, at p. 385.
\(^8\) *Post*, p. 237.
\(^9\) (1896), 22 Bom. 590, at p. 595.
\(^10\) *Santappyya v. Rangappyya* (1894), 15 Mad. 397, at pp. 398, 399.
Adoption by ascetic.

It has been held that a professed ascetic cannot take in adoption.¹

Although the Hindu codes did not contemplate an adoption by a person who had renounced the world for the sake of religion, there seems now, having regard to the provisions of Act XXI. of 1850, nothing to prevent a person from emancipating himself from a religious order and taking a son in adoption.²

A husband does not require the assent of his wife to his taking a son in adoption. He may adopt in spite of her express dissent.³ A wife may, however, join in an adoption by her husband.

There is said to be a practice in Bengal by which a man adopts a son in conjunction with more than one wife.⁴ There seems to be no legal objection to this practice, but a question may arise as to whether the son inherits to the relations of the wives concurring in the adoption.⁵

A woman cannot take a child to herself in adoption.⁶

If she goes through the form of doing so, the boy acquires no rights thereby, either in her property or in that of her husband.

A woman can, if she is governed by the Mithila school of law, take to herself a son according to the Kṛṣṭīma form of adoption.⁷

Permission to Wife or Widow to Adopt.

A Hindu, who is capable of taking a son in adoption, can give to his wife power to adopt a son, or sons in

¹ See Punjab Records, 1874, p. 83.
² In Mahalabai v. Vithoba Khanadappa Guive (1862), 7 Bom. H. C. App. xxvi., it was held that there is nothing in the Hindu law books to show that a Vaisya who has undergone the ceremony of Vāhut Vṛdd (a ceremony indicating renunciation of worldly affairs, analogous to "retirement to a forest," in ancient law, Sircar's "Law of Adoption," p. 201) is incapable of adopting a son.
⁵ See post, p. 184.
⁶ Chowdrey Pudum Singh v. Koer Oodey Singh (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. (P. C.) 1. In Peria Ammami v. Krishna sami (1892), 16 Mad. 182, at p. 194. Best, J., expressed the opinion that a Jain widow who succeeded absolutely to her husband's property, could adopt a son to herself, but such expression of opinion was unnecessary for the decision of the case. An interesting discussion as to the capacity of women to adopt is to be found in Sircar's "Law of Adoption," pp. 216-226. As to adoption by dancing-girls, see post, p. 165.
⁷ Post, p. 159.
succession,\(^1\) to him, to be exercised either during his lifetime,\(^2\) or (except he be governed by the Mithila school of law\(^3\)) after his death.\(^4\)

"A man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime."\(^5\)

The existence of a son, grandson, or great-grandson, who is not Existence of permanently incapacitated from performing religious rites,\(^6\) does not of itself invalidate a power, but it prevents the exercise of the power, which remains in suspense.\(^7\) In the event of the son, grandson, or great-grandson dying unmarried, or leaving no son or widow behind him, the power, if it be still in existence,\(^8\) can be exercised.\(^9\)

As to the case where the son, grandson, or great-grandson has renounced worldly affairs, see ante, p. 104.

It is said that when a person is by reason of impurity arising from his bodily state, such as from virulent leprosy, disqualified from adopting,\(^10\) he can nevertheless give to his widow a permission to adopt.\(^11\)

Under no circumstances can a son be adopted by any one except the man to whom he is adopted, or his widow.\(^12\)

\(^1\) Sham Chander v. Narayani Dibe (1867), 1 Ben. Sel. R. 209 (new edition, 279). For other instances, see Jwana Dasraya Chowdhari v. Ramasundari Dasraya Chowdhari (1876), 3 I. A. 72; 1 Calc. 289; Bhobson Moge Debia v. Ram Krishore Achary Chowdhry (1895), 10 M. I. A. 279; 3 W. R. P. C. 15; Ram Soondar Singh v. Bhunbore Dossos (1874), 22 W. R. C. R. 121. As to whether in the absence of a special power sons can be adopted in succession, see post, p. 192.

\(^2\) She cannot adopt a son to him during his lifetime without his authority, Narayan Babaji v. Nana Manohar (1870), 7 Bom. H. C. A. C. 153.

\(^3\) Post, p. 127.


\(^5\) Gopee Lall v. Chundrasales Bukhojee (Musammat Bee) (1872), I. A. Sup. vol. 131, at p. 133; 11 B. L. R. 391, at p. 394.

\(^6\) Ante, p. 104.

\(^7\) Ante, pp. 103, 104.

\(^8\) See post, pp. 130, 131.


\(^10\) See ante, p. 110.


\(^12\) Amrito Lal Dutt v. Surnomoye Das (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; Lakshminarai v. Ramchandra (1896), 22 Bom. 590, at p. 593; Karsandas Natha v. Laddowakhu (1887), 12 Bom. 185, at p. 199; Bhagawandas Tejmal v. Rajmal (1873)
Power to adopt can be given to the wife alone, and to no one else. The inclusion of other persons in the power vitiates it; but the donor of the power may express his desire that in the exercise of the power the wife should consult any named person, and he may make the exercise of the power contingent upon the consent of other persons.

The authority need not be in any particular form. It may be in writing, or (except in a case to which the Oudh Estates Act applies) it may be oral.

If the authority is contained in a will to which the Hindu Wills Act applies, such will must be executed in accordance with the formalities required by that Act.

If the instrument giving the authority is not of a testamentary character, it must, if executed after the 1st January, 1870, be engrossed on a stamped paper of ten rupees, and if executed after the 1st of January, 1872, it must be registered.

In cases to which the Oudh Estates Act, 1869, applies, the power must be in writing, but need not be registered.

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2  Amrto Lal Dutt v. Surnomoye Dasi (1900), 27 I. A. 128; 27 Calc. 996; 4 C. W. N. 549.
3  See Surendra Nandan Das v. Soileja Kant Das Mahaputra (1891), Calc. 385.
6  XXI. of 1870.
7  S. 50 of Act X, of 1865, applied by Act XXI. of 1870, s. 2, to such wills as are subject to the latter Act.
8  By Act II. of 1899, Sched. I. art. 3, an adoption deed, that is to say, any instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt, requires a stamp of ten rupees. There are similar provisions in Act I. of 1879, Sched. I. art. 38, and Act XVIII. of 1869, Sched. II. art. 31.
9  Act III. of 1877, s. 17. As to whether in the absence of registration evidence may be given as to the grant of the power, quere, see Somasundara Mudaly v. Duraisami Mudaliar (1903), 27 Mad. 30.
10 I. of 1869.
11 S. 22 (s).
12 Bhaiya Rabindal Singh v. Indar Kunwar (Maharani) (1888), 16 I. A. 53; 16 Calc. 556.
A power of adoption may be revoked, either expressly or by implication.

An example of a revocation by implication would be where, after giving the power, the man himself took a son in adoption.\footnote{See Gourapershad Rai v. Jynmala (Munmunmal) (1814), 2 Ben. Sel. R. 136 (new edition, p. 174).}

The mere birth of a son would not necessarily imply a revocation, but it might, taken with other circumstances, have such effect.\footnote{See Gungaram Bhadure v. Kashekarun Roy (1813), 2 Ben. Sel. R. 44 (new edition, p. 56).}

Where the power is contained in a will, to which the Hindu Wills Act applies, it cannot be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required to be executed,\footnote{Act X. of 1865, s. 50, applied by Act XXI. of 1870, s. 2, to such wills as are subject to the latter Act.} or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.”\footnote{Act X. of 1865, s. 57, applied to Hindu wills by Act XXI. of 1870, s. 2.}

Where the power is contained in a will, which is not subject to the Hindu Wills Act, the revocation can be effected by parol.\footnote{See Pertoob Narain Singh (Maharajah) v. Sobhoo Koer (Maharanee) (1877), 4 I. A. 228; 3 Calc. 626; 1 C. L. R. 113. In that case a verbal authority given by a Hindu testator for the destruction of a will, although the will was not in fact destroyed, was held to constitute a revocation of the will.}

When a power to adopt is given to one of several widows, such widow can adopt without reference to the other widow or widows,\footnote{Colebrooke’s remarks in Choliummal v. Munnummal (1803); Strange’s “Hindu Law,” vol. ii. p. 91.} and she alone can exercise the power.\footnote{Mayne’s “Hindu Law,” 7th ed., pp. 151, 152. An authority given to the “Maharani Sahib” to adopt was held to give power to the elder widow alone. Indar Kunwar (Maharani) v. Jaipal Kunwar (Maharani) (1888), 15 I. A. 127; 15 Calc. 725.}

When power is given to the widows jointly, it cannot be acted upon by one of them singly, except on the death of her co-wife.\footnote{See Venkata Narasimha Appa Row (Sri Rajah) v. Ramaya Appa Row (Sri Rajah) (1905), 29 Mad. 437, at p. 444. Sir F. Macnaghten (“Considerations,” p. 171) considered that there cannot be a joint acceptance, but as it is possible in Western India when no permission has been given (post, p. 127), there seems no reason why it should not be possible when permission has been given.}
severally, either of them can adopt, unless the husband has signified that preference be given to one of them.

Where the authority contemplates simultaneous adoption by the several widows, or that there should be two adopted sons living at the same time, the power is incapable of being exercised at all.

The permission may be absolute, or its exercise may be contingent upon certain events, or may be subject to lawful conditions, or may be subject to restrictions as to the boy to be adopted, or otherwise.

The exercise of the power may be contingent upon the consent of persons named by the husband, and if such consent cannot be obtained the authority cannot be exercised.

A direction to a wife "to adopt a son with the good advice and opinion of the manager," does not make the adoption contingent on the consent of the manager.

In some cases the contingency which is expressed is one that is implied by the law, as, for instance, a man gives to his wife a power to adopt in case his son dies under age and unmarried.

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1 See Monabini Das v. Adinath Dey (1890), 18 Calc. 69. In Lucknowin Tagore’s case, F. Macnaghten’s “Considerations,” p. 172, Sir car’s “Yuvarath Darpana,” 2nd ed., 442, the claim of the eldest widow was upheld by the Court. For an instance of a power given to the elder widow to adopt three sons successively and thereafter to the younger widow to adopt, see Akkhoj Chunder Bagchi v. Kalapahar Haji (1885), 12 I. A. 198; 12 Calc. 406.

2 Surendra Kesho Roy v. Doorga sundari Dasses (1892), 19 I. A. 108; 19 Calc. 513; Akhoy Chunder Bagchi v. Kalapahar Haji (1885), 12 I. A. 198; 12 Calc. 406, but the Court will, if possible, give to the document a construction which will make a lawful adoption possible.

3 A condition subsequent, i.e. providing that in a certain event the adoption is to become void, would not affect an adoption which has been made.


6 Surendra Nanda Das v. Basiaja Kant Das Mahapatra (1891), 18 Calc. 395.

There is authority that where the power of adoption requires as a Condition as to condition of its being exercised that particular arrangements should be property. made with regard to the property, as, for instance, that particular property should be devoted to a charity, effect must be given to such condition.\(^1\)

The failure of a disposition as to property in a will does not necessarily affect a power of adoption.\(^2\)

Where the contingency, upon the happening of which the power is to be exercised, does not occur, the power cannot be exercised.

For instance, A, leaving his wife pregnant, makes a will giving her authority to adopt "in case the son to be born shall die." The widow is delivered of a daughter. The power cannot be exercised.\(^3\)

Where the exercise of the power is contingent upon circumstances, which involve an invalid adoption, or is contingent upon illegal, or immoral, or impossible conditions, the power cannot be exercised.

In a case where the power was only to be exercised in case of the disagreement of the wife and son, the power was held to be invalid.\(^4\)

A permission to adopt must be strictly construed, and if the permission be acted upon it must be strictly followed.\(^5\)

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\(^1\) *Ganapati Ayyan v. Samidhri Ammal* (1897), 21 Mad. 10. As to the power of the adoptive father to restrict the adopted son's rights in ancestral property, see post, p. 187.

\(^2\) *Bachoo Hurkiosnan v. Mankoresbai* (1907), 34 I. A. 107; 31 Bom. 375; 11 C. W. N. 769.

\(^3\) *Mohendrooll Moorkjes v. Rockney Dobee* (1864), Coryton, 42.


\(^5\) *Mohendrooll Moorkjes v. Rockney Dobee* (1884), Coryton, 42. This, and other cases, which lay down the rule that powers of adoption are to be strictly construed are criticized in Sircar's "Law of Adoption," p. 235, where it is advocated that a liberal construction should be given to powers of adoption, see *Suryanarayana v. Venkataramana* (1903), 29 Mad. 681, at p. 684.

\(^6\) *Chowdary Pudum Singh v. Koer Ooday Singh* (1889), 12 M. I. A. 350, at p. 356; 12 W. R. (P. C.) 1, at p. 2, where their lordships say, "Of course such a power must be strictly pursued." (In the report of the same case in 2 B. L. R. (P. C.) 101, at p. 104, the words are reported as, "Of course such authority must be strictly proved.") See *Anirto Lal Dutt v. Suronoye Dasi* (1900), 27 I. A. 128; 27 Cal. 996; 4 C. W. N. 549; *Mutsaddji Lal v. Kundan Lal* (1908), 33 I. A. 55; 28 Ali. 377.
If the strict exercise of the power would involve an invalid adoption, then no effect can be given to the power, as, for example, where the donor of the power directs the simultaneous adoption of more than one child,\(^1\) or the adoption of a boy during the lifetime of a living son.\(^2\)

Where the husband has specified the boy to be adopted, or the class out of which the child is to be adopted,\(^3\) his direction must be followed. It is not settled whether if a specified boy be unavailable, another boy can be adopted.\(^4\)

In Bombay an authority to adopt a specified child would not, at any rate in the case of that child being unavailable, prevent an adoption of another child, unless the husband has expressly forbidden the adoption of any other child.\(^6\) In an old case\(^6\) a similar rule was applied in Madras, but in a recent case\(^7\) a different view was entertained. It is submitted that except in a case governed by the Maharashtra school of law, an authority to adopt a specified boy cannot be exercised with respect to any other boy. The above-named school permits an adoption by the widow without the express consent of her husband,\(^8\) and will not imply a prohibition to adopt a boy other than the named boy.


\(^3\) Amirthayyan v. Ketharamayyan (1890), 14 Mad. 65.


\(^6\) See Lakshmibai v. Rajaji (1897), 22 Bom. 996, approving of the following passage in West and Bähler, vol. ii. p. 965, "It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least, in Bombay, to warrant the adoption of another child, unless, indeed, he had said 'such a child and no other.' The presumption is that he desired an adoption, and by specifying the object merely indicated a preference." See Ramakandra Baji v. Bapu Khondo, Bom. P. J. 1877, p. 42.

\(^7\) Veerapomall Pillay v. Narain Pillay (1801), 1 Mad. N. C. 78.

\(^8\) Post, p. 126.
Where the adoption is otherwise valid, a discussion as to the motive of the widow for adopting is immaterial.\footnote{Veckata Krishna Row (Enjak) v. Venkata Rama Lakshmi Narayya (1876), 4 L. A. 1, at p. 14; 1 Mad. 174, at p. 190, 191; 26 W. R. C. R. 21, at p. 26; Ramchandra Bhagwan v. Mulji Nanabhai (1896), 22 Bom. 558. This was a decision of a full bench of the Bombay High Court. The following were previously reported decisions on the same question: Bhimaves v. Sanguva (1896), 22 Bom. 306; Mahableshwar Pundal v. Durgabai (1896), 22 Bom. 199; Vilshoda v. Basu (1890), 15 Bom. 110; Patel Vandramun Jekin v. Patal Manilal Chunilal (1890), 15 Bom. 565; Rupchand Hinduram v. Rakhmabai (1871), 8 Bom. H. C. A. 114; Rakhmabai v. Radhabai (1866), 5 Bom. H. C. A. 181.} ADOPTION BY WIDOW.

There is a difference of opinion between the schools as to the power of a widow to adopt a son.

The difference of doctrine of the several schools of law arises from the interpretations put by the schools upon a text of Vasiṣṭha.\footnote{Annexed Chapter on Digest, vol. iii. p. 242.} As to this, the Judicial Committee said, in Collector of Madura v. Moottoo Ramalinga Sathupathy,\footnote{Collector of Madura v. Moottoo Ramalinga Sathupathy, 39 C. L. J. 350.} "All the schools accept as authoritative the text of Vasiṣṭha, which says, 'Nor let a woman give or accept a son unless with the consent of her lord.' But the Mithila school apparently takes this to mean that the consent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Muyookhu and Koottukha treatises which govern the Maharatta school explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, rather than to the authority to adopt being independent of the husband."

Under the Bengal school of law a widow cannot adopt a son without the express permission of her husband.\footnote{Collector of Madura v. Moottoo Ramalinga Sathupathy, 39 C. L. J. 350.}
The same rule applies under the *Benares* school of law.\(^1\)

It applies even if the deceased husband was a member of a joint undivided family, and his rights had devolved by survivorship upon the other members of the family.\(^2\)

Among the Jains, the right of a childless widow to adopt is generally co-extensive with the right which was possessed by her husband, and does not depend upon his authority, either express or implied.\(^3\)

Such right, as being derogatory to the ordinary Hindu law, must be specially proved in each case. It has been affirmed in cases of members of the Saraoee, Agarwala sect from Meerut,\(^4\) Aligarh,\(^5\) and Arrah,\(^6\) and in a case of the Oswal sect from Mooshedabad,\(^7\) and also in an old case from Lower Bengal,\(^8\) in which it does not appear to what sect the parties belonged. In a case in Madras,\(^9\) it was held that the custom was not proved.

According to the *Dravida* school, a widow can adopt, either with her husband's express permission,\(^10\) or, if there be no express or implied prohibition by him, with the assent of her husband's kindred.\(^11\)

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8. *Manik Chand Golecha v. Jagat Settani Prankumari Babi* (1889), 17 Calc. 518. It was also held in this case that the adoption of orthodox Hinduisim does not affect the right.


“Inasmuch as the authorities in favour of the widow’s power to adopt with the assent of her husband’s kinsman proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied whenever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfill defective religious rights. ... The same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt when on a new and unforeseen occasion the religious duty arises.”

“In Madras it is established ... that, unless there is some express prohibition by the husband, the widow’s power, at least with concurrence of sapindas in cases where that is required, is co-extensive with that of the husband.”

The power to adopt with the assent of the husband’s kinsmen applies to every case in which a widow might make an adoption under the express authority of her husband.

Thus she can adopt on the death of a natural son, and she can take successive sons in adoption on the death of sons previously adopted, either with the assent of her husband or of his kinsmen.

Among the Nambudri Brahmins in Malabar in theory the widow’s power is as under the Dravida school, but in its application the husband’s authority is presumed, unless there is an express prohibition.

1 Collector of Madura v. Moottoo Ramalinga Satkupathy (1869), 12 M. I. A. 397, at pp. 443, 445; 1 B. L. R. (P. C.) 1, at pp. 17, 18, 19; 10 W. R. P. C. 17, at pp. 24, 25.

2 Gurusingswami (Sri Balusu) v. Ramalakshmanma (Sri Balusu) (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at pp. 436, 437.


4 Ibid.

at any rate when the adopting widow is the surviving member of the 
illam.\(^1\)

“Where the husband’s family is . . . undivided, . . . 
the father of the husband, if alive, might, as the head of 
the family and the natural guardian of the widow, be 
competent by his sole assent to authorize an adoption 
by her.”\(^2\)

Where the father is not alive, it was said in the Ramnad 
case\(^3\) that “the consent of all the brothers, who in default 
of adoption would take the husband’s share, would probably 
be required, since it would be unjust to allow the widow 
to defeat their interest by introducing a new coparcener 
against their will,” but an adoption with the consent of 
the manager of the joint family, who is acting bonâ fide, 
would apparently be upheld.\(^4\)

In the latter case, and also probably in the case of a 
consent by the father, as head of the family, such due 
consideration of the propriety of the adoption would be 
necessary,\(^5\) as is required in the case where the family is 
separate.\(^6\)

“Even in the case of an undivided family, when a 
widow of a member thereof makes an adoption without 
the authority of her husband or the assent of her father-
in-law, it cannot be taken to be the settled law that the 
assent of all the then surviving members of the coparcenary 
is absolutely necessary.”\(^7\) The consent of kinsmen is 
required on account of the incapacity of women to act

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1 Vasudevan v. Secretary of State (1887), 11 Mad. 167, at p. 179. In 
this case the widow was the sole surviving member of the illam, so the 
question whether the consent of the other members was required did not 
arise (see p. 188).

2 Collector of Madura v. Mootoo Ramalinga Sathupathy (1868), 12 M. 
I. A. 397, at pp. 441, 442; 1 B. L. R. (P. C.) 1, at p. 16; 10 W. R. P. 
C. 17, at p. 23.

3 Ibid.

4 See Raghunada (Sri) v. Broso-
kishoro (Sri) (1876), 3 I. A. 154, at 
p. 191; 1 Mad. 69, at p. 81; 25 W. 
R. C. R. 291, at p. 302; G. C. Sir-

5 See Karunabah Ganesa Ratnamai-
yar v. Gopala Ratnamaiyar (1880), 7 
I. A. 173, at pp. 177, 178, 179; 2 
Mad. 270, at pp. 279, 280, 281.

6 Post, p. 123.

7 See Venkatakrishnamma v. Amma-
puramama (1899), 23 Mad. 486, at 
pp. 487, 488.
rather than to procure the consent of all whose interests will be defeated by the adoption.\(^1\)

Where the joint family consists of several branches, it would seem to be sufficient to obtain the consent of the branch to which the husband belonged.\(^2\)

It is clear that when the family is undivided the requisite authority cannot be sought for outside the family.\(^3\)

Where the widow has taken by inheritance the separate estate of her husband, the consent of every kinsman, however remote, is not essential. The consent of the father-in-law would be sufficient.\(^4\) If the father-in-law be dead, “there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.”\(^5\)

\(^1\) Collector of Madura v. Moottoo Ramalinga Sathupathy (1888), 12 M. I. A. 397, at p. 442; 1 B. L. R. (P. C.) 1, at pp. 16, 17; 10 W. R. P. C. 17, at p. 23.
\(^3\) Collector of Madura v. Moottoo Ramalinga Sathupathy (1888), 12 M. I. A. 397, at p. 442; 1 B. L. R. (P. C.) 1, at pp. 16, 17; 10 W. R. P. C. 17, at p. 23.
\(^5\) Raghunada (Sri) v. Brajakishore (Sri) (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. B. 291, at p. 302, approving of Rama-satam Iyen v. Bhagati Annual (1873), 8 Mad. Jur. 58, where it was held by the Sadr Court of Travancore that the assent of certain separate dayadics (kinsmen) of the deceased husband was not sufficient to validate an adoption by a widow to which the husband’s undivided brother and the head of the undivided family had not assented.

See also Venkataramanamma v.
A widow should give to all the *sapindas* concerned an opportunity to advise her with regard to making an adoption, or against adopting a particular boy.\(^{1}\)

The omission by the widow to ask the consent of one of two divided brothers of the deceased husband could not be justified by saying that it was known he would refuse. To consult him was essential to the widow’s obtaining the mind of the kinman on the question.\(^{2}\)

The consent of the *sapindas* must be free, and given solely in the due exercise of the discretion confided to them by the law with a view to the selection of a suitable boy for adoption. Thus a consent given on an untrue representation that the widow had received the permission of her husband is of no effect.\(^{3}\)

“Though gifts to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption.”\(^{4}\)

“There is nothing improper in a *sapinda* proposing to give his assent to a widow adopting his own son, if such son be the nearest *sapinda*, and refusing to give his assent to her adopting a stranger or more distant *sapinda*, if there be no reasonable objection to the adoption of his own son,”\(^{5}\) or in his stipulating that his own share should not be reduced by the adoption.\(^{6}\)

When the majority of the *sapindas* consent, it will be presumed that their assent was given on *bona fide* grounds.\(^{7}\)

Annapurnamma (1899), 23 Mad. 486, where one *sapinda*, without giving any reason, refused to consent. As to the necessity for a consideration by the *sapindas*, see *Raghunadha (Sr) v. Brozokishoro (Sr)* (1876), 3 I. A. 154, at pp. 192, 193; 1 Mad. 69, at pp. 82, 83; 25 W. R. C. R. 291, at pp. 302, 303; Karunobih *Ganasa Ratnamaiyar v. Gopala Ratnamaiyar* (1880), 7 I. A. 173; 2 Mad. 270; *Jonnalagadda Venkamma v. Jonnalagadda Subrahmaniam* (1906), 34 I. A. 22; 30 Mad. 50; 11 C. W. N. 345; S. C. in Court below, *Subrahmaniam v. Venkamma* (1903), 26 Mad. 627.

1 *Subrahmaniam v. Venkamma* (1903), 26 Mad. 627.


3 *Raghunadha (Sr) v. Brozokishoro (Sr)* (1876), 3 I. A. 154, at p. 193;


5 *Subrahmaniam v. Venkamma* (1903), 26 Mad. 627, at p. 537.

6 *Srinivasa Ayyangar v. Bangaswami Ayyangar* (1907), 30 Mad. 450.

7 *Venkatarkrishnamma v. Annapurnamma* (1899), 23 Mad. 486, at p. 488.
The assent must be to an adoption of a specified boy, and not to an adoption generally. It must be acted upon within a reasonable time, and has no operation after the death of the person giving it.

An adoption by the senior widow with the consent of the junior widow is valid without the consent of the junior widow.

According to the Maharashtra School a widow can adopt either with her husband’s express permission or without such permission, if the estate be vested in her, and there be no express or implied prohibition by him.

1 See Suryanarayana v. Venkatarama (1903), 26 Mad. 681, at p. 685.
3 Narayanasami Naik v. Mangamal (1905), 29 Mad. 515. See post, p. 127. As to a joint adoption, see ante, p. 115.
8 Gopal Balkrishna Kenjale v. Vishnu Raghunath Kenjale (1898), 25 Bom. 250, at p. 256. In Vandrarvan Jekin (Patel) v. Manilal Chinnalal (Patel) (1890), 15 Bom. 565, at p. 574, the court treated an express prohibition as the only qualification to the power of the widow, but it is submitted that the observations of the Judicial Committee in the Collector of Madura v. Moottoo Ramalinga Bathupathy (1868), 12 M. I. A. 397, at pp. 445, 445; 1 B. L. R. (P. C.) 1, at pp. 17, 18, 19; 10 W. R. P. C. 17, at pp. 24, 25, ante, p. 121, apply equally to a case governed by the Maharashtra school. In Bayobai v. Bala (1888), 7 Bom. H. C. App. 1, at p. xx, the husband on his deathbed refused to take a son in adoption, This was held to prevent the widow adopting, and in Dnyanoba v. Radhabai, Bom. P. J. 1894, p. 22, where the husband had repudiated his wife.
If the husband was undivided in estate\(^1\) she cannot adopt without either his express permission\(^2\) or the consent of his coparceners.\(^8\)

Where she has no express authority, the widow derives her power from authority presumed to have been given to her by her husband.\(^4\) Such authority is implied even when the husband was a minor at the time of his death.\(^6\)

It has been held that the husband’s authority would not be presumed in the case of the adoption of an only son, an act which, although not illegal, was considered sinful,\(^6\) but apparently that decision would not now be followed,\(^7\) and it would be held that her authority is co-extensive with that of her husband.

As under the Dravida school,\(^8\) an assent given by her father-in-law,\(^8\) as the head of the family, and as natural guardian of the widow, to an adoption in his lifetime,\(^10\) would validate an adoption by the widow of a member of the undivided family. The rules as to the nature and

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1. Whether or not the husband possessed separate property, see Raghu:nadha (Sri) v. Brozkishoro (Sri) (1878), 3 I. A. 154, at pp. 191, 192; 1 Mad. 69, at pp. 81, 82; 25 W. R. C. R. 291, at p. 302.

2. Bachoo Hurkisondas v. Mankore (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; S. C. in Court below, (1904) 29 Bom. 51.


5. See, however, Lakshmibai v. Sarassmitibai (1899), 23 Bom. 789, at p. 794, 795, 797, 798.


8. See Gurulingaswami (Sri Balasa) v. Ramalakshamamma (Balasa) (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at p. 437, post, pp. 122, 123.


sufficiency of the consent required for the adoption by a widow governed by the Dravida school\(^1\) apparently apply to the case of adoption in an undivided family governed by the Maharashtra school of law.

Where the family is divided, an elder widow can adopt without the consent of the junior widow;\(^2\) but not so as to devest property which has vested in the younger widow as heir to a son.\(^3\) The junior widow cannot adopt without the consent of the senior widow,\(^4\) unless, perhaps, where the latter be incapacitated, as where she is leading an irregular life.\(^5\)

A joint adoption by the widows seems possible.\(^6\)

According to the Mithila school, a widow cannot under Mithila school any circumstances adopt a son to her husband.\(^7\) She can under that school adopt a son to herself in the \textit{Kritima} form.\(^8\)

In the Punjab the custom varies in different localities.\(^9\)

A minor\(^10\) widow, acting under an express power given to her by her husband, can take in adoption,\(^11\) provided, at
any rate, she has attained sufficient maturity of understanding to comprehend the nature of the act. The same rule would apparently also apply to an adoption under the Dravida school with the authority of the sapindas, and to a case under the Maharashtra school, where similar authority had been given. It is apparently unsettled whether a minor widow can, in a case governed by the Maharashtra school, act upon the implied authority of her husband.

A widow cannot adopt unless she be the widow of the last full owner, or the estate is vested in her as heir to her son, legitimate or adopted, who has died unmarried, or has left no child or widow surviving him, or (it is submitted) if the circumstances be such that the estate will vest in the adopted son on his adoption.

Before the decisions on which the above proposition is based were passed, Sastri G. C. Sircar said, in his "Law of Adoption," "If the

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1 Mondakini Dasi v. Adinath Dey (1890), 18 Calc. 69, at p. 72. In this case the widow was 11 or 12 years of age, but, as the boy to be adopted had been designated by her husband, the discretion to be exercised by her was limited. It may be questioned whether in the absence of such limitation a girl of so tender an age would be competent to exercise sufficient discretion in the selection of a boy. See ante, p. 107.


3 Sircar's "Law of Adoption," p. 250.

4 Patappa Akkapa Patel v. Appanna (1898), 23 Bom. 327, at p. 329; Gopal Balkrishna Kenjale v. Vishnu Raghunath Kenjale (1898), 23 Bom. 250; Vasudeo Vishnu Manohar v. Ramchandra Vinayak Modak (1896), 22 Bom. 551. See also cases, post, pp. 130, 131.


6 As was the case in Deeno Moyee Dossee (Sreemutty) v. Doonga Peshad Mitter (1885), 3 W. R. M. A. 6, where a Hindu, governed by the Bengal school of law, left his property to a boy to be adopted by the widow of his son, who had predeceased him. In this case the boy took under the will, but the Court treated the adoption as valid, and in Deeno Moyee Dossee (Sreemutty) v. Tarachurn Konoodoo Chowdhury (1885), Bourke A. O. C. 48; 3 W. R. M. A. 7, note, which referred to the same adoption, the Court held that the widow took as heir of the son, so adopted, and thus upheld the adoption. There might also be the case of a woman taking as heir of her son's son.
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Ancestral estate is vested in the mother-in-law by reason of her son predeceasing his father, it would appear that both the mother-in-law and daughter-in-law are competent to adopt. What has been laid down is that the adoptive father's estate must be vested in the adopting widow, in order that an adoption made by her may be valid. If the daughter-in-law adopts first, then the mother-in-law cannot make an adoption during the life of the son adopted by the daughter-in-law, for the father-in-law cannot under that circumstance be considered as destitute of male issue, there being that grandson by adoption in existence. But if the mother-in-law adopts first, then the daughter-in-law cannot be precluded thereby from making an adoption for the spiritual benefit of her husband who would not be benefitted by his mother's adoption. This distinction would apply to all similar cases in all the schools." It is submitted that having regard to the above-mentioned decisions, the daughter-in-law cannot so adopt.

In the absence of express direction to the contrary, 1 a Time for exercise of power of adoption, whether express or implied, 2 may be exercised at any time, provided it be not exhausted, or be at an end. 3

Adoptions made twelve, 4 twenty-two, 5 twenty-five, 6 fifty-two, 7 and even seventy-one 8 years after the death of the adoptive father have been upheld.

Except, perhaps, in Bengal, a power, which does not expressly or impliedly prohibit successive adoptions, is not exhausted by having been once exercised. 9

According to the Bengal authorities, such permission is exhausted by having been once exercised. 10

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1 See Mutsaddi Lal v. Kundan Lal (1906), 33 I. A. 55; 38 All. 377.
2 F. Macn. 157.
3 Post, p. 130.
4 Anon. (1814), 2 Morl. Dig. 18.
7 Brijbhooshanji Mularaj (Sree) v. Gokoolcoochjie Mularaj (Sree) (1816), 1 Borr. 181 (editon of 1863, p. 217).
In Kannepalli Suryanarayana v. Pucha Venkata Ramana, the Judicial Committee in dealing with a Madras case, say that they are unable to attach much weight to Gournath Choudhry v. Arnopoorna Choudraine, and also say, “The more liberal rule had been followed by the High Court of Bombay, as well as in Madras, and was not without support in Bengal (see Surendra Nandan v. Sastaja Kant Das Mahapatra, and the Ramnad case)”. It is therefore unlikely that, if a Bengal case on this subject were to come before the Judicial Committee, the Bengal authorities would be followed.

A widow's power to adopt is at an end for all purposes as soon as the estate of her husband is vested in an heir (other than herself), of his natural or adopted son, or of his son's son, or son's son's son who has inherited to him.

v. Tarachurn Koondoo Choudhry (1865), 1 Bourke (A. O. C.) 48; 3 W. R. M. A. 7, note; Kobendrooli Moorjoses v. Rockney Dabes (1844), Coryton, 42, at p. 46; F. Meen. 156, 179. Sir W. Macnaghten (vol. i. pp. 86–90) treats the point as disputed. He says that according to the doctrine of the “Dattaka Mimana,” the second adoption would clearly be illegal; but that Jagannatha holds that it would be valid, the object of the first being defeated. 1 (1906), 33 I. A. 145; 29 Mad. 382; 10 C. W. N. 921.


* (1891), 18 Calc. 385. In that case there had been permission to adopt three sons in succession.

* Collector of Madura v. Mootto Ramalingo Sathyapathy (1888), 12 M. I. A. 397, at p. 448; 1 B. L. R. P. C. 1, at pp. 17, 18; 10 W. R. (P. C.) 17, at p. 24. This was a Madras case.

* In Ramkrishna Ramchandra v. Shamroo Thavasuni (1902), 26 Bom. 526, the son had left a son, and in Annamah v. Mahbu Bati Reddy (1875), 8 Mad. H. C. 108, he had left an adopted son. In the following cases the case had left a widow: Bhobun Moyee Debia (Musemud) v. Ram Krishore Achary Chowdhr (1865), 10 M. I. A. 279, at p. 310; 3 W. R. P. C. 15, at p. 18; Padma Coomari Debi v. Court of Wards (1891), 8 I. A. 229, at p. 245; 8 Calc. 302, at p. 309; Tarachurn Chatterji v. Suresh Chunder Moorjose (1889), 16 I. A. 166; 17 Calc. 122; Thayammal v. Venkatarama Aiyar (1887), 14 I. A. 87, at pp. 70, 71; 10 Mad. 205, at p. 209; Amin v. Mahadgouda (1896), 22 Bom. 416; Kesare Ram Krishna v. Govind Ganesh (1894), 9 Bom. 94; Manikyamal Bose v. Nanda Kumar Bose (1906), 33 Calc. 1306; 11 C. W. N. 12.


* See Bhobun Moyee Debia (Musemud) v. Ram Krishore Achary Chowdhr (1865), 10 M. I. A. 279, at p. 310; 3 W. R. P. C. 15, at p. 18; Manik Chand Golecha v. Jagat Settani Prankumar Bibi (1889), 17 Calc. 517.

* In Puisuddin Ali Khan v. Tincoori Saha (1895), 22 Calc. 565, the son was succeeded by his mother, and in Drobomoyee Chowdhrain v. Bhama
and is not revived by the death of such heir, even when on such death she herself succeeds to the property which was of her husband, and therefore by adopting, devests no estate but her own.  

This rule applies, whether there be an express power given by the husband, or such power be implied, as in the Maharashtra school, or the power be exerciseable with the consent of the sapindas.

It is unsettled whether this rule applies in its entirety to an adoption Jaina.
by a Jain widow, who can adopt without the consent of her husband. It has been so applied in Bombay, but in Calcutta it has been held that a Jain widow in whom the estate was vested can adopt, although her husband's adopted son has died leaving a son as his heir. Although the decision rested on the distinction between the power of a Jain widow and that of the widow of an ordinary Hindu, the Court seems to have acted on the view of the decision in Bhodubnmooye's case, which was accepted by the Calcutta High Court in Puddoo Kumares Debee v. Juggrut Kishore Acharje, but which was not accepted by the Judicial Committee in the appeal from that decision.

It has been attempted to extend the rule to the case where the son, although he has left no heir, other than the adopting mother, had attained to full age and

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Churn Chowdhyr (1885), 12 Calc. 246, by his grandmother. Gavdappa v. Girimallappa (1894), 19 Bom. 331.


3 Thayamml v. Venkaterama Aiyun (1887), 14 I. A. 67; 10 Mad. 205.

4 Ansa, p. 120.

5 Aunsa v. Madadguda (1896), 22 Bom. 416.


8 (1879), 5 Calc. 615.

9 Padma Coomari Debi v. Court of Wards (1881), 8 I. A. 229; 8 Calc. 302.
complete ceremonial capacity,¹ or had been married,² but this extension has not been recognized.³

It may be a question whether the power to adopt would not be at an end when the widow has devested herself of the estate by surrender, or authorized alienation.⁴

It is submitted that in the case of a joint family governed by the Mitakshara law, the power of a widow to adopt extends until partition.⁵

A widow by remarriage loses her power to take in adoption.⁶

It is unsettled whether an unchaste widow can adopt.

In *Sayamalal Dutt v. Saudamini Dasi*,? Norman, J., held that an unchaste widow, who was pregnant by the man with whom she was living in a state of concubinage, and who had not performed any expiation, could not take in adoption. This decision was based upon the alleged necessity for the performance of religious ceremonies, but, as the parties were Sudras, it is clear ⁸ that no religious ceremonies were necessary, and it is therefore doubtful whether this decision can be viewed as an authority. Where religious ceremonies are unnecessary (and it is by no means clear that in any case religious ceremonies are requisite in the case of adoption by a widow ⁹), there seems to be no other authority prohibiting adoption by an unchaste widow. If she be not actually pregnant, she can remove the bar, if it be one, by expiation.¹⁰

As a widow adopts, not for her own benefit, but for that of her deceased husband, it may seem hard that her want of chastity should deprive him of the benefits which, according to Hindu ideas, accrue to him from an adoption.

The question whether a widow, who is in a state of ceremonial impurity from the death or birth of a relation, and who has not performed the necessary expiation, is


² See *Sircar's "Law of Adoption,"* pp. 253, 254.

³ See *West and Bühler*, p. 999, referred to in *Panchappa v. Sangambaswam* (1898), 24 Bom. 89, at p. 94; *Sircar's "Law of Adoption,"* p. 251.

⁴ (1870), 5 B. L. R. 362.

⁵ *Post,* p. 153.

⁶ *Post,* p. 155.

⁷ *Sircar's "Law of Adoption,"* p. 458.

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competent to adopt, is apparently the same as the question whether a man can under such circumstances adopt.¹

If she can, as apparently she can, depute a relation to perform such ceremonies, if any, as may be necessary,² there can be no objection to an adoption by her. There is, moreover, a question whether any religious ceremonies are necessary in the case of an adoption by a widow.³ If none are necessary, her ceremonial impurity cannot affect the adoption.

A widow’s power of adoption cannot be exercised unless the circumstances are such as would have justified an adoption by her husband, if alive.

Thus she could not adopt a boy whom her husband could not have adopted, and she cannot adopt so long as a son, son’s son, son’s son’s son of her husband be in existence.⁴ During that time her power of adoption is in suspense.⁵

“It follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime.”⁶

A widow is under no legal obligation to exercise a power of adoption.⁷ An express direction by the husband cannot be enforced,⁸ even if he directed the adoption of a

³ Post, p. 155.
⁵ Gandappa v. Girinalalappa(1894), 19 Bom. 351, at p. 357.
particular boy.¹ The widow does not, by the non-exercise of the power, forfeit any of her rights as widow,² or mother.³

In a case where the husband has power to deal with property by will there is nothing apparently to prevent him from enforcing the exercise of a power of adoption by a gift over of his property to some one other than the widow, in the event of the power not being exercised within a specified time.

Until she actually adopts, a widow can exercise no rights on behalf of the boy, the adoption of whom she is contemplating.⁴

It is unsettled whether a covenant by a widow not to adopt is valid.⁵

Such question might depend upon the nature of the power (if any).⁶
It is submitted that she could not be restrained from exercising a power, which is given to her, not for her own benefit, but for that of her husband.

CAPACITY TO GIVE IN ADOPTION.

The natural father⁷ can give in adoption where there is no dissent by the mother, and, even in case of such dissent, the weight of authority is in favour of the father's power to give his son in adoption.

¹ See Prasannamayi Dasi v. Kadambini Dasi (1868), 3 B. L. R. O. C. 85. This question was suggested, but not decided, in Bamundoo Mookerjee v. Turinoe (Mussamut) (1858), 7 M. I. A. 169, at p. 190, and in Shamavahoo v. Dwarakadas Vasenji (1878), 12 Bom. 202, at p. 215.
³ Deeno Moyes Dosses (Breamuty) v. Tarachund Koondoo Chowdery (1865), Bourke, A. O. C. 48; 3 W. R. M. A., 7 note.
⁵ In Aseur Purahotam v. Ratnabai (1888), 13 Bom. 56, the Court refused to issue an ad interim injunction restraining the widow from adopting.
⁷ An adoptive father cannot give in adoption. See post, p. 149.
In *Narayanasami v. Kuppusami* (1887), 11 Mad. 43, at p. 47, it is said, "Where there is a competition between the father and mother, the former has a predominant interest or a potential voice."

Mr. Mayne says, "It is quite settled that the father alone has absolute authority to dispose of his son in adoption, even without the consent of his wife, though her consent is generally sought and obtained." He cites two cases. In one (*Alank Manjari v. Fakir Chand Sarkar* (1834), 6 Ben. Sel. R. 356 (new edition, 418)), the question was as to the adoptive mother's consent, which is a different question from the present one. In the other (*Chitko Raghunath Rajaditya v. Janaki* (1874), 11 Bom. H. C. 199), the question did not arise, but (at p. 202) the Court says, "In the eye of Hindu law, when a man gives his son in adoption, he would seem to exercise a power, more like the power of an absolute proprietor than of a guardian."

Sastri G. C. Sircar contends that the abolition of slavery has implicitly destroyed a Hindu father's absolute dominion over his son, and concludes, "The proper view to take, therefore, seems to be that the father alone is incompetent to give when the mother is opposed to it, and that such gift is not void, but voidable only at the instance of the mother."

Nanda Pandita contends that unless the mother consents, the adoption does not affect the boy's relationship to his maternal relations. It is scarcely likely that this view would now be taken by the Courts.

A mother can, during the father's lifetime, with his mother's consent, give her son in adoption.

On the death of the father, or on his being permanently absent from home, or on his entering a religious order, or losing his reason, or otherwise becoming incapable of giving his consent, a mother can give her son in ...
adoption,1 provided that the father has neither expressly nor impliedly prohibited her from doing.2

The power to give in adoption is not limited to a season of distress, nor is it affected by the possession of means by the giver.3

Under no circumstances can any one other than the father or mother give a boy in adoption.4

A stepmother,5 a brother,6 and a paternal grandfather,7 have no power to give in adoption.

The power to give a son in adoption cannot be delegated to any person;8 but a father or mother may

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5 Papamut v. V. Appa Ray (1891), 16 Mad. 384.


authorize another person to perform the physical act of giving a son in adoption to a named person.\footnote{Shamsing v. Sontobai (1901), 25 Bom. 551; Jamnbad v. Baychand Nahalchand (1883), 7 Bom. 225; Vijayarangan v. Lakhman (1871), 8 Bom. H. C. O. C. 244, at p. 257.}

It is not settled whether a minor father or mother can give his or her son in adoption.

The Hindu law books do not expressly prohibit a minor from giving a son in adoption.\footnote{G. C. Sirer's "Law of Adoption," 1888, p. 371.} This is probably for the reason that the event would be unlikely to occur. The question apparently stands upon the same footing as the capacity to take in adoption,\footnote{Ante, pp. 107, 108.} and, at any rate, a father who has not attained the age of discretion\footnote{Ante, p. 107.} would apparently be incompetent to give his son in adoption. As a Hindu minor\footnote{That is, a minor within the meaning of the Indian Majority Act (IX. of 1875).} cannot make a will, and apparently cannot appoint a testamentary guardian, it would seem unlikely that he would have power to dispose of a child, in respect of whose custody after his death he could make no provision.

There seems no reason why an adult father could not give to his minor widow power to dispose of his son in adoption.

It has been held that a Hindu father, at any rate if he is not a Brahmin, does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.\footnote{Shamsing v. Sontobai (1901), 25 Bom. 551.}

In this case the child had remained a Hindu. If the child had also become a Mahomedan, the Hindu law of adoption would have been inapplicable. In spite of the above decision, there is a question whether a father, who has by his conversion adopted a system of law which does not recognize the adoption of sons, can retain a portion of the system which he has repudiated.\footnote{See Josula Buksh v. Dharum Singh (1866), 10 M. I. A. 511, at p. 537; Abraham v. Abraham (1863), 9 M. I. A. 199, at p. 243; 1 W. R. P. C. I, at p. 5.} Act XXI. of 1860 merely destroys the effect of any law or usage which inflicts a forfeiture of rights or property upon persons changing their religion. In this case the forfeiture, if it can be so described, does not arise from any law or usage. There is, it is submitted, an abandonment of a right, by virtue of the voluntary assumption of other rights which are inconsistent with such rights. The above decision is based upon authorities which deal with the right of custody, which
was a right known both to the system abandoned, and to the system adopted.

A father, who becomes a Brahmo, does not lose his right to give his son in adoption.¹

Remarriage of widow.

A widow by remarriage loses her power to give her son in adoption, even when she belongs to a caste in which remarriage is customary.²

Where the father has expressly authorized his widow to give in adoption, remarriage would not necessarily have the same effect,³ and apparently it would not affect the authority, where the parties belong to a caste in which remarriage is customary.

WHO MAY BE TAKEN IN ADOPTION.

The boy must belong to the same primary caste⁴ as that of his adoptive father.⁵

For instance, a Brahmin cannot adopt a Kshatriya or a Sudra.

The reason for this rule is that the adoptive father could not have married the natural mother, when a virgin, as she belonged to a different class.⁶

There seems to be nothing to prevent an adoption of a boy belonging to a different subdivision of the Sudra class,⁷ as the weight of authority is in favour of the legality of a marriage between persons belonging to different subdivisions of that class.⁸

No boy has a preferential or any right to be adopted, and there is nothing to prevent the adoption of a stranger, even though there be a near relation qualified for adoption.

¹ See Kum Kumari Roy v. Satyaranjan Das (1903), 30 Cal. 999; 7 C. W. N. 784.
³ Ibid., at p. 91.
⁴ Ante, p. 17.
⁶ See post, p. 139.
⁷ Decision of the Calcutta High Court in Regular Appeals, 274, and 392 of 1886, referred to in G. C. Sircar’s “Law of Adoption,” p. 165; see also pp. 357, 358, of the same work. See, however, Sutherland’s “Synopsis,” head, 2, para. 1; “Dattaka Mimansa,” s. 2, paras. 35, 74–76, s. 3, paras. 1–3.
⁸ Ante, p. 33.
The texts which prescribe the preferential adoption of a sapinda have not the force of law.1

Among the three twice-born classes, no one whose mother, when she was a virgin,2 the adoptive father (or the husband of a widow taking a boy in adoption), was by reason of propinquity barred from legally marrying, can be adopted.3

This rule in its present form was first enunciated by Mr. Sutherland in his “Synopsis.”4 He deduced this rule from a rule which had reference to the obsolete practice of niyoga, which, when used in this sense, means the appointment of a kinsman to raise up issue by the wife of a childless husband, or of one deceased without leaving children.5

A text of Saumaka6 requires the boy adopted to bear “the reflection of a son.” Nanda Pundita7 in construing this text, held that the resemblance must consist in “the capability to have sprung from (the adopter) himself, through an appointment (to raise up issue on another’s wife), and so forth,” as (in the case) of the son of a brother, a near or distant kinsman, and so forth.8

2 See Siriramulu v. Ramayya (1881), 8 Mad. 15.
3 Minakshi v. Ramnada (1887), 11 Mad. 49. (In this case the prohibition was laid down as a general rule of Hindu law without reference to any distinction between the twice-born classes and Sudras, but the judgment is based upon considerations inapplicable to Sudras.) Gopal Narhar Safray v. Hazarant Ganesa Safray (1879), 3 Bom. 273; Bhagirathbhai v. Radhabaibhai (1879), 3 Bom. 298; Jivani Bhai v. Jivet Bhai (1865), 2 Mad. H. C. 462. See also judgment of Banerjee, J., in Bhagwan Singh v. Bhagwan Singh (1895), 17 All. 394; Haran Chunder Banerji v. Huran Mohun Chuckerbutty (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 398; Vyasa Chimanlal v. Vyasa Ramchandra (1899), 24 Bom. 473.
4 Stokes’s “Hindu Law Books,” p. 664. As to the rules of exclusion by reason of propinquity in the case of marriage, see ante, pp. 34–38. Where the adopting father has himself been removed from his natural family by marriage this rule would debar him from adopting the son of a woman whom he could not have married before being so removed, and also the son of one whom he could not have married after having been so removed. See Mad. Dec. of 1858, p. 117.
5 Wilson’s “Glossary,” p. 380.
6 “A risk of unquestioned authority.”
7 “Dattaka Mimanasa,” a. 5, para. 16.
8 “The phrase ‘so forth’ is explained to refer to a legal marriage having been possible between the adopter and the mother of the boy fixed for adoption.” Siriramulu v. Ramayya (1881), 3 Mad. 15, at p. 16.
As the practice of **niyoga** is now obsolete,¹ the rules by which it was regulated in respect of the person selected for appointment are not, as such, now used for the purpose of testing the capability of the person to be adopted, but in their place the rules as to the prohibited degrees in the case of marriage have been substituted.

The two sets of rules have been held not to conflict,² but they do not appear to completely coincide.³ "Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand, irrespective of marriage, and when the girl selected for marriage is a maiden. But prohibited connection in the case of **niyoga** has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. . . . The rules of prohibited connection had a common object in both cases, viz. the prevention of incest.

In the case of marriage, there are three prohibitions,⁴ viz.—

(i) The couple between whom marriage is proposed should not be **sapindas**;
(ii) They should not be **sagotras**; and
(iii) There should be no **Viraddha Sambandha** or contrary relationship, that is, such relationship as would render sexual connection between them incestuous. This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as, for instance, the daughter of the wife's sister and the sister of the maternal uncle's wife."⁵

According to the **niyoga** rule, "The relations prohibited for adoption by a man are: the paternal uncle, the maternal uncle, the brother, the four first cousins on paternal and maternal side, the brother-in-law, the sister's son, and the daughter's son."⁶

Of these the father's brother's son, and the mother's son,⁷ would not be excluded by the marriage rules.

Whatever may have been the origin of the marriage rule, it has been held in Madras that the Court cannot now go behind it and test the validity of an adoption by the rules which governed the obsolete system of **niyoga**.⁸

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¹ See ante, p. 100.
² **Minakshi v. Ramunada** (1887), 11 Mad. 49, at p. 54. See also **Bhagwan Singh v. Bhagwan Singh** (1895), 17 All. 294, at p. 322. (In the appeal in this case (1899), 26 I. A. 158; 21 All. 412; 3 C. W. N. 454, this view was not disturbed.)
³ See Bhattacharya’s "Hindu Law," 2nd ed., p. 199.
⁴ Ante, pp. 32–39.
⁵ **Minakshi v. Ramunada** (1887), 11 Mad. 49, at p. 53. Marriage between a Hindu and the daughter of his wife's sister was held to be valid in **Ragavendra Rao v. Jayaram Rao** (1897), 20 Mad. 283.
⁷ See **Virayya v. Hamumanta** (1890), 14 Mad. 459, at p. 461.
⁸ Ibid.
It remains to be seen whether the Judicial Committee will, when it becomes necessary to lay down a general rule on this subject, accept the rule of prohibited degrees in marriage laid down in India, or will accept the nityoga rule, enunciated in the “Dattaka Mimansa,” or will confine the prohibitions to the three cases which have hitherto been considered by the Committee, viz. those of the sister’s son, daughter’s son, and mother’s sister’s son. These are the only cases specified by the sages Saunaka and Sakala, from whose texts Nanda Pandita, in the “Dattaka Mimansa,” based the nityoga test of exclusion.

The high authority of the “Dattaka Mimansa” might possibly give a preference to the nityoga test of exclusion; but with regard to the analogy between the Dattaka form of adoption and this obsolete practice the Judicial Committee has said, “as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.”

The burden of proving a special custom to the contrary amongst any special members of these three classes, prevalent, either in their caste, or in a particular locality, lies upon him who avers the existence of that custom.

In the following cases, which fall within the above-mentioned rule, adoptions have been held to be invalid.

(a) Daughter’s son.

Brahmins in the Tanjore, Trichinopoly, and Tinnevelly districts, by

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3 Collector of Madura v. Mootoo Ramalinga Sathupathy (1888), 12 M. I. A. 396, at p. 441; 1 B. L. R. P. C. 7, at p. 16; 10 W. R. P. C. 17, at p. 23; Raghumadha (Sri) v. Brosokishoro (Sri) (1876), 3 I. A. 154, at p. 190; 1 Mad. 69, at p. 80; 25 W. R. C. R. 291, at pp. 301, 309.
custom, adopt daughter's sons. There seems to be a similar custom among the Nambudri Brahmins of Malabar, and it has been held that in the Southern Mahratta country the prohibition of the adoption of a daughter's son is not universally in force.

(b) Sister's son.

By custom, Brahmins in the Tanjore, Trichinopoly and Tinnevelly districts, the Bohra Brahmins of the northern districts of the Northwestern Provinces, and the Nambudri Brahmins of Malabar, adopt sister's sons. It has also been held that in the Southern Mahratta country the prohibition of the adoption of sister's sons is not universally in force.

1 Vaiṣṇavī āṇa. (1885), 9 Mad. 44.
2 See Eranjali Ilath Vīṣṇu Nambudri v. Eranjali Ilath Krishnam Nambudri (1888), 7 Mad. 3.
3 Nani (Bai) v. Chundal (1897), 22 Bom. 973, at p. 976.
4 Bhagwan Singh v. Bhagwan Singh (1889), 25 I. A. 152, at p. 150; 31 All. 412, at p. 418; 3 C. W. N. 454, at p. 456; Lali (Mussammat) v. Murli Dhar (1906), 33 I. A. 97; 38 All. 488; 10 C. W. N. 730; Naraíinas Das (Laloo) v. Rammanj Dayal (Lalo) (1897), 25 I. A. 48, at p. 52; 20 All. 208, at p. 217; 2 C. W. N. 193, at p. 195; Sundar (Mussammat) v. Parbatí (Mussammat) (1889), 16 I. A. 186, at p. 193; 12 All. 54, at p. 56; S. C. in Court below, Parbatí v. Sundar (1885), 8 All. 11; Rajooomar Lal v. Bisweswar Dyal (1884), 10 Cal. 688, at p. 693; Narusammat v. Balaramacharí (1863), 1 Mad. H. C. 420; Gopalayyam v. Raghupatsiayyam (1873), 7 Mad. H. C. 250; Kora Shanko Tākoor (Dow dem) v. Munnee (Beebe) (1815), East's notes, case 20; Morl. Dig. vol. I. p. 18; Shiball v. Bashumber, S. D. A. N. W. P. 1886, p. 25. In Ramalinga Pillai v. Sadasiva Pillai (1864), 9 M. I. A. 510; 1 W. R. P. C. 25, the adoption of a sister's son was upheld. The parties were said in the report to be Vaisyas. The question as to the validity of the adoption was raised, but the case was determined on the ground that the title of the respondent was admitted by the appellant's father. In Jinami Bhau v. Jeev Bhau (1885), 2 Mad. H. C. 469, at p. 467, it was asserted that the parties to the case of Ramalinga Pillai were clearly Sudras. See also Gopal Narhar Sfray v. Hanuman Ganesh Sfray (1879), 3 Bom. 273, at pp. 282, 283. In Ganapatram Vireswar v. Vishoda Khandappa (1887), 4 Bom. H. C. A. C. 130, the adoption of a sister's son was upheld, but the parties were evidently Sudras (see Gopal Narhar Sfray v. Hanuman Ganesh Sfray (1879), 3 Bom. 273, at p. 283). In Bhagwan Singh v. Bhagwan Singh (1895), 17 All. 294, at p. 302, it is said that the parties in Ganapatram's case were Vaisyas, but that the Court erred in supposing that the parties in Ramalinga Pillai's case were other than Sudras.

8 Vaiṣṇavī āṇa. (1885), 9 Mad. 44.
9 Chain Suh Bah Ram v. Parbatí (1891), 14 All. 58. In an Agra case (Lali v. Muridhar (1901), 24 All. 195, at pp. 197, 205), an unsuccessful attempt was made to prove that a Bohra Brahmin could adopt his sister's son.

10 Eranjali Ilath Vīṣṇu Nambudri v. Eranjali Ilath Krishnam Nambudri (1883), 7 Mad. 3.
11 Nani (Bai) v. Chundal (1897), 22 Bom. 973, at p. 976.
A sister’s daughter’s son would be inadmissible for adoption.\(^1\)

Such adoption is permissible in the Telegu and Tamil country, where a marriage between a maternal uncle and his niece is allowed.\(^2\)

(c) Mother’s sister’s son.\(^3\)
(d) The son of the daughter of a sagothra.\(^4\)

It seems that the adoptions of the following are prohibited, not by the marriage rule, which is inapplicable, but by express authority, viz.:—

(i) Brother.\(^5\)

In the Deccan the adoption of a younger brother is permitted.\(^6\)

(ii) Stepbrother.\(^7\)

(iii) Paternal and maternal uncles.\(^8\)

Having regard to the prohibition as to the age\(^9\) of the adopted son, this case is unlikely to occur except, perhaps, in Western India.\(^10\)

It has been held that the adoptions of the following persons are permissible, except in the case where the natural mother of the boy happens to be a person whom, as a virgin, the adoptive father could not lawfully have married.

(a) Brother’s son’s son.\(^11\)

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1. Venkata v. Subhadra (1884), 7 Mad. 548, at p. 549. As to a half-sister’s daughter’s son, see Karunakodi Ramana Ramanaikar v. Gopal Ramanaikar (1889), 7 I. A. 173, at p. 177; 2 Mad. 270, at p. 279.
7. Srimatul v. Ramanayya (1881), 3 Mad. 15, at p. 16.
(b) Paternal uncle’s son.¹
(c) Paternal uncle’s son’s son’s son.²

There can equally be no objection to the adoption of a paternal uncle’s son’s son.³

(d) The son of the mother’s father’s brother’s daughter’s daughter.⁴
(e) The wife’s brother.⁵
(f) The wife’s brother’s son.⁶
(g) The wife’s sister’s son.⁷

The rule as to the relationship between the adopting father and the natural mother⁸ has no application to Sudras.⁹

Relationship between the adopting widow, or the wife of the adopting father, and the natural father of the boy is no impediment to an adoption.

² Haran Chunder Banerji v. Hurro Mohun Chuckerbutty (1880), 6 Cal. 41, at p. 47; 6 C. L. R. 393, at p. 399.
³ In Venkata v. Subhadra (1884), 7 Mad. 548, the boy was the son of the paternal uncle’s son, but no objection was made to the adoption on this ground. Such adoption is said even to be commendable. G. C. Sircar’s “Law of Adoption,” p. 348.
⁴ Venkata v. Subhadra (1884), 7 Mad. 548. In this case, Sastri G. C. Sircar points out (“Law of Adoption,” p. 348) that having regard to the Mitakshara system of computation of degrees, the Court was in error in considering that the adopting father could, under the general Hindu law, have married the natural mother. Such marriage seems to have been permissible by a usage to which the parties were subject.
⁶ Srimulu v. Ramayya (1881), 3 Mad. 15, at p. 17. See Nani (Bai) v. Chunilal (1897), 22 Bom. 973, at p. 979.
⁷ Gunja (Baxe) v. Sheshshunkur (Bose) (1892), Bom. Sal. R. 73, at p. 76.⁸ Ande, p. 139.
⁹ See Bhagvan Singh v. Bhagvan Singh (1899), 26 I.A. 153, at p. 162; 21 All. 412, at p. 418; 5 C. W. N. 454, at p. 452. In Ramaliga Pillai v. Sudarsiva Pillai (1884), 9 M. I. A. 510; 1 W. R. P. C. 95, where the parties were Sudras, an adoption of a sister’s son was upheld. The marginal note of the report erroneously describes the parties as Vaisyas (see Jivani Bhai v. Jibu Bhai (1885), 2 Mad. H. C. R. 462, at p. 467), but it does not appear whether the Judicial Committee were aware that the
This is in accordance with the views now adopted by all the High Courts at Allahabad,1 Madras,2 and Bombay.3 The question does not seem to have been decided by the High Court of Bengal.

Nanda Pandita held that a woman must not adopt her brother’s son.4 His view was accepted in two cases.5 It is supported by Dr. Jogendronath Bhattacharya, who carries the rule to its logical conclusion, and in the case of an adoption by a woman excludes from adoption the sons of men between whom and her there could be no legal nyogya or appointment to raise issue.6 This is also the opinion of Sastrl Gopal Chundra Sircar.7

There is no ground for holding that the adoption of a relation is limited to a particular generation.8

In the Punjab no adoption is rendered invalid by any relationship between the adopting and natural parents.9

Adoptions of daughter’s sons, sister’s sons, brother’s daughter’s sons, and sister’s sons, by members of twice-born classes, have been upheld in the Punjab.10

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1 Jai Singh Pal Singh v. Bijai Pal Singh (1904), 27 All. 417, differing on this question from Battas Kuar (Musst.) v. Lachman Singh (1875), 7 N. W. P. 117.
2 Sriramulu v. Ramayya (1881), 3 Mad. 15.
3 Nani (Bai) v. Chunilal (1897), 22 Bom. 973 (a case from Gujarat). See Girivir v. Bhimeji Raghuval (1884), 9 Bom. 58, which was a case from the Southern Maharashtra country, where the prohibition of the adoption of a daughter’s or sister’s son is not universally in force.

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5 Battas Kuar (Musst.) v. Lachman Singh (1875), 7 N. W. P. 117. Dogumbarai Dabee v. Taramoney Dabee (1818), Macnaghten’s “Considerations,” 170; 1 Morley’s “Digest,” 19. In the latter case Nanda Pandita’s rule was extended to an uncle’s son.
8 Haran Chunder Banerji v. Hurro Mohun Chuckerbutty (1880), 6 Calc. 41, at p. 48; 6 C. L. R. 393, at p. 399. It was there contended that a brother’s son’s son could not be adopted, although a brother’s son could be adopted.
9 See cases referred to in Sircar’s “Law of Adoption,” pp. 341, 342.
10 Ibid.
Jains are apparently not bound by any restrictions as to the relationship between adopter and adopted.1

Among Jains a daughter’s son may be adopted.5

An adopted son cannot adopt from his adoptive family a boy whom he could not have adopted if he had been a natural son of his adoptive father.8

An only son, or any one of several sons, can be adopted.4

A widow can give her only son in adoption.5

There was for a long time a conflict in the Indian Courts as to whether an only son could be given in adoption,4 but in 1899 it was definitely settled that he could be so given. The power to adopt an elder or any one of several sons was settled much earlier.7

1 Among the Jains adoption is a mere temporal arrangement, and has no spiritual object. Bhagwanidas Tejmal v. Rajmal (1873), 10 Bom. H. C. 241, at p. 262.
2 Sheo Singh Rai v. Dobho (Mussulman) (1879), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193; Lakhmi Chand v. Gatto Bai (1886), 8 All. 519; Hassan Ali v. Nagar Mal (1876), 1 All. 288.
4 Gurulingaswami (Sri Balusu) v. Ramalakshmanama (Sri Balusu), Radha Mohan v. Hardai Bibi (1889), 26 I. A. 113; 22 Mad. 398; 21 All. 460; 3 C. W. N. 427; Vyasa Chimandla v. Vyasa Ramachandra (1899), 24 Bom. 367.
5 Krishna v. Paramshri (1901), 25 Bom. 537, at p. 542, where it is said, “Now that the recent decisions have established the fact that the gift of an only son is not blamable, the implied effect ceases to be operative, and no restriction can be placed on the widow’s power to make a valid gift of an only son.” It was not necessary to decide in Balusu Gurulingaswami’s case whether a widow would have power to give an only son in adoption. In Somasekhara Raja v. Subhadramaje (1882), 6 Bom. 524, following Lakshmappa v. Ramana (1875), 13 Bom. H. C. 364, at p. 396, it was held that an authority by the husband to give in adoption, even as a dvarbanashayana (post, pp. 194, 195), would not be implied in the case of the adoption of an only son. See also Debee Dial v. Hur Hor Singh (1828), 4 Ben. Sel. R. 320 (new edition, 407). The decision in Krishna v. Paramshri is supported by the views expressed by the Judicial Committee in Balusu Gurulingaswami’s case, 26 I. A. at pp. 127, 128; 22 Mad. at pp. 407, 408; 21 All. at pp. 469, 470; 3 C. W. N. at pp. 436, 437.
According to the Bengal and Benares schools, in the case of the three higher classes the adoption must take place before the boy is invested with the sacred thread; in the case of Sudras it must take place before marriage.

An unmarried Sudra, of any age, who is in other Sudras respects qualified, can be adopted according to all the schools.

In the Madras Presidency the same rules apply, except Madras that a Brahmin boy of the same gotra can be adopted after the thread ceremony has been performed, but before marriage.


2 See Papamman v. V. Appa Rau (1893), 16 Mad. 384, at p. 396, 397, in which case the Court considered that the adoption of an unmarried man of over forty years of age would not be invalid on the mere ground of age.


4 As to the meaning of “gotra,” see ante, p. 34.

Western India. In Western India there is no objection to the adoption of a married man even if he has children.\(^1\)

It has been held that a married Sudra of a different gotra can be adopted,\(^2\) and the adoption of a married Brahmin of a different gotra, having children at the date of his adoption has been upheld.\(^3\) When he is of the same gotra it follows that there can be no objection.\(^4\)

The rule of Hindu law requiring a difference of age between the adoptive father or mother and the boy,\(^5\) is apparently merely directory.\(^6\)

If a boy, eligible in other respects, upon whom the ceremonies of chudakarṇa (tonsure) and ēpamayava (investiture with the sacred thread) have not been performed in his natural family, can be obtained, he should be preferred, but the fact that such ceremonies have been performed does not invalidate the adoption.\(^7\)

In the Punjab there is no limit of age, and the performance of the thread ceremony or of marriage in the family does not invalidate the adoption.\(^8\)

Among Jains there is no limit of age,\(^9\) and a married man may be adopted.\(^10\)

An orphan, whether he be a minor or an adult, cannot be adopted.\(^11\)

This follows from the rule that only a father or mother can give in adoption.\(^12\)

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\(^3\) Dharma Dagv v. Ramkrishna Chinnaji (1885), 10 Bom. 80; Laksmappa v. Ramara (1875), 12 Bom. H. C. 364, at p. 370.

\(^4\) In Mukhan v. Ninka, Punjab Records of 1868, case No. 57, p. 96, the Chief Court upheld the adoption of a man of the age of 30.


\(^6\) Manohar Lal v. Banarsi Das (1907), 29 All. 495.


\(^8\) Ante, p. 136.
A boy who has been taken in adoption, cannot be Taken again in adoption. 1

Two persons, even if they are brothers, cannot take The same person in adoption, either at the same time 2 or at different times. 3

Where a boy is disqualified by personal defects from Personal inheriting, it is not settled whether he can be adopted. 4

A defect which would attach to the boy in consequence of a fault on the part of his parents would not operate as a disqualification. 5

There is no objection to the adoption of the Brahmo son of a Brahmo. Brahmo. 6

The simultaneous adoption of two or more sons is Invalid as to all. 7

The practice of simultaneous adoptions of two or more sons seems to have been prevalent in Bengal after 1846, and to have owed its origin to the ingenuity of Hindu lawyers, who attempted thereby to evade the effect of the decision of the Privy Council in Rungama v. Atchana, 8 in which an adoption during the lifetime of a previously adopted son was declared void. 9

It may in some cases be difficult to determine whether the adoptions

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2 Rajoonar Lall v. Bisessur Dyal (1884), 10 Calc. 688, at pp. 696, 697.

3 Above, note 1.


5 It is an obvious inference that the person selected should be exempt from any disqualification, which might prevent him fulfilling the purpose of the adoption. This is supported by Nanda Pandita, "Dattaka Mimanasa," s. 2, para. 62. See, however, G. C. Sircar's "Law of Adoption," pp. 349, 350.


7 Kusum Kumari Roy v. Satyaranjan Das (1903), 30 Calc. 999; 7 C. W. N. 784.


11 (1846), 4 M. I. A. 1; 7 W. R. P. C. 57; ante, p. 108.

were simultaneous, and, therefore, both void, or merely successive, in which case the latter only would be void.

In Suddcessor Dosssee v. Doogachurn Sett,1 Phear, J., said, "But, moreover, on that occasion, the ceremonies for the two boys were carried on, practically speaking, simultaneously, although possibly the beginnings and endings were not absolutely synchronous. If either boy was adopted, both were adopted, and it would be an outrage to common sense to say otherwise than that they were adopted at one and the same time."

**ACT OF ADOPTION.**

There must in every case be an actual corporeal gift and acceptance of the boy in adoption,4 coupled with an expression of the intention of the one person to give, and of the other to accept, the boy in adoption.6

A mere gift by a document transferring the boy,4 or a constructive gift of an absent boy,6 or an expression of assent8 or intention 7 without an actual gift is insufficient.

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1 (1865), 2 Ind. Jur. (N. S.) 22; Bourke, O. C. 360.
3 Ranganayakamma v. Alvar Setti (1889), 13 Mad. 214, at pp. 219, 219. See also Gorindayyar v. Dorarami (1887), 11 Mad, at p. 7, where in referring to Shosinath Ghose(Mahashoya) v. Krishna Soondari Dasi (Srimati) (1880), 7 I. A. 250; 6 Calc. 381; 7 C. L. R. 318, the Court said, "the decision is an authority for the proposition that any overt act is not sufficient, but that there must be corporeal delivery of the child by a person competent to give, to a person competent to take, accompanied by the declaration on the one side, 'I give the child in adoption,' and on the other, 'I take the child in adoption."
A deed or other writing in support of the act of adoption is unnecessary, but in cases to which the Oudh Estate Act, 1869, applies, an adoption by a widow must be by a writing executed and attested in manner required in case of a will, and registered.

Although it is usual to invite relations to the performance of the Invitations, etc. ceremonies, and, in the case of large landowners, to represent the fact of the adoption to the Government authorities, the absence of such invitation or representation does not vitiate the adoption. The consent of the ruling authority is not necessary, unless it be a condition of the exercise of a permission to adopt.

The person giving in adoption ought not to receive any consideration for the adoption; but it has been held that if he does so the adoption is not void.

A contract to pay money in consideration of giving a son in adoption cannot be enforced.

The receipt of a sum of money by the widow from the natural father does not affect the adoption. As to an arrangement made by a widow to reserve the property of her husband for herself, see post, pp. 188, 189.

Where a father actually gives his son in adoption, he must give in writing,

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2 I of 1869.
3 Act X. of 1865, s. 50, applied to wills under Act I. of 1869 by s. 19 of the latter Act.
4 S. 32 (8). This would apparently not take the place of the corporeal giving and receiving required by Hindu law. See Bhakya Rabidas Singh v. Indar Kumar (Maharani) (1988), 16 L. A. 53, at p. 56; 16 Calc. 556, at p. 561.
6 Bhaskar Buncjatra v. Narro Ragho-
has apparently no power to impose a condition invalidating the adoption on the happening or non-happening of a future event; but in giving to his wife permission to give in adoption, he may subject the exercise of that power to a condition, and unless that condition be substantially fulfilled the gift has no effect.¹

If the condition be an illegal or immoral one, the gift would be effectual even though the condition be not performed.

It is by no means clear what effect upon the boy’s position in his natural family would be caused by an adoption upon a condition which is not fulfilled.

As to conditions with regard to the property made at the time of the adoption, see post, pp. 187-189.

As to gifts of property conditional on adoption, see post, pp. 208, 210.

The person taking ² and the person giving ³ in adoption must be mentally capable of understanding, and must understand the significance of the act, otherwise there is no valid gift or acceptance, as the case may be.

There may be a question as to whether the amount of mental capacity which is requisite in the case of a will ⁴ is necessary for the taking a child in adoption,⁵ as the taking in adoption is a matter of religious necessity.⁶

If an adoption has been brought about by fraud, coercion,⁷ mistake,⁸ misrepresentation,⁹ undue influence,¹⁰ or

¹ Rangubai v. Bhagirthabai (1877), 2 Bom. 377. In this case the previous sanction of Government was the condition required by the natural father.
⁵ Banee Per selfies (Baboo) v. Abdool Hye (Moonske Byad) (1876), 23 W. C. R. 192, at p. 195.
otherwise than by the free consent of the persons giving and taking in adoption, it is voidable. It can be ratified subsequently if no one's interest is prejudicially affected by such ratification.

Where the adopter is a young widow, the Court will require clear evidence that, at the time of adoption, she was fully informed of her rights, and of the effect of adoption. There will, however, be some relaxation of the strictness of this rule where the husband has directed his wife to adopt.

Where a person who has attained the age of majority is adopted, his assent would apparently be essential to the adoption. In other cases no such assent is necessary.

In the case of Sudras no religious ceremonies are necessary.

An intentional omission to perform even unnecessary ceremonies, with a view to leave the adoption unfinished, or a non-performance of

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1 Venkata Narasimha Appa Row (Sri Rajah) v. Ramgoyya Appa Row (Sri Rajah) (1905), 29 Mad. 437.
2 Ibid.
3 Bajubai v. Bala (1846), 7 Bom. H. C. App. i., at pp. xx., xxi. See Jayamalini v. Sashikala Nather (1865), 10 M. I. A., at p. 433. There have been a number of cases in which it has been held that if it is sought to make a purdahmaneek woman responsible for acts which are detrimental to her interest, it must be clearly shown that she knew the effect of such acts and had had independent advice, and that no advantage was taken of her.
5 i.e. the age of majority according to Hindu law, ante, p. 41. This might be the case in Western India, the Punjab, or among Jains; see ante, p. 146.
contemplated ceremonies in consequence of death, or of some other cause, may be evidence to show that the adoption is incomplete.

The performance of the datta homam\(^1\) is apparently necessary in the case of the twice-born classes, at any rate where the boy is not of the same gotra as the adoptive father.

Where the boy is of the same gotra as the adoptive father, as, for instance, where he is a brother's son, according to the law prevalent in the Presidencies of Bombay and Madras, no religious ceremonies are necessary.\(^2\)

In Bengal this distinction has not been made.\(^3\)

There is not very much direct authority on the question whether the absence of religious ceremonies in any case invalidates an adoption among the twice-born classes. In an old case the Judicial Committee said,\(^4\) "Although neither written acknowledgments nor the performance of any religious ceremonials are essential to the validity of adoptions;" but it does not appear that the question as to the necessity of religious ceremonies was raised in that case.

In reference to these remarks the Judicial Committee said in a subsequent case,\(^5\) "It cannot, however, be considered as more than a dictum, since the decision was against the adoption in fact."

In a still later case, where the parties were Sudras, the Judicial Committee said,\(^6\) "It is perfectly clear that amongst the twice-born classes there would be no such adoption by deed, because certain

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1 Oblations of clarified butter to fire, Wilson's "Glossary."
3 A suggestion of a distinction on this ground was made in Nittianand Ghose v. Krishna Dyal Ghose (1871), 7 B. L. R. 1, at p. 5; 15 W. R. C. R. 300, at p. 301, where the parties were Sudras, and the question was not decided. In Atma Ram v. Madho Rao (1884), 6 All. 276, at p. 279, Stuart, C.J., considered that the distinction was one of general application. Sastri G. C. Sircar ("Law of Adoption," p. 382) repudiates the distinction.
religious ceremonies, the datta homam in particular, are in their case requisite."

Although it has been considered that this expression of opinion decides the question,1 "it is doubtful if more was intended than to point out that such religious ceremonies are requisite as part of the purely ceremonial law, not that the validity of an adoption for civil purposes depends on their due observance." 2

At any rate, so far as the Judicial Committee is concerned, there are only contradictory dicta on the subject, with the exception above named.

The High Courts have accepted the view that the performance of the datta homam is necessary,3 but in one case only 4 has a High Court, so far as the writer can ascertain, set aside an adoption on the ground that religious ceremonies had not been performed.

It has been suggested 5 that adoption by a widow perhaps stands on a different footing, as, "according to the sages, the twice-born females hold the same position as Sudras with respect to the performance of religious ceremonies," but this distinction is not made by the cases which hold that religious ceremonies are necessary in the case of an adoption in one of the regenerate classes. In some of those cases 6 the adoption was made by a widow.

In the Punjab no religious ceremonies are necessary.7

Amongst the Jains no religious ceremonies are necessary.8

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1 Ranganayakamma v. Alvar Setti (1889), 13 Mad. 214, at p. 220. The parties in this case were Vaisyas, but as there was no effective giving or taking, the decision of this question was not necessary.

2 Atma Ram v. Madho Rao (1884), 6 All. 276, at p. 283.

3 Ranganayakamma v. Alvar Setti (1889), 13 Mad. 214, at p. 220; Venkata v. Subhadra (1884), 7 Mad. 548; Govindaayar v. Dorasami (1887), 11 Mad. 5, at pp. 9, 10; Chandramala Patna Mahadevi (Sri Sri) v. Mukundama Patna Mahadevi (Sri) (1892), 6 Mad. 20; Atmaram v. Madho Rao (1884), 6 All. 278; Oomrao Singh (Thakoor) v. Mehtab Koonser (Thakoorer) (1888), 3 Agra H. C. 103A. See Ranji Vinayakram Jagannath Shankarsetti v. Lakshmi Bai (1887), 11 Bom. 381, at pp. 385, 384; "Dattaka Mimansa," v. 36; West and Bühler, 922, 923; Steele, 45.


6 Luchmun Lall v. Mohun Lall Bhaya Goyal (1871), 16 W. R. C. R. 179; Ranganayakamma v. Alvar Setti (1889), 13 Mad. 214; Ranji Vinayakram Jagannath Shankarsett v. Lakshmi Bai (1887), 11 Bom. 381; Atmaram v. Madho Rao (1884), 6 All. 276; Oomrao Singh (Thakoor) v. Mehtab Koonser (Thakoorer) (1888), 3 Agra H. C. 103A.

7 Tupper's "Punjab Customary Law," vol. iii. p. 82.

8 Lakshmi Chand v. Gatto Bai (1886), 8 All. 319. As to the rites which are usual among Jains, see G. C. Sircar's "Law of Adoption," p. 454.
No ceremonies are necessary in an adoption in the duryamudhyayuna form among the Nambudri Brahmins.\(^1\)

The homa ceremony may be performed at any time after the actual giving and taking, and it does not seem to be necessary that the father should perform it. When the homa is necessary, the adoption is not complete until it is performed. Its performance after the death of the natural father,\(^2\) or of the adoptive father,\(^3\) does not invalidate the adoption.

Although it is usual to perform the homa in the dwelling-house of the adopter,\(^4\) it is immaterial where the ceremony is performed.\(^5\)

There seems to be nothing to prevent the natural and adoptive parents delegating to others the performance of the homa ceremony.\(^6\)

Although other religious ceremonies may be usual, it does not appear that the absence of them invalidates an adoption.\(^7\)

Provided the above rules as to the capacity to take in adoption, the capacity to give in adoption, the capacity to be taken in adoption, and as to the act of adoption, are followed, an adoption is valid; otherwise it is void.\(^8\)

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1 Shankaran v. Keshav (1891), 15 Mad. 6. As to this form of adoption, see post, pp. 194-196.
2 Venkata v. Subhadra (1884), 7 Mad. 549. In this case five years had elapsed. In the interval the natural father died, but the homa was performed by one of his sons.
3 Subbarayar v. Subbammal (1898), 21 Mad. 497.
5 Oonrao Singh (Thakoor) v. Mchtub Kooner (Thakooraner) (1886), 3 Agra H. C. 103a.
6 See Subbarayar v. Subbammal (1898), 21 Mad. 497; Lakshmibai v. Ramachandra (1896), 22 Bom. 590. As to the delegation of the giving and receiving, see ante, pp. 133, 138.
7 In Luchmu Lall v. Mohun Lall Bhaya Gayal (1871), 16 W. R. C. R. 179, the Court held that the performance of the putreṣṭi jyot (sacrifice for male issue) is essential to the validity of an adoption among the three superior castes. G. C. Sircar ("Law of Adoption," p. 383) suggests that the words "putreṣṭi jyot" were in the judgment in that case by mistake substituted for "dattapunam," as the putreṣṭi jyot is only necessary when the ceremony of tonsure has been performed in the natural family ("Dattaka Miamana," s. 4, paras. 33, 49).
8 See Gangai Sakhai v. Lekhraj Singh (1886), 9 All. 253, at pp. 296, 297. As to the application of the doctrine factum valet quod fieri non debuit, see ibid. Gurulingaswami (Sri Balus) v. Ramalakshamma (Sri Balus), Radha
The invalidity of an adoption, or of a power to adopt, cannot be cured by a subsequent event.\(^1\)

**Illustrations.**

(a) An adoption made during the lifetime of a son is not rendered valid by the death of such son.\(^2\)

(b) A power to adopt a son as co-heir to a living son cannot be exercised even after the death of the living son.\(^3\)

(c) The death of the son’s widow, in whom the property has vested, does not validate an adoption made before her death.\(^4\)

Except in so far as the law in certain cases requires the consent of kinsmen for the purpose of validating an adoption,\(^5\) it is submitted that the consent of the person in whom the estate of the adoptive father is vested, or of the person or persons entitled in reversion, does not validate an adoption which is otherwise invalid.\(^6\)

It has been held in Bombay that where the adoption takes place with the full consent of the person in whom the estate is vested by inheritance,\(^7\) the adoption is rendered valid, and the estate vested in the adopted son by such consent;\(^8\) but there

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\(^2\) As to the postponement of the religious ceremonies, see ante, p. 158.


\(^5\) **Pudma Cooamati Deb v. Court of Wards** (1881), 8 I. A. 229; 8 Cale. 302.


\(^7\) Where the estate is vested by survivorship, the assent of the co-partners in whom it is vested is in Western India necessary so far as joint property is concerned (ante, p. 125).

is authority to the contrary to be found in decisions of the same
Court.\(^1\)

It is submitted, that although the consent may have the effect of
estopping the person adopting from denying the adoption,\(^2\) it cannot
otherwise affect the validity of the adoption.

In one instance it has been said that consent validates an otherwise
invalid adoption. In the "Dattaka Mimansa,"\(^3\) it is said that a
second son may be adopted\(^4\) with the sanction of the existing issue,
and in *Rungama v. Atchama*\(^5\) this seems to have been accepted,
although it became unnecessary to decide the question, but the Courts
have not in any subsequent case upheld such adoption, and there are
great difficulties in the way of giving effect to any such consent, as
no provision seems to be made for the division of the property in that
event.

As to consent to the devesting of estates on adoption, see *post*,
p. 201.

Acquiescence. Whatever may be the effect of consent to an adoption, active
acquiescence may, in certain circumstances, operate as an estoppel,\(^6\)
but passive acquiescence cannot alter rights, unless it extend to the
period provided by the law of limitation.\(^7\) It may, however, be some
evidence of the fact of the adoption.\(^8\)

Cancellation or
Renunciation.

An adoption once validly made cannot be cancelled by
the natural or adoptive parents,\(^9\) or renounced by the
adopted son.\(^10\)

There is nothing to prevent an adopted son renouncing any interest
in property which would come to him as such.\(^11\)

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\(^1\) See *Dharnidhar (Shri) v. Chinto* (1895), 20 Bom. 250, at p. 258; *Vanande Vishnu Manohar v. Ram-
chandra Vishwak Modak* (1896), 22 Bom. 551, at p. 555.

\(^2\) *Post*, p. 174.

\(^3\) S. 1, para. 12.

\(^4\) See ante, p. 103.

\(^5\) (1848), 4 M. I. A. 1, at pp. 97, 103; 7 W. B. C. 57, at pp. 59, 62.

\(^6\) *Post*, p. 176.

\(^7\) See *Uda Begum v. Imam-ud-din* (1875), 1 All. 82; *Turuck Chunder Bhattacharje v. Hurro Sunkur
Sandhyal* (1874), 22 W. R. C. R. 367; *Rajan v. Basura Cetti* (1865), 2
Mad. H. C. 428; *Ran Raw v. Roja Raw* (1864), 2 Mad. H. C. 114; *Peddis-
muthalaly v. N. Tamma Reddy* (1864), 2 Mad. H. C. 270.

\(^8\) *Post*, p. 177.

p. 108; *Sukhooal Lal v. Gunam Singh* (1879), 2 All. 366; *Hosak Rao
Manohar v. Govind Rao Bulevant Rao
Manohar* (1828), 2 Borr. 75.

\(^10\) *Mahadu Gama v. Rajoji Sicks* (1893), 19 Bom. 259; *Ranee Bhande v. Roopshanker Shunkarjee* (1823), 2
Borr. 656, at pp. 665, 671.

\(^11\) *Post*, p. 192.
KRITIMA ADOPTION.

In the district of Mithila, or Tirhoot, where it is the prevailing form, and in the adjoining districts, a form of adoption called the Kritima is practised, and is recognized by the law.

This form of adoption is not to be confounded with the adoption of a Kritima son according to the Smritis and commentaries. The latter held the same position as a Dattaka son, and the ceremonies and conditions were apparently identical in both cases. The Kritima form of adoption which prevailed throughout India has long been obsolete.

The modern form of Kritima adoption is based upon recent authorities, and is said to owe its origin to the prohibition of adoption by a widow in the Mithila country.

Either a man or a woman can adopt in this form, provided he or she has no son, grandson, or great grandson in existence.

A wife or widow so adopting does not require the assent of her husband or of his kinsmen, and she cannot adopt a son to her husband in this form, even if she receives his permission.

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1 See ante, p. 9.
2 Kulkeon Sing v. Kirpa Sing (1795), 1 Ben. Sel. R. 4 (new edition, 11); Sutpaloea (Mussoomaun) v. Indrunund Jha (1816), 2 Ben. Sel. R. 173, note to p. 175 (new edition, 221, note to p. 224); Colebrooke’s “Digest,” vol. iii. p. 276; Strange’s “Hindu Law,” vol. ii. p. 204. There is nothing to prevent a dattaka adoption in the Mithila district by a man, Sircar’s “Law of Adoption,” p. 447; but a widow cannot adopt in that form according to the Mithila school.
3 G. C. Sircar’s “Law of Adoption,” p. 448. In a note to Srinath Serna v. Radhakamnis (1796), 1 Ben. Sel. R. 15, at p. 16 (new edition, 19, at p. 21), it is said that this form of adoption is in use in North Behar, and the contiguous districts of Baglipore (Bhaughupore) and Purnaea.
5 Ande, p. 127.
6 W. Macnaghten’s “Hindu Law,” vol. i. pp. 95-100.
7 Sircar’s “Law of Adoption,” p. 449.
A husband and wife can adopt jointly, or they may each adopt a separate son under this form. 1

Except that he must belong to the same class 2 as the person adopting him, there is no restriction as to the person to be adopted. 3

The relationship of the adopter and the adopted does not, it is submitted, affect the validity of the adoption.

In *Purnessur Dutt Jha (Chowdree) v. Hunooman Dutt Roy,* 4 the adoption of a sister's son by a Brahmin in the *Kritima* form was upheld, but in an earlier case, 5 the adoption of an elder brother by a younger brother was held invalid.

In *Nunkoo Singh v. Purn Diwan Singh,* 6 an adoption of a sister's son in the *Kritima* form was upheld, but on the ground that the parties did not belong to one of the regenerate classes.

According to the Dvaita-Parishishta of Kesava Misra, a pundit of Mithila, even a father or a brother may be adopted. 7

Sir William Macnaghten considers that there is no restriction except as to tribe, 8 but Sastri G. C. Sircar 9 contends that the rule as to relationship applicable to an adoption in the *Dattaka* form 10 are equally applicable to an adoption in the *Kritima* form.

The age of the son adopted in this form is immaterial. 11

The performance of the initiatory ceremonies in the natural family, 12 or the marriage, 13 does not prevent the adoption.

The consent of the adopted son, 14 and the consent (or at

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7 *I.e. caste or class," Hindu Law," vol. i. pp. 75, 76.
9 *Ante,* pp. 139-144.
12 W. Macnaghten's "Hindu Law," vol. i. p. 76.
13 *Luchman Lall v. Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R.
any rate the absence of the express dissent) of his parents, if living, is necessary to this form of adoption.

The relationship being one created by contract, the consent of all the necessary parties must coincide. An assent given by the son after the death of the adoptive father to an adoption to which the adoptive father assented before his death will not be sufficient.

No ceremonies are necessary, and no particular form is required to be observed.

Colebrooke cites from "Rudradraka in the Suddhiviveka," the following:-

"The form to be observed is this. At an auspicious time, the adopter of a son having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says, 'Be my son.' He replies, 'I am become thy son.' The giving of some chattel arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential."

A Kritima adoption, when once validly made, cannot be revoked.

SOME OTHER SPECIAL AND LOCAL FORMS OF ADOPTION.

In the district of Gya there is amongst the Gyawl Brahmins a Gyawals. practice of adoption in a form which is similar to the Kritima form. It is purely contractual, and does not affect the position of the adopted son in his natural family.


1 Macnaghten's "Hindu Law," ii. p. 196.


3 Shikboores (Musramat) v. Joogun Singh (1887), 8 W. R. 155, at p. 158.

4 "Mitakshara," chap. i. s. 11, para. 17, note.

5 Referred to in Durgopal Singh v. H.L.


Among the Reddi caste it is customary for a man who has no son to affiliate a son-in-law by what is called an Illatam adoption. This custom prevails in the Bellary, Kurnool, Cuddapah, Nellore, and North and South Arcot districts, but not among the Kondarazu caste of the Vizagapatam district.

There is no mention of this form of adoption in the Digests, and there are few decided cases on the subject. It is necessary to determine each case according to the evidence as to the custom, and its effects which may be brought forward.

It is uncertain whether a man having a son can affiliate a son-in-law in this form of adoption, whether the affiliation is affected by the introduction into the family, or requires for its completion marriage with a daughter, and whether, if the father be dead, the right may be exercised by a surviving paternal grandfather.

A son-in-law so adopted stands for purposes of inheritance in the place of a son, and in competition with natural born sons, or sons adopted in the Dattaka form, takes an equal share.

He does not lose any of his rights of inheritance in his natural family, nor do the members of his natural family lose their rights of succession to him.

An Illatam son-in-law can deal with property acquired by him as such in the same way as he can deal with any other self-acquired property. His sons have no right therein by virtue of their birth.

The property received by the Illatam son-in-law as such passes to his heirs in the same way as self-acquired property. The heirs of the adopter have no right in it.

1 The principal caste of Telinga cultivators, a caste of Sudras, Wilson's "Glossary," p. 442.
3 Illata, a bride's father having no son, and adopting his son-in-law, Wilson's "Glossary," p. 216.
4 Balaram Reddi (Sisoda) v. Pero Reddi (Sisoda) (1883), 6 Mad. 267, at p. 269. See also Hanumantamma v. Rami Reddi (1881), 4 Mad. 272.
5 Naramma Ruru v. Veerabhadra Ruru (1893), 17 Mad. 287.
6 See Hanumantamma v. Rami Reddi (1881), 4 Mad. 272, at p. 275; Tirumana Reddi v. Peurnal Reddi (1892), 1 Mad. H. C. 51.
7 See Chinna Obayya v. Sara Reddi (1897), 21 Mad. 298; Malla Reddi v. Padimbledon (1893), 17 Mad. 48, at p. 50.
8 Hanumantamma v. Rami Reddi (1881), 4 Mad. 272, at pp. 282, 283.
9 Hanumantamma v. Rami Reddi (1881), 4 Mad. 272, at p. 283. This places him in a better position than a Dattaka son, see post, pp. 189, 190.
11 Balaram Reddi (Sisoda) v. Pero Reddi (Sisoda) (1883), 6 Mad. 267.
12 Ramakrishna v. Subba (1889), 12 Mad. 449.
It is uncertain whether a son-in-law so adopted obtains a right to right to insist upon partition of ancestral property during the father's lifetime; he apparently cannot do so, as it has been held that there is no right of survivorship between him and an adopted son living in commensality with him, and the interest acquired by the *ilatom* son-in-law is to be treated as self-acquired property.

The taking of a son-in-law in *ilatom* adoption does not prevent the subsequent adoption of a *Dattaka* son.

In Nair families governed by the *Marumakkathayam* rule of inheritance, the right (and perhaps duty) to adopt females into the family or *taravad* is vested in the *karnavan*, or head of a family, but he cannot, in the absence of proof of custom to that effect, adopt either without consulting the co-sharers, or in case it be essential to the preservation of the *taravad*. It cannot be so essential until the last possible *karnavan* has been reached.

Under the *Aliyamanta* system the last female member of the family cannot adopt a daughter without the consent of her son.

As to the adoption by Nambudri Brahmin's following this law, see *Subramanyan v. Paramaswaran* (1887), 11 Mad. 116.

As to the law of adoption in Malabar, see Wigram's "Malabar Law and Customs," pp. 11-14.

In families governed by the *Makkalayam* rule of inheritance, there are three systems of adoption.

(a) "In the first, ten hands or five persons take part, viz. the adopting parents, the natural parents, and the boy."

1 *Hanumantamma v. Rami Reddi* (1881), 4 Mad. 272, at p. 283. Like other questions as to the incidents of this form of adoption it must be determined on evidence of custom.


3 *Chennamma v. Subbaya* (1885), 9 Mad. 114. In *Mulla Reddi v. Padmanama* (1893), 17 Mad. 48, the Court on the evidence decided against a claim of survivorship made by a male member of the family against the daughters of the son of an *ilatom* son-in-law.

4 *Ante*, p. 162.

5 This was done in *Chenchantama v. Subbaya* (1885), 9 Mad. 114, at p. 115.

6 *Thirthipalli Raman Menon v. Varangattil Palisseri Raman Menon* (1800), 27 I. A. 231; 24 Mad. 73; 4 C. W. N. 810, citing Strange's "Manual," s. 403, which is as follows: "On failure of the sister's progeny, male and female, the head of the family may make adoption. The descent being in the female line, the adoption must be of a female. In view of the probable minority of her offspring at the period when the management may fall in, a male, her brother, may be taken in adoption at the same time with herself, in order to afford provision for the administration of the affairs of the family, and for conduct of the religious rites to be observed therein."

7 Inheritance by the male line. Wilson's "Glossary," p. 587.


Wigram says that this form is probably almost identical with the ordinary Hindu adoption. It is called pattukayayai dattu.

(b) Adoption by Chamatha, i.e. by burning a piece of sacred grass.

(c) The third form is akin to the Krittima form. It is "commonly adopted by Brahmin widows and Sudras for the purpose of perpetuating the family when it is in danger of becoming extinct. There is no limit as to age or number of persons adopted. The only limit seems to be that the person or persons adopted should be of the same vamsam or tribe as the adopter. Among Sudras the adoption should be of one or more females, but it is frequently accompanied by the adoption of a male for the purpose of providing for the future management of the adopter's property. Sometimes a whole family of adults is adopted."

The practice among Nambudris, that only the eldest marries, necessarily limits the right of adoption to his line. "But if there be any male relative at all, however distant, then he is not entitled to the right of adopting. The nearest and oldest relative must be made to marry, and thus preserve the family continuity. But if there should be no prospect of his brothers getting issue, and if they should give their consent to the act, then he may have recourse to an adoption, to which the consent of the other relatives is not necessary. If, however, he adopts one of his distant relatives, in that case the consent of all his other relatives, however distant, will be necessary."

Among the Nambudri Brahmins, a widow can adopt or appoint an heir in order to perpetuate her ullaṁ, in the absence of dayadieś, whose relationship is the cause of two or three days' pollution, or with their consent. It is usual, but apparently not indispensable in such case, to require the person so adopted or appointed to marry for the purpose of continuing the ullaṁ. There is, apparently, no limit of age.

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1 Ibid.
3 See Vasudevan v. Secretary of State (1887), 11 Mad. 157, at p. 182.
8 A family.
9 Kinsmen.
10 Vasudevan v. Secretary of State (1887), 11 Mad. 157, at p. 188. There is no substantial distinction between the power to make a Krittima adoption (ante, p. 159) and the power to appoint an heir, ibid., at p. 174. See also p. 189.
11 Kasaravan v. Vasudevan (1884), 7 Mad. 297.
12 Kasaravan v. Vasudevan (1884), 7 Mad. 297, at p. 299.
There seems also to have been, or to be, a custom that if a Nambudri widow directs a person to marry to raise up issue for her illsam, the status of the son in the illsam for which he is begotten, is that of a son obtained in gift by adoption.\footnote{\textit{Tuttahura Alluttar Manukai Narrain Nambudripad v. Purolly Manukai Trinikrama Nambudripad}, Mad. S. D. A. 1855, p. 125, referred to in \textit{Vanandoom v. Secretary of State} (1887), 11 Mad. 157, at pp. 175, 176.}

It is unsettled whether the Courts will recognize the common practice of dancing-girls and prostitutes to adopt daughters, but except where the child has been taken in such a way as to make her reception punishable by the Criminal law, it is submitted that there is no reason why the Courts should not give effect to such usage.\footnote{\textit{Venku v. Mahalinga} (1888), 11 Mad. 393; \textit{Muttukkannu v. Paramasami} (1888), 12 Mad. 214.}

In cases of adoption, prior to the coming into force of the Indian Penal Code,\footnote{\textit{Venkatachellam v. Venkatasaamy}, Mad. dec. of 1856, p. 65.} the Courts in Madras recognized the custom,\footnote{\textit{Strange’s “Manual,”} para. 109.} but declined to extend it by allowing a plurality of adoptions.\footnote{\textit{Hencover Bye (Dee dom) v. Hencover Bye} (1818), 2 Murl. Dig. 133.}

It was also held that no ceremonies were necessary, and that mere recognition was sufficient.\footnote{\textit{Tuttahura Alluttar Manukai Narrain Nambudripad v. Purolly Manukai Trinikrama Nambudripad}, Mad. S. D. A. 1855, p. 125, referred to in \textit{Vanandoom v. Secretary of State} (1887), 11 Mad. 157, at pp. 175, 176.} Apparently the adoptive mother cannot adopt if she has a daughter.\footnote{\textit{Muthura Naikin v. Eru Naikin} (1880), 4 Bom. 545.} It is immaterial whether she has a son.\footnote{\textit{Manjumma v. Sheshgirinur} (1902), 26 Bom. 491, at p. 495. See ante, p. 25.}

In an old case in Bengal,\footnote{\textit{Chalakonda Akani v. Chalakonda Ratnachalam} (1864), 2 Mad. H. C. 58; Steele, 185, 186; \textit{Strange’s “Manual,”} paras. 98, 99.} the Court declined to recognize such adoptions, and in a Bombay case,\footnote{\textit{Muttukkannu v. Paramasami} (1888), 12 Mad. 214.} the report of which does not show when the adoption took place, but where apparently it had taken place before the coming into force of the Indian Penal Code, the Court, in declining to recognize the adoption, gave reasons which are as applicable to cases before that Act came into force as thereafter.

In a later Bombay case, effect was given to an adoption effected by a dying prostitute for the purpose of providing for the performance of her funeral ceremonies, and the inheritance of her property.\footnote{\textit{Muthura Naikin v. Eru Naikin} (1880), 4 Bom. 545.}

In cases where a minor under the age of sixteen years has been sold or otherwise disposed of, or received with intent that she shall be employed or used for the purpose of prostitution (and this generally happens in the cases of so-called adoptions by dancing-girls\footnote{\textit{Muthura Naikin v. Eru Naikin} (1880), 4 Bom. 545.} the disposition or reception of the girl is punishable by the Penal Code.\footnote{\textit{Act XLV. of 1860, ss. 372, 373.} See \textit{Queen-Empress v. Ramanna} (1889), 12 Mad. 273.}
and therefore, as being prohibited by law, no effect can be given to it by the Court.\footnote{Sanjini v. Jalajakshi (1899), 21 Mad. 229; Kamalakshi v. Ramasami Chetti (1896), 19 Mad. 127.} In \textit{Venku v. Mahalinga},\footnote{In Kaluwa v. Padopa Valad Bha-\textit{janow} (1878), 1 Bom. 248, it was held that a suit would lie to obtain an injunction restraining a person from performing the \textit{Shraddh} or other ceremonies as an adopted son, or assuming the status of such adopted son.} Muttusami Ayyar, J., said, “We may set aside or decline to enforce a contract or disposition which has for its immediate object the prostitution of a minor during her minority so as to leave her no choice of married life when she is over sixteen years. The policy of the Penal Code, as it seems to me, is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assume to them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing women, and to leave otherwise the incidents of their legal status as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus.”

Effect was given to an adoption by a prostitute dancing-girl in \textit{Narasamma v. Gangu}.\footnote{See Act I. of 1877, s. 42, post, p. 167.}

**Disputes as to Adoption.**

Suits in which question of adoption arises.

Who is entitled to dispute adoption.

Adoption by widow.

A question as to the factum or validity of an adoption would arise in a suit or other proceeding in which the alleged adopted son is asserting his title as such, or in a suit brought against him for the purpose of disputing his title as an adopted son, or in a suit to recover property held by him by virtue of such alleged title, or in a suit for the purpose of preventing him from acting as adopted son.\footnote{See Act I. of 1877, s. 42, illus. f, post, p. 168, and cases, post, p. 167, note 1.}

An alleged adoption may be disputed by any person whose interests are affected by it.\footnote{See Act I. of 1877, s. 42, post, p. 167.}

A suit to declare the invalidity of an adoption by a widow can only, as a general rule, be brought by the presumptive reversionary heir.\footnote{See Act I. of 1877, s. 42, post, p. 168, and cases, post, p. 167, note 1.} Such a suit may be brought by a more distant reversioner, if those nearer in succession are in collusion with the widow or have
precluded themselves from interfering, 1 or refuse, without sufficient cause, to take steps, 2 or where the next reversioner has only a limited estate. 3

The nearer reversioner would apparently be a necessary party to a suit brought by a more distant reversioner. 4

In case of an adoption by the husband the widow or adoptive father, other heir may sue, at any rate after the death of the adoptive father.

In case of the widow, or other limited heir, 5 colluding, or being precluded from interfering, the presumptive reversionary heir may sue, and possibly in case such presumptive reversionary heir is also colluding, a more distant reversioner may sue. 6

Except in a case where he is estopped from so doing, 7 a suit seeking to declare an alleged adoption to be invalid may be brought by the person making the adoption. 8

A declaratory decree will not be made as of right. 9 Declaratory decree.

Sec. 42 of the Specific Relief Act 10 is as follows:—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief.

1 Anund Koer (Rani) v. Court of Wards (1880), 8 I. A. 14, at p. 22, 23; 6 Calc. 764, at pp. 772, 773; 8 C. L. R. 381, at pp. 385, 386; Bhi-
2 Gurulingaswami v. Ramalakhmamma (1894), 18 Mad. 53.
4 See Anund Koer (Rani) v. Court of Wards (1880), 8 I. A. 14, at p. 23; 6 Calc. 764, at p. 772; 8 C. L. R. 381, at pp. 385, 386; Gurulingaswami v. Ramalakhmamma (1894), 18 Mad. 53.
5 Such as a daughter.
6 Ante, p. 166.
7 Post, p. 174.
8 As, for instance, where the adoptor has been induced to adopt by misrepresentation or coercion (ante, pp. 152, 153).
9 I. of 1877. The right to bring a suit to declare an adoption to be invalid independently of a claim to property has been incidentally recognized by the Legislature. See Court Fees Act (VII. of 1870, s. 2, art. 17, cl. 5) and in Limitation Acts (IX. of 1871, Sched. II., art. 129; XV. of 1877, Sched. II., art. 118).
Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a person interested to deny a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustration.

A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

It is unsettled whether, in exercise of the discretion given to it by the Specific Relief Act,¹ the Court can determine a right to take in adoption before the adoption has taken place.

The High Court of Bengal has held in an unreported case that a suit will lie for a declaration that a permission set up by a widow is false.² The same Court decided in a case under the law before the Specific Relief Act came into force that such suit will not lie,³ relying on the decision of the Judicial Committee in Sree Narain Mitter v. Kishen Soondory Dassee (Sreemutty),⁴ but in the last-named case the suit was merely to set aside certain deeds of gift and acceptance in adoption, under which the defendant took no interest. It may in many cases be desirable that the question should be determined in order to save the parties expense, to save the boy from the peril of his adoption being declared invalid, and to save the estate from the expense of maintaining the boy if the adoption be declared invalid.⁵ On the other hand, the boy would not be bound by the decree, as he could not be a party to such suit.

There seems to have been no case in which an

¹ S. 42, above.
³ Run Bahadoor Singh v. Lucho Coosar (Musst.) (1879), 4 C. L. R. 270. See also Rajcomarree Dossee (Sreemutty) v. Noboocomar Mullick (1856), Boul. 127; Pearce Deyee (Mussamut) v. Hurbunsee Koee (Mussamut) (1873), 19 W. R. C. R. 127; Subudra Choudruyn (Mussamut) v. Golaknath Choudhry (1843), 7 Ben. Sel. R. 143 (new edition, 164).
⁵ See post, pp. 207, 208.
injunction has been granted to restrain the performance of an adoption,¹ but provided the application be made in due time, and there be no objection on the merits, there seems no reason why a Court should not be justified in issuing such injunction.

There is authority that an interim injunction will not be granted to restrain the carrying out of an adoption.²

The Courts will not decree specific performance of an agreement to give or take in adoption,³ but the breach of such agreement would apparently give a right to damages.⁴

A decision as to the factum or validity of an adoption will only bind the persons who are parties to such decision and those claiming under them.⁵

It is unsettled whether a decision as to the fact, or the validity of an adoption in a suit between the alleged adopted son and a person who is, during the lifetime of the widow, the then immediate reversioner, will bind another person who may succeed to the reversion.⁶ The Madras High Court has held that he is bound,⁷ but this is not in accordance with the views of the other High Courts.

When the question is decided, after the death of the widow, in a suit between the adopted son and the person who would in the absence of the adopter be entitled to the reversion after her death, such decision would bind all persons subsequently interested in the estate as they would take through the person then entitled.

A decision in a litigation which has been bona fide instituted and

¹ See Assur Parsokotam v. Ratanbai (1888), 13 Bom. 56.
² Ibid.
³ Act I. of 1877, s. 216.
⁴ See Sure Narain Mitter v. Kishen Soondores Dossec (1873), I. A. Sup. Vol. 149, at p. 160; 11 B. L. R. 171, at p. 188.
⁵ See Civil Procedure Code, 1908, s. 11; Act XIV. of 1882, s. 13.
⁶ See Bhagwanta v. Sukhi (1899), 22 All. 33; Chhiddu Singh v. Durga Dei (1900), 22 All. 382. This question was left undecided in Brojo-kishoree Dossec v. Sreenath Bose (1868), 9 W. R. C. R. 463, and in Jumoma Dassyu Choudhrami v. Bama soonderaj Dassyu Choudhrami (1876), 3 I. A. 72, at p. 84; 1 Cal. 289, at p. 296; 25 W. R. C. R. 235, at p. 239. The fact that a previous suit by a reversioner has been unsuccessful may be a reason for refusing a mere declaratory decree (see ante, p. 167) at the suit of another reversioner. The idea that a decision in a question of adoption had the effect of a judgment in rem was disposed of in Kanha Lall v. Radha Churn (1867), B. L. R. F. B. R. 692; 7 W. R. C. R. 338. The matter is now dealt with by the Evidence Act (1. of 1872), s. 43.
⁷ Chiruvolu Punnamma v. Chiruvolu Peraru (1906), 29 Mad. 390.
conducted between the alleged adopted son and the widow in whom the property was vested would, in the case where the adoption was alleged to be made by the widow's husband, bind the reversioners. Probably it would also have the same effect where the adoption is said to have been made by the widow, but she denies it.

A decision against one person claiming to be an adopted son would not bind another person claiming under another act of adoption.

Under the Specific Relief Act, a declaration is only binding on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. As these expressions do not include the case of a subsequent reversioner, it seems clear that a declaration, or the refusal to grant one, in a suit by one reversioner does not bind another reversioner.

A suit "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place," must be brought within "six years" from the time "when the alleged adoption becomes known to the plaintiff."

This provision is confined to declaratory suits, and does not alter the limitation for suits for possession of property.

There was a conflict of authority as to whether the effect of this provision is to bar suits for possession of property against a person holding under an alleged adoption which are brought more than six years after the alleged adoption becomes known to the plaintiff, or whether it is confined to cases where a declaration only can be obtained, and there is no present right to substantive relief.

The Madras and Bombay High Courts held that it has the

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3 I. of 1877, s. 43.
4 Act XV. of 1877, Sched. II., art. 118. "Plaintiff" includes also any person from or through whom a plaintiff derives his right to sue," s. 3.
5 Tiribhuvan Bahadur Singh (Thakur) v. Rameshar Baksh Singh (Rojir) (1906), 33 I.A. 156; 28 All. 727; 10 C. W. N. 1065.
6 As where the widow is alive, and the reversioner seeks to have it declared that the adoption made by her is not valid. See Specific Relief Act (I. of 1877), s. 42, ante, p. 187. This question was raised, but not determined, in Lucknow Lal Chowdhry v. Kankya Lal Mosur (1894), 22 I. A. 51; 22 Calc. 609.
8 Shrinivas Murar v. Hansam
former effect, but in Calcutta 1 and Allahabad 2 a contrary view was expressed.

The Madras decision was based upon two judgments of the Judicial Committee 3 with reference to the construction of Act 129 of the 2nd Schedule of an earlier Limitation Act (IX. of 1871). That article provided a limitation for suits to "set aside an adoption," and was held to be equally applicable to suits seeking a mere declaration that the adoption was invalid, and to suits which sought the possession of property held under colour of an alleged adoption. Although the phraseology of that article differs from that of the article now in force, which in terms contemplates only a declaratory suit, 4 there are observations of the Judicial Committee which were held to be equally applicable to the present law. 5

This rule of limitation has no application to a case where the proceeding or document is on its face no obstacle to the title of the heir, as, for instance, where a woman adopts to herself and not to her husband. 6

If the right of the nearest reversioner for the time being to contest an adoption by the widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioners. 7

The right to bring such suit would be barred where adverse possession.


5 Cf. Art. 119, post, p. 172, which also speaks of a suit for a declaration, but apparently contemplates substantive relief on the ground of the plaintiff's rights being interfered with.


the person claiming under an alleged adoption had held
the property for more than twelve years adversely to
the widow of his adoptive father 1 or to the plaintiff.

A suit "to obtain a declaration that an adoption is
valid" must be brought within "six years" from the
time "when the rights of the adopted son as such 2 are interfered
with." 3

It has been held by the High Courts of Bengal 4 and the North-west
Provinces 5 that this article does not prevent a suit for possession by a
person claiming as an adopted son, even though it be brought more
than six years after his rights have been interfered with. 6

A different view has been accepted in Bombay. 7 In Madras the
High Court has differed on this question. 8 The section clearly does
not bar a suit in which the plaintiff claims to succeed independently of
the alleged adoption. 9

Where time has begun to run before the adoption as in the case of
the widow being dispossessed, the adopted son may be barred by
adverse possession, 10 but in a suit claiming property alienated by the
widow before the adoption, time does not begin to run before the
adoption. 11

Where a person, entitled to dispute an adoption, is
benefitted in the same character by a will, or other dispo-
sition of property, which benefits the person adopted, he
must elect whether to take under the will, or other dis-
position, or against it.

"A principle not peculiar to English law, but common to all law,
which is based on the rules of justice, namely . . . that a party shall
not, at the same time, affirm and disaffirm the same transaction—affirm

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1 Act XV. of 1877, Sched. II., art. 144; Ghandarap Singh v. Lachman Singh (1888), 10 All. 485.
3 Act XV. of 1877, Sched. II., art. 119.
5 Lali v. Murudhar (1901), 24 All. 195; Chandumia v. Saligram (1903), 26 All. 40.
6 See notes to art. 118 of the schedule, ante, pp. 170, 171.
7 See Shrinivas Murar v. Hanmant Chacdo Deshpande (1899), 24 Bom. 280, differing from Pudajirao v. Ram-
    rav (1888), 13 Bom. 160; Laxmana v. Ramappa (1907), 32 Bom. 7.
8 Ratnamahar v. Akhandamahar (1902), 26 Mad. 291.
9 See Gangobai v. Tarobai (1902), 26 Bom. 720.
it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice.”

A person, whose title depends upon an adoption, must, in a contest between him and the person who would succeed in the absence of such adoption, prove the fact of the adoption, the performance of the ceremonies (if any) which may be necessary, and such facts as are necessary to establish its validity. If the adoption was by a widow, who could not adopt without permission, he must prove the fact of such permission having been given.

The burden of proving the adoption is on the person alleging it, in the unusual case of the adoption being denied by the person alleged to be adopted.

1 Rungama v. Atobalna (1848), 4 M. I. A. 1, at p. 103; 7 W. R. (P. C.), 57, at p. 62. See Act X. of 1865, ss. 167-177, applied to certain Hindu wills by Act XXI. of 1870, s. 2.


3 Oomrao Singh (Thakoor) v. Mehtab Koover (Thakooranee) (1888), 3 Agra, 103A. See ante, pp. 150, 153, 154.

4 See ante, pp. 153, 154.

5 Oomrao Singh (Thakoor) v. Mehtab Koover (Thakooranee) (1888), 3 Agra, 103A. In Rango Balaji v. Mudusoppa (1896), 23 Bom. 296, at p. 303, it was held that the person setting up an adoption was required to establish the death of the natural son of his adoptive father at the time of the adoption.


7 Chandra Kunwar (Rani) v. Narpat Singh (Chaudhri) (1906), 34 I. A. 27; 29 All. 184; 11 C. W. N. 321; Har Shankar Partab Singh v. Lal Raghuraj Singh (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 841.
Where the plaintiff claims property as heir, and is unable to establish his relationship, it is unnecessary for the defendant to prove his adoption.¹

In certain summary proceedings a de facto adoption might be acted upon until set aside in a properly constituted suit.²

Where the fact of the adoption is admitted, and it is alleged that the natural father has lost his right to give in adoption, the burden of proving such loss is upon the person alleging it.³

There is authority that in a suit which merely seeks to declare invalid an adoption which in fact took place, the burden of proof is upon the person seeking to obtain such declaration.⁴

A person entitled to dispute an adoption may be estopped from disputing it, although the same adoption may be liable to be disputed by other persons who are not so estopped.

The Indian Evidence Act,⁵ s. 115, enacted as follows:—

"Where one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief,⁶ neither he nor his representative⁷ shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

For instance, a widow representing to the natural father that she had a power to adopt, and thereby inducing him to give his son in adoption, would be estopped from thereafter denying the power.⁸

Allowing the thread ceremony and marriage to be performed in the

¹ Kalikishore Dutt Gupta v. Mozoomdar v. Bhuvn Chunder (1890), 18 Calc. 201.
³ Kusum Kumari Roy v. Satya Ranjan Das (1903), 50 Calc. 999; 7 C. W. N. 784.
⁵ Act I. of 1872.
⁷ This would not include an auction purchaser at a sale of property belonging to the person estopped. Parbhoo Lal (Laloo) v. Myinc (1887), 14 Calc. 401.
⁸ Kannammal v. Viraamani (1892) 15 Mad. 486.
adoptive family, and otherwise allowing the youth to act as an adopted son, would amount to an estoppel.1

Active participation in the adoption may also operate as an estoppel.2

A person may be so estopped, although he was acting in good faith, Good faith, or without a full knowledge of the circumstances, or was under a mistake or misapprehension.3

Mere acquiescence in, or presence at, an adoption is not sufficient to create an estoppel.4

The person taking in adoption would generally, in the absence of fraud or coercion, be estopped from denying the adoption,6 but where there has been no mis-statement,8 or conduct equivalent thereto, or where the mis-statement has not been acted upon,7 there can be no estoppel.

A person is not estopped from denying an adoption merely because he had previously secured succession to properties by setting up that adoption, when it appears that his claim as adopted son was not opposed by the person as against whom he is said to be estopped.8

The acts of a Hindu female, who “is acting without the guidance of a disinterested adviser, cannot prejudice her.”9

The misrepresentation to operate as an estoppel must apparently be Matters of law. of a matter of fact. An erroneous expression of opinion that an adoption was valid in law could not apparently lead to an estoppel, nor could a person apparently be estopped from asserting the state of the law.10

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1 Santappayya v. Rangappayya (1894), 18 Mad. 397.
4 Gurudisingasami v. Ramalakshumma (1894); 18 Mad. 53, at p. 60; Pappama v. Appa Rau (1893), 16 Mad. 584, at p. 391.
7 See Kuverji v. Babai (1890), 19 Bom. 374; Parvatibayamna v. Ramlakshma Rau (1894), 18 Mad. 145, at p. 149.
8 Har Shankar Pratap Singh v. Lal Raghuraj Singh (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 341.
10 See Gopala Lall v. Chundruoolee Bhoojee (Mussamat Sree) (1872), I. A. Sup. Vol. 131, at p. 133; 11 B. L. R. 391, at p. 395; 19 W. R. C. R.
In Parvatibayamma v. Ramakrishna Rau, it was laid down on the authority of Gopalayyan v. Raghupatiayyan, that "the claimant has to show that by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation in his original family has been altered so that it would be impossible to restore him to it." This limitation to the doctrine of estoppel is not, it is submitted, justified by the terms of sec. 115 of the Evidence Act. There seems to have been no estoppel in that case, as the representation, if made, was neither believed nor acted upon.

Mode of proof. The fact of the adoption, and of the power (if any), and of the circumstances necessary to establish the validity of the adoption, must be proved in the same way as any other fact. There are no special rules of evidence applicable.

The Court must carefully and strictly examine the evidence as to the completion of the act of adoption, and as to the facts which are necessary to validate it. Acquiescence by the person entitled to dispute an adoption, or by other members of the family, is some evidence of the fact of the adoption. Its value as such must depend upon the circumstances. Where it has arisen from an imperfect knowledge of the facts it can be of no value. A statement as to the existence of the power by the person alleged to have given it is evidence in support of it. As to statements by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, when these statements relate to the existence of relationship by adoption, see the Indian Evidence Act I. of 1872, sec. 32 (5), (6).

A statement amounting to an admission by the person alleged to have been adopted will be evidence against him requiring explanation.
An ancient report of a  *pramahayat* as to the pedigree of a family has been held to establish an adoption which was not then disputed.¹

A tradition in a *waqif-al-ars* has been acted upon by the Judicial Committee.²

"It may be desirable carefully to examine cases of possible fraud, yet . . . instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as nothing, on a mere suspicion of perjury and forgery."³

After such a lapse of time as makes it impossible, or difficult, to obtain direct evidence of the adoption, or of the performance of the necessary ceremonies, or of the giving of the necessary permission, evidence of recognition by the adoptive parents, or by other members of the family, or of treatment as an adopted son by permitting him to perform the family worship, or to share in the inheritance, or otherwise, may be sufficient to establish an adoption, or, at any rate, to render slight evidence sufficient,⁴ and in any case will, it is submitted, be admissible in support of the adoption,⁵ but such evidence cannot establish an adoption which is in law invalid.

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² Achal Ram (Lal) v. Kaxim Husein Khan (Raja) (1905), 32 I. A. 118; 27 All. 271; 9 C. W. N. 477.
⁵ See Indian Evidence Act (I. of 1872), s. 50. In that section "it will be noted that the words 'by blood marriage and adoption' have not been inserted after the word 'relationship' by Act XVIII. of 1872, as in the case of s. 32, cl. (5) and (6). Illustration (a) refers to the case of marriage, but relationship is not mentioned." Ameer Ali and伍德罗夫的"Law of Evidence," 1st ed., p. 360. This would seem to show that the conduct of relations would not be admissible as evidence in the case of adoption, but the Indian Courts have undoubtedly been
A person who asks the Court to presume that an adoption did take place, must establish an initial probability that the adoption was likely to have been validly made and that the conduct of the partners cognizant of the facts had been at least consistent with such an hypothesis.\(^1\)

Where there is conflicting evidence upon the fact of an adoption, much must depend upon the probabilities of the case to be collected from the admitted or proved facts, but such probabilities do not take the place of evidence.

The fact that the person alleged to have adopted was childless, and advanced in years, and had despaired of having male issue;\(^2\) or the fact that he was anxious to deliver himself from Pur,\(^3\) give rise to a probability that he wished to adopt.

The fact that the alleged adoptive father or mother was at enmity with the reversioner might also render an adoption probable.\(^4\)

The religious duty to adopt a son, which is said to be incumbent upon every childless Hindu,\(^5\) is also a circumstance to be taken into consideration,\(^6\) but by itself it has not much force, having regard "to the fact that childless Hindus die daily without having fulfilled this obligation, or made provision for its fulfilment after their death."\(^7\)

On the other hand, the absence of notices to relations and of ceremonials may be evidence against the probability of the fact of adoption.

in the habit of admitting such evidence. With two exceptions (Hum Dyal Nag v. Roy Krishn Boominch and Vyas Chimanlal v. Vyas Ramchandra), the decisions in note 4 above were given before the passing of the Indian Evidence Act.

\(^1\) Har Shankar Partab Singh v. Lal Raghuraj Singh (1907), 34 I. A. 129; 29 All. 519; 11 C. W. N. 841.


In Sootroogun Sutputty v. Subiba Dye,1 the Judicial Committee say, "But although neither written acknowledgments, nor the performance of any religious ceremonies, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption by which that transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth."

The youth,2 or vigour,3 of the alleged adopting father, and the consequent probability of male issue, may also be a circumstance rendering the adoption improbable.

"In considering the validity of" powers to adopt, "it is of great importance, in the first place to ascertain the position of the parties at the time when the instruments are alleged to have come into existence, and the motives which may have led to the execution of them."4

A permission to give in adoption may be presumed,5 but no such presumption may be made with reference to a permission to take in adoption.6

It has been held7 that "when the Court is satisfied that the authority to adopt really was given, it will require comparatively slight proof of the performance of the ceremonies by which the adoption is completed. But

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3 In Sarodaasowndy Dosses (S. M.) v. Tincowrey Nundy (1863), 1 Hyde, 223, at p. 250, the Court said, "We agree . . . that a Hindu does not adopt in his lifetime, unless he is prepared to acknowledge that he has lost the power of procreation; for, if his wife is sterile, he may marry another wife, and is enjoined to do so after the lapse of a certain time."


5 "Dattika Chandrika," s. 1, para. 32.


7 Radnamadub Gossuin v. Radhahbullub Gossuin (1863), 1 Hay, 311; 2 Ind. Jur. O. S. 5. See also Mohendra Lal Bokerjee v. Rookney Dubec (1864), Coryton, 43, at pp. 45, 46, where a similar observation was made, "When many years have passed and the person whose adoption is questioned has always been recognized as a son."
the Court will not presume that permission was given merely because it is shown that the usual ceremonies were duly performed."

There may be a presumption that a widow does not adopt while in a condition of ceremonial impurity.¹

¹ See Rangamayakamma v. Alwar Setti (1889), 13 Mad. 214, at p. 222.
CHAPTER IV.

PARENT AND CHILD (continued).

RESULTS OF DATTAKA ADOPTION.

ADOPTION in the Dattaka form completely transfers the boy from the family of his natural father to that of his adoptive father, and, except as specially provided by the law, he acquires, as from the date of the adoption, all the rights, privileges, duties, and obligations of a son born to his adoptive father.

When he has been adopted by a widow, his rights do not date back to the death of his adoptive father.

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1 As to the effect of the birth of a legitimate son after the adoption, see post, pp. 189, 190. As to the restrictions placed upon an adopted son with regard to marriage and adoption in his natural family, see ante, p. 39, and post, p. 205.


4 Lakshmana Babu v. Lakshmi An-
An adoption *pendente lite* has the same effect as a birth *pendente lite*.1

As to an adopted son’s impurity on deaths and births, and as to his competency to perform Sraddha rites,2 see G. C. Sircar’s “Law of Adoption,” p. 388.

The right of guardianship of an adopted son passes by the adoption from the natural parents to the adoptive parents.3

A son adopted by a Hindu governed by the Mitakshara school of law acquires the same rights in ancestral property on adoption 4 as would be possessed on birth by a natural son born to his adoptive father.5

Except where a son is born to his adoptive father subsequent to the adoption,6 an adopted son inherits to his adoptive father,7 and to the relations, whether lineal or collateral, of his adoptive father, to the same extent as he would have inherited if he had been born as a son to his adoptive father.8

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1 Narain Mal v. Koer Narain Mylives (1879), 5 Calc. 251; Moro Narayan Joshi v. Baliya Raghunath (1894), 19 Bom. 809, at p. 814; cases collected in Morley’s “Digest,” vol. iii. 186.

2 Rambhat v. Lokshman Chintaman Mayalay (1851), 5 Bom. 359, at p. 357.

3 See “Dattaka Mimana,” s. 3, para. 50; “Dattaka Chandrika,” s. 1, para. 25; s. 3, para. 17.


6 See post, pp. 231, 232; Haru Singh v. Baryur Singh (1866), 1 Agra, 256.

7 See post, pp. 189, 190.


As to the devesting of estates on adoption, see post, pp. 197–202. The right of the adopted son and of his heirs to inherit to the following relations by adoption has been established:

1. Paternal grandfather.¹
2. Paternal uncle.²
3. First cousin of his father.³
4. First cousin of his grandfather.⁴
5. Father’s brother’s son.⁵
6. Father’s daughter’s son.⁶
7. Father’s third cousin.⁷
8. The adopted son of the son of the brother of the man to whom the father of the claimant was adopted.⁸

Where an adopted son omits his adoptive father’s widow, who has taken possession in ignorance of the adoption, he is entitled to receive such rents and profits which have been received, or might with due diligence have been received, between the death of his adoptive father and his getting possession, credit being given for the maintenance of the widow, funeral expenses, and all such expenditure as she might properly have made as widow, subject to any question as to limitation.⁹

Conversely the relations of the adoptive father will inherit to the adopted son in the same way as if he had been a son born to his adoptive father.

An hereditary title or honour passes to an adopted son, title, and his descendants, in the same way as to a legitimate son, or his descendants.

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² Gourbhulub v. Jugernath Persaud Mitter (1824), Sir F. Macnaghten’s “Considerations,” p. 151.
³ In Sambhoocunder Chandry v. Narain Deb (1835), 3 Knapp, 55; 5 W. R. P. C. 100, it was held that the adopted son of the brother of the whole blood was entitled to inherit in preference to the son of a brother of the half-blood. Khemnath Roy v. Hureegobind Roy, Ben. S. D. A. 1859, p. 18.
⁴ Dinonath Mukerjee v. Gopal Churn Mukerjee (1881), 6 C. L. R. 379; 8 C. L. R. 57.
⁵ Tara Mohun Bhattacharjee v. Kripa Moyee Debia (1868), 9 W. R. 423.
⁷ Pudma Coomari Debi v. Court of Wards (1881), 8 I. A. 229; 8 Calc 302.
* See Dalil Kumar v. Ambika Partap Singh (1903), 25 All. 266.
Where the adoption is by a husband alone,¹ or in association with his wife, or one of his wives, or where it has been made to him by his wife with his concurrence, or after his death, the son inherits to the wife,² and to her relations,³ in the same way as if he had been a son born to such wife.

The right of the adopted son to inherit to the brother,⁴ and father,⁵ of the adoptive mother has been upheld.

The adoptive mother⁶ and her relatives⁷ inherit to the adopted son in the same way as if she had been his natural mother.

Where an adoption is made by a husband in conjunction with one only of several wives, or after his death by one of several wives, the adopted son⁸ inherits only to that wife and her relations, his relationship to the other wives being that of a step-son.

It is unsettled whether, when a man adopts in conjunction with more than one wife,⁹ or where two or more widows adopt in accordance with a joint power,¹⁰ or where two or more widows adopt in Western India

¹ See Sham Kuar v. Gaya Din (1876), 1 All. 255, at p. 257; "Dat-taka Mimansa," s. 1, para. 22.
³ Kuli Komul Moseomdar v. Uma Shunkur Moitra (1888), 10 I. A. 138; 10 Calc. 292; 13 C. L. R. 379. This decision in effect overruled Moru Mose Debesh v. Befoy Kikato Gosam-me (1883), W. R. Sp. No. 121 (so far as this question is concerned), and Chinmaramkrista Ayyar v. Minatchi Anumi (1875), 7 Mad. H. C. 245.
⁴ Shunkur Moitra (1888), 10 I. A. 138; 10 Calc. 292; 13 C. L. R. 379.
⁵ Sham Kuar v. Gaya Din (1876), 1 All. 255; Surjokant Nundi v. Mokesh Chunder Dutt (1882), 9 Calc. 73; Raja Prasad Mullick v. Kanere Muni Dassee (1908), 93 Calc. 947; 10 C. W. N. 896.
⁷ Sham Kuar v. Gaya Din (1876), 1 All. 255; Surjokant Nundi v. Mokesh Chunder Dutt (1882), 9 Calc. 73.
⁸ See Ramaswami Aiyar v. Ven-kantarayyan (1879), 6 I. A. 196; 2 Mad. 91; Annapurni Nachiar v. Forbes (1899), 26 I. A. 246; 23 Mad. 1; 3 C. W. N. 730; Jaiandra Nath Chaudhuri (Rai) v. Amrita Lal Bagchi (1900), 5 C. W. N. 20; Lakshmi Chaud v. Gatto Bai (1886), 8 All. 319.
¹¹ See ante, p. 112.
¹² See ante, p. 115.
CHAP. IV.]

POWERS OF FATHER.

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jointly, the adopted son inherits to all the widows so adopting and their relatives. It is submitted that this question depends upon whether such joint adoption is authorized by the law. The mere concurrence by a widow in an adoption by her co-widow would not, it is submitted, confer upon the adopted son any rights of inheritance to her or her relations.

It seems also to be unsettled whether, when a husband adopts in spite of his wife's express dissent, the son inherits to her and to her relations. A son adopted by a man who is disqualified from inheritance by reason of a personal disability, such as congenital blindness, impotence, or lameness, cannot acquire greater rights than his adoptive father, and therefore cannot inherit to any one from whom the adoptive father was disqualified from inheriting.

There is, it is submitted, nothing to prevent his inheritance from his adoptive father and from his adoptive mother and her relations. According to the "Dattaka Chandrika" he is entitled to maintenance. The descendants of an adopted son have the same rights of inheritance as the descendants of a legitimately begotten son.

An adopted son does not, as such, acquire any rights greater than those of a begotten son.

The adoption of a son does not interfere with the powers of the adoptive father to dispose of the property over which he has a power of disposition.

An adoptive father can defeat the rights of inheritance of his

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1 See ante, p. 127.
2 See ante, p. 115, note 9.
4 Ante, pp. 109, 110, and post., pp. 235, 256.
7 Chap. ii. a. 10, paras. 9-11. This is disputed in Sircar's "Law of Adoption," p. 419.
10 By will, gift, or transfer.
adopted son, whether the property held by him be partible or impartible. He can, in giving a power of adoption, require as a condition of the exercise of the power that the estate of his widow should not be interfered with, and might apparently impose such other conditions as are not inconsistent with the provisions of the law of gifts and wills.

In cases governed by the Hindu Wills Act, adoption, or the giving of a power of adoption, does not operate as a revocation of a will.

There is some authority that in other cases a Hindu has no power to completely disinherit his adoptive son, and that a will making no provision for adopted sons would be invalidated by a power given subsequently, but it is submitted that there is no reason why an adoption should have greater effect than the birth of a son in revoking a will. Where the will purports to deal with property, over which the adopting father ceased to have a power of disposition on the birth or adoption of a son, it would be ineffectual to deal with the property except where assent to the provisions of the will was a condition of the adoption.

Effect would apparently be given to an arrangement made at the time of the adoption stipulating that the adoptive father should not exercise his powers of disposition. Such arrangement would be enforced at the instance of the adopted son.

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2 Venka Surya Mahipati Rama Krishna Rao Bahadur (Sri Roja) v. Court of Wards (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; Sartag Kuari (Rani) v. Deoraj Kuari (Rani) (1888), 15 I. A. 51; 10 All. 272.


4 See Ganagpati Ayyan v. Savithri Ammal (1897), 21 Mad. 10; ante, pp. 116, 117.

5 Act XXI. of 1870, s. 2, read with Act X. of 1865, s. 57.


7 As the will must be taken to speak from the death of the testator, at which time he would have no disposing power.


In cases governed by the Mitakshara law, the adoptive father has no power to interfere with the adopted son’s right of survivorship in coparcenary property.\(^1\)

When, after attaining the age of majority, an adopted son ratifies an arrangement made between his natural father and the person adopting him limiting the interest in coparcenary property which he would acquire by adoption, he is bound by the arrangement.\(^2\) It is unsettled whether, in the absence of such ratification, he can be bound by such arrangement, but it is submitted that if the arrangement be a fair one, and does not unduly interfere with the rights of the adopted son, effect will be given to it, at any rate when the arrangement is made with the adoptive father or is authorized by him.

The Madras High Court has upheld dispositions of ancestral property by the adopting father with the consent of the natural father for the purpose of providing for the maintenance of the wife of the adopting father.\(^3\)

In another case\(^4\) the Bombay High Court held that when the adopted son and the person who gave him in adoption were fully cognizant of the disposition of the property made by the testator, and with the knowledge of such disposition the natural father consented to the adoption taking place, and when the disposition and the adoption might, under the circumstances, be regarded as one transaction, the disposition, though contained in a will, could not be repudiated by the adopted son.\(^5\) The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the

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\(^2\) See Ramakrishna Aiyyan v. Venkataramaiyay (1879), 6 I. A. 196; 2 Mad. 91.

\(^3\) Lakshmi v. Subramanya (1889), 12 Mad. 490; Narayanasami v. Ramasami (1890), 14 Mad. 172. See Basava v. Linganguda (1894), 19 Bom. 428.

adoption, and that its acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary."

The same Court upheld an arrangement between the natural father and the adopting mother, where provision was made for the enjoyment of a portion of the property by the mother in the case of her disagreement with the adopted son.

In *Ramasawmi Aiyar v. Venkatarama Aiyar*, the Judicial Committee said, "How far the natural father can by agreement before the adoption renounce all or part of his son's rights, is a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh v. Janaki* 4 certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding." In *Bhaiya Rabindat Singh v. Indar Kunwar (Maharani)* 5 the Judicial Committee said, "It is difficult to understand how a declaration by Guman Singh (the natural father) on an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which would only arise when his parental control and authority determined."

It is submitted that the determination of this question depends upon the nature of the particular arrangement. It is scarcely necessary to speculate as to what would happen if the natural father assented to a disposition of the whole of the ancestral property away from the son, as such a case is not likely to occur. If such case did occur, the Courts would probably hold that the natural father acted in excess of his powers, and that his son was not bound by it, but in dealing with a less extreme case, effect might well be given to a fair arrangement, in which the son distinctly benefits by the adoption. Where the adoptive father is separate from his kinsmen, and has, therefore, a power of disposing by will even of ancestral property, if he has no son, it must be remembered that he is by any such arrangement only doing what it was competent for him to do in the absence of an adoption.

As to a condition contained in the permission to adopt, see *ante*, pp. 116, 117.

There is authority that where there is an express power of adoption given by the husband, the widow cannot originate conditions. If she does so, the adoption would be valid, and the conditions would be ineffectual.

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4. (1874), 11 Bom. H. C. 199.
5. (1888), 16 I. A. 53, at p. 59; 16 Calc. 556, at p. 564.
6. *Jagannadha v. Pappamma* (1892),
Effect would be given to an arrangement which had been ratified by the boy after attaining majority.1

In Bombay it has been held that a widow can, at the time of the adoption, make a fair arrangement for the protection of her interest in the estate during her lifetime.2 The cases in which this conclusion has been arrived at were not cases in which express power was given by the husband, but cases where the widow exercised the power given to her by the system of Hindu law prevalent in Western India.3

When a widow obtains a reservation of rights by such an arrangement, she possesses therein only the ordinary rights of a Hindu widow.4

A widow would apparently have no power to arrange with the natural father to obtain for herself an interest in property which had not been vested in her, as, for instance, in property which, on her husband's death, passed by survivorship to other members of the family, and which is devested by the adoption.5

Where, after an adoption,6 a son is born to the adoptive father, the adopted son loses all rights to the performance of religious ceremonies, and his rights of inheritance are reduced—

(a) If he be governed by the Bengal school, to one-half of the share of a natural-born son.7

(b) If he be governed by the Benares school, to one-third of the share of a natural-born son.8

1 Mad. 400. In Solubhna (Musun- nu) v. Ramdotal Pande (1811), 1 Ben. Sel. R. 324 (new edition, 434). The pundits considered that an instrument under which the widow remained in possession was inoperative. G. C. Sircar ("Law of Adoption," p. 408) considers that the widow can make conditions.


3 Ante, pp. 125, 126.

4 Antaji v. Dattaji (1893), 19 Bom. 36.

5 Post, p. 302.

6 Where the son is born before the adoption then the adoption is invalid, ante, p. 108.

7 "Dayabhaga," x. 9; "Dattaka Chandrika," v. 16-17; Sir F. Macnaghten's "Considerations on Hindu Law," 137; 1 W. Macn. 70; 2 W. Macn. 184; G. C. Sircar's "Law of Adoption," p. 308. Consequently, if there be one begotten son the adopted son takes one-third of the whole, if there be two he takes one-fifth, and so on.

8 Sir F. Macnaghten's "Considerations on Hindu Law," 137; 1 W. Macn. 70; 2 W. Macn. 184; "Mitakshara," i. 11, 24, 25; "Dattaka Mimansa," x. 1; v. 40. See, however, Raghubanund Doss v. Sadhu Churn Doss (1878), 4 Cal. 425; 3 C. L. R. 534, which was governed by the Mitakshara law and apparently by
(c) If he be governed by the schools prevailing in Southern India and Bombay, to one-fourth of the share of a natural-born son.

It is not settled whether this rule applies to Sudras, or whether in the case of Sudras natural-born and adopted sons take equally.

The Madras High Court has held that among Sudras the adopted son is entitled to take an equal share with a legitimate son, who is born subsequently to the adoption. The "Dattaka Chandrika" is to the same effect, and the same view is said to have been taken by the Calcutta High Court. Baboo Shamachurn Sircar holds that this does not apply to what he calls "the good Sudras of this country." This distinction is based upon a text of Vridhha Goutama, which says, "A given son abounding in good qualities existing, should a legitimate son be born at any time: let both be equal sharers of the father's whole estate." It is submitted that where there is no special custom, the above rule applies to all classes of Sudras alike.

In a case where A adopted B, and afterwards a son, C, was born to A, and B and C survived A, and then C died, the Benares school. The Court there considered that an adopted son takes half the share of a natural-born son.

1 Ayyavan Muppanar v. Nilakkodi Ammal (1882), 1 Mad. H. C. 45.
2 Girappa v. Ningappa (1892), 17 Bom. 100. In the earlier cases the Bombay High Court considered that the share was one-third of the share of a natural-born son. Hamant Ramachandra v. Bhimacharya (1887), 12 Bom. 105; Rukhab v. Chuniilal Ambusheet (1891), 16 Bom. 347. In Girappa v. Ningappa the Court did not refer to these earlier decisions, See "Vyasahra Mayukha," p. 60, Mandlik's edition.
4 S. 5, para. 29-33.
5 Bramanund Mahunty v. Choudhary Krishna Churn Patnani (1882), unreported case referred to in G. C. Sircar's "Law of Adoption," p. 403. The rule was apparently unknown to Sir P. Macnaghten, who, in dealing with a case of Sudras (Gopee Mohun Deb v. Raja Rajkishun, "Considerations on Hindu Law," 233), expressed the opinion that the adopted son was entitled to one-third of the estate. In Raghunand Dass v. Sudhu Churn Doss (1878), 4 Cal. 25; 3 C. L. R. 534 (ante, p. 189, note 8) the parties were Sudras.
6 "Vyasahra Darpana," pp. 913-915. This is a digest of the Hindu law current in Bengal.
7 In his "Vyasahra Chandrika" (a digest of Hindu law current in all the Provinces of India, except Bengal proper), vol. I. p. 169, Baboo Shams Churn Sircar says as to this text, "The above rule, however, is now quite inapplicable, adopted sons possessed of good qualities, such as are required by the law, being rare at the present (Kali) age."
it was held by the Madras Sudder Court that B inherited all the property of A.\(^1\)

It is not settled whether, in sharing an inheritance with a natural relation of the same degree other than a legitimate son, an adopted son is entitled to a less share than that of a legitimate son.

It is submitted that, at any rate, on a partition of joint family property in a case governed by the Mitakshara law, there is no reason why he should receive a less share than he would have received if he had been a legitimate son.

It has been held in *Tara Mohun Bhattacharjee v. Kripa Moyee Debûa,*\(^2\) by a Bench of the Bengal High Court, that “when an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have,” and in *Surjokant Nundi v. Mohesh Chunder Duff,*\(^3\) it was held by the same Court that the adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather, but it does not appear from the report whether this question was discussed in that case. In *Raghubanund Das v. Sadhu Churn Das,*\(^4\) it was held by the same Court in a case governed by the “Mitakshara” that in a partition between an adopted son and the natural-born sons of the brothers of his adoptive father the adopted son can only take half the share which he would have taken if he had been a legitimate son. This decision was based upon a paragraph \(^6\) of the “Dattaka Chandrika,”\(^8\) which has no reference

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\(^1\) Civil Petition, No. 130, of 1862 (1862), 1 Mad. H. C. 49, note. Mr. Mayne, to whom the reporter was indebted for a note of the case, says (“Hindu Law,” 7th ed., p. 228) that the adopted son took by survivorship. This presumably would have been the case, as the family was probably governed by the "Mitakshara."

\(^2\) (1866), 9 W. R. C. R. 423, at p. 425. This decision was in G. C. Sirnar’s opinion (“Law of Adoption,” p. 400) based on an omission from, and a mistranslation of the “Dattaka Chandrika,” by Mr. Sutherland.

\(^3\) (1865), 9 Calc. 70.

\(^4\) (1878), 4 Calc. 425; 3 C. L. R. 534.

\(^5\) 24. “Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even.” The words in italics are omitted in Mr. Sutherland’s translation. See *Raghubanund Das v. Sadhu Churn Das* (1878), 4 Calc. 425, at pp. 428, 429; 3 C. L. R. 534, at p. 538.

\(^6\) The “Dattaka Chandrika” is an
to the peculiar incidents of a Mitakshara joint family. It has been doubted by the High Court of Madras. Mr. Mayne also gives reasons for doubting its authority. Sastri G. C. Sircar says, "There cannot be any doubt that according to the 'Dattaka Chandrika,' when a relation by adoption is entitled to inherit together with a real relation of the same degree, either lineally or collaterally, the former must take half as much as is taken by the latter; as, in fact, the rule which has been laid down with respect to the distribution of the adopter's estate between an adopted and a real son, is to be applied to all cases. Accordingly it was held, upon the opinion of a Pundit in a case in which succession opened to the nephews, that a nephew by adoption was entitled to half of what was to be allotted to each of the real nephews." He, however, points out the error of the Calcutta High Court in applying this rule in the case of Raghunandun Das v. Sadhu Churn Das, as in that case the adopted son was entitled to the whole share which his father would have been entitled to, if a partition had been effected in his lifetime.

The birth of a legitimate son would not apparently affect the incapacity of the adopted son to marry in, or adopt from, his adoptive family.

The Jain law in this matter coincides with the ordinary Hindu law.

In the case of impartible property the afterborn son succeeds to the exclusion of the adopted son.

An adopted son can renounce his interest in property which becomes vested in him by virtue of his adoption, or may waive any of his rights therein.

On such renunciation the person who would take in default of adoption would succeed to the property.


Raja v. Subbaraya (1883), 7 Mad. 253.


6 (1878), 4 Calc. 425; 3 C. L. R. 554.

7 At pp. 401, 402.

8 Rukhab v. Chunilal Ambuskel (1891), 16 Bom. 347.


10 W. Macnaghten's "Hindu Law," vol. ii. pp. 183, 184. He cannot renounce his status as an adopted son, ante, p. 158.

There is nothing to prevent an adopted son from making over his rights in the property, or in a portion thereof, to his adoptive mother or to any one else after he has attained majority.\textsuperscript{1}

Except when he has been adopted as a dovamushyayana,\textsuperscript{2} an adopted son loses by his adoption all rights as the son of his natural father and mother.\textsuperscript{3}

He cannot inherit to the members of his natural family,\textsuperscript{4} except he has such right as the son of his adoptive father, and they cannot inherit to him.\textsuperscript{5}

It may happen that he loses the right to succeed to his natural mother and her relatives, and does not acquire a new mother, or maternal relatives for spiritual or temporal purposes, as where the adoption is by a bachelor, or a widower,\textsuperscript{6} or by the adoptive father alone.\textsuperscript{7}

An adopted son on adoption ceases to be liable for the debts\textsuperscript{8} or other obligations for which he would have been liable as a member of his natural family.

In parts of the Punjab the rights of the adopted son in his natural Punjab family take effect if his natural father dies without leaving legitimate sons.\textsuperscript{9}

In the case of an adoption made by the Gyawals (a class of priests Gyawals at Gya in Behar), the person adopted does not lose his rights in his natural family.\textsuperscript{10}

Adoption does not devest any property which has vested in the adopted son by inheritance, gift, or any form of self-acquisition previous to the adoption.\textsuperscript{11}

\textsuperscript{2} Post, p. 194.
\textsuperscript{3} "Manu," chap. ix. para. 142; "Datta Mimansa," s. 6, paras. 6–8; "Datta Chandrika," s. 2, paras. 18–20; "Mitakshara," chap. i. s. 11, para. 32; "V. Mayukha," chap. iv. s. 5, para. 21.
\textsuperscript{4} W. Macnaughten’s “Hindu Law,” vol. i. p. 69.
\textsuperscript{6} Ante, p. 106.
\textsuperscript{7} Ante, p. 112.
\textsuperscript{9} "Punjab Customary Law," iii. p. 83; "Punjab Cust.,” 81.
\textsuperscript{10} Luckmun Lal Chowdhey v. Kanha Lal Moowar (1894), 22 I. A. 51; 22 Calc. 609.
\textsuperscript{11} Behari Lal Laha v. Kailas Chunder Laha (1896), 1 C. W. N. 121. As,
He would lose such rights as he might have had in ancestral property as a member of a joint family governed by the Mitakshara school of law. When the property had been partitioned and a share had vested in him by virtue of the partition, he would retain his rights in it in spite of the adoption, and where the family property had vested in him as the only surviving member of a joint family, it would not be divested by his adoption.

A boy can be adopted, so as to retain his relationship to his natural father, while acquiring the relationship of a son to his adoptive father. He is then said to be Dvayamushyayana, or son of two fathers.

When so adopted he is either—

(a) Nitya Dvayamushyayana (i.e. perpetual or absolute son of two fathers); or

(b) Anitya Dvayamushyayana (i.e. temporary son of two fathers).

A boy adopted in Mithila by the Krṣitima form of adoption is also treated as the son of two fathers.

Where there is an understanding, or a previous stipulation between the gaver and the receiver in adoption, that the boy should belong to both of them, the boy is said to be nitya dvayamushyayana.

for instance, where he has acquired property by the will of a natural relation, or by succession to a maternal grandfather, or it may be even by inheritance from his natural father, as was the case in Pappuma v. V. Appa Rao (1893), 16 Mad. 384, although the question as to whether it was divested did not arise in that case.

1 Ante, p. 182.
3 Literally two persons. See Sutherland's "Synopsis," head fifth. The practice of adopting a son as dvayamushyayana seems to have originated from the obsolete practice of niyoga. The dvayamushyayana son, treated of in the "Mitakshara," chap. i. s. 10, is the son begotten in accordance with that practice.
4 Ante, p. 159–161.
5 See Uma Devi (Srimati) v. Goolanand Das Mahapatra (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58.
This arrangement can be made by a widow taking in adoption.\footnote{Krishna v. Paramashri (1901), 25 Bom. 537.} The authorities show that where an only son has been adopted by a adoption of united brother of his father it is presumed that there was an arrange-\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at p. 454; Uma Deyi (Srimati) v. Gokoolanund Das Mahaputra (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Sastri G. C. Sircaur ("Law of Adoption," p. 377), says, "It may no doubt be contended from what Nanda Pandita says in one passage that the gift of an only son is limited to the case of brothers. But in the very next passage ('Dattaka Mimansa,' ii. 39) he explains the principle of the adoption of an only son, which is applicable to all cases. And this general position is supported by what is said in the 'Mitakshara' with respect to the analogous case of a son produced by a man other than the brother on another man's wife. The 'Dattaka Chandrika,' however, does not appear to limit the dya-\footnote{Ante, p. 146.}munshyayana adoption of an only son to the case of adoption by a paternal uncle only, but intimates it to be applicable to all cases." ("Dattaka Chandrika," ii. 28; iii. 17; v. 35.) See also Krishna v. Paramashri (1901), 25 Bom. 537, at p. 542.}ment that he was to be dya-\footnote{Uma Deyi (Srimati) v. Gokoolanund Das Mahaputra (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Sastri G. C. Sircaur ("Law of Adoption," p. 377), says, "It may no doubt be contended from what Nanda Pandita says in one passage that the gift of an only son is limited to the case of brothers. But in the very next passage ('Dattaka Mimansa,' ii. 39) he explains the principle of the adoption of an only son, which is applicable to all cases. And this general position is supported by what is said in the 'Mitakshara' with respect to the analogous case of a son produced by a man other than the brother on another man's wife. The 'Dattaka Chandrika,' however, does not appear to limit the dya-\footnote{Ante, p. 146.}munshyayana adoption of an only son to the case of adoption by a paternal uncle only, but intimates it to be applicable to all cases." ("Dattaka Chandrika," ii. 28; iii. 17; v. 35.) See also Krishna v. Paramashri (1901), 25 Bom. 537, at p. 542.}munshyayana.\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at pp. 454, 456; Chenares v. Basrur-gudi (1895), 21 Bom. 105 at pp. 108, 109.} It does not seem to be very clear whether this rule applies only to the adoption of an only son of a brother, or whether it is applicable to all only sons.\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at pp. 454, 456; Chenares v. Basrur-gudi (1895), 21 Bom. 105 at pp. 108, 109.} It applies to adoption by widows of brothers.\footnote{Ante, p. 146.}

As it has now been held that an only son can be adopted in the Dattaka form,\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at pp. 454, 456; Chenares v. Basrur-gudi (1895), 21 Bom. 105 at pp. 108, 109.} there seems to be little advantage in adopting a boy as a dya-\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at pp. 454, 456; Chenares v. Basrur-gudi (1895), 21 Bom. 105 at pp. 108, 109.}munshyayana, for a boy so adopted could not secure the salvation of the person adopting as effectually as a Dattaka son.\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at pp. 454, 456; Chenares v. Basrur-gudi (1895), 21 Bom. 105 at pp. 108, 109.} The adoption of a boy as dya-\footnote{Bassar v. Linganguda (1894), 19 Bom. 428, at pp. 454, 456; Chenares v. Basrur-gudi (1895), 21 Bom. 105 at pp. 108, 109.}munshyayana under these circumstances seems to have arisen from a desire to reconcile the prohibition against the adoption of an only son with the recommendation to adopt the son of a brother. There is no necessity to evade a prohibition which has now been held to have no legal force.
In some parts of India a nitya dvayamushyayana seems to be quite obsolete.\footnote{Strange’s “Manual,” 2nd ed., para. 94; V. N. Mandlik, p. 506; Mad. Dec. of 1859, p. 81; Banosa v. Lingangouda (1894), 19 Bom. 428, at pp. 454, 455.}

It is obsolete on the east coast, but is said to be the ordinary form of adoption recognized in Malabar and amongst the Nambudri Brahmins.\footnote{Vasudevan v. Secretary of State (1887), 11 Mad. 157, at pp. 167, 179.} The practice has been held by the Bombay High Court to exist among Lingayets, whether the brothers are divided or joint.\footnote{Cheutura v. Basangouda (1895), 21 Bom. 105.}

It is said to be not at all unusual in the southern districts of the Bombay Presidency,\footnote{Steele’s “Law and Custom,” 45, 47, 183, 384; Basama v. Lingangouda (1894), 19 Bom. 428, at pp. 446, 447; Krishna v. Parameshri (1901), 25 Bom. 537, at p. 548.} and it has been recognized by the Judicial Committee in two cases from Bengal,\footnote{Nithadhub Doom v. Bishanand Doom (1869), 13 M. I. A. 85, at pp. 100, 101; 12 W. R. P. C. 29, at p. 31; Uma Deyi (Srimati) v. Gokoodunand} and by the Allahabad High Court in a case from Bareilly.\footnote{Das Mahapota (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 588; 2 C. L. R. 51, at p. 58.}

When from a different gotra (family) a boy is adopted after he has been initiated into the ceremony of tonsure in the gotra of his natural father, and is invested with the sacred thread in the gotra of his adoptive father, as the rites of initiation have been performed by both fathers, he is said to be termed anitya dvayamushyayana.\footnote{Behari Lal v. Shib Lal (1904), 26 All. 472.}

The anitya dvayamushyayana is said to be unknown to modern Hindu law.\footnote{Same.}

The forms and conditions of dvayamushyayana adoption are the same as in other cases, where the adoption is in the Dattaka form.\footnote{I.e. temporary son of two persons.}

In both kinds of dvayamushyayana the boy adopted inherits both in the family in which he was born and in the family of his adopter.\footnote{See Shumesh Murl (Raja) v. Dilraj Kowar (Rane) (1816), 2 Ben. Sel. R. 189; 2nd ed., 216, at p. 221.}

The authorities seem to show that the issue of the anitya dvayamushyayana revert to their father’s natural family.\footnote{See Mayne’s “Hindu Law,” 7th ed., pp. 229, 230.} As in the other
case the adoption is complete, it is submitted that the issue inherit in the adoptive family, and in that family only.1

Failing near heirs, the natural mother2 and other natural relations will inherit to a man adopted in this form.

If a son is born to the natural father, the dvyamushya- After-born yana son takes half of what the after-born son takes. If a son is born to his adoptive father, he takes half of an adopted son's share.3

The "Mayukha" says,4 "If both have legitimate sons, he offers an obligation to neither, but takes a quarter of the share allotted to a legitimate son of his adoptive father."

Adoption by a widow vests in the adopted son (as the vesting and heir of her husband) the estate vested in her as widow,5 or as mother of a deceased son,6 or vested in her

(Srimati) v. Gokoolamond Das Maahopatra (1878), 3 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. See "Dattaka Mimansa," s. 6, paras. 41-44; Strange's "Hindu Law," vol. ii. pp. 122, 123.


2 See Behari Lai v. Shib Lai (1904), 26 All. 472.

3 G. C. Sircar's "Law of Adoption," p. 403; "Dattaka Chandrika," s. 5, paras. 33, 34. As to what is such share, see ante, pp. 189, 190.


6 Jatindra Nath Chandhuri (Rai) v. Amrita Lal Bagchi (1900), 5 C. W. N. 20; Ranji Vinayakram Jogannath Shankarsett v. Lakshmidhar (1901), 11 Bom. 381, at p. 397; Jamnabai v. Raychand Nahaklal (1883), 7 Bom. 295; Lakshmi Chand v. Gatto Bai (1886), 8 All. 319. See Velanki Venkata Krishna Row (Rajah) v. Venkata Rama Lakshmi Narasayya (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 28 W. R. C. 21, at p. 23; Ramaswami Aiyen v. Venkataramayya (1879), 6 I. A. 196, at p. 208; 2 Mad. 91, at p. 101; Ruhkun Monee Roy v. Kisto Sonderees Roy (1867), 7 W. R. C. 392. A contrary opinion was expressed in Gobinda Nath Roy v. Ram Kanay Chowdhry (1875), 24 W. R. C. R. 183, and Padum Kamesh Deoes v. Jugger Kishore Acharjee (1875), 5 Calc. 615, in the former of which cases the question did not directly arise, and in the latter the decision was set aside by the Judicial Committee upon another ground (Puduma Coomari Debi v. Court of Wards
co-widow, as widow, subject to a right of maintenance; but, with these exceptions, it does not devest any estate of inheritance which has been taken by a person, as heir of a male holder other than the person to whom the adoption was made.

Illustrations.

(L.) A, governed by the Bengal school of law, dies, leaving a son B, and a widow C, and having given to C a power to adopt a son in case of failure of male issue; B dies, leaving a widow D. C adopts E. E cannot oust D.

(ii.) A dies, leaving a son B, and a widow C. B dies unmarried. C validly adopts D. D can oust C.

(iii.) A dies, leaving a widow B, and a son C by another wife. C dies unmarried, and thereupon B adopts D. D cannot oust the heir of C who had succeeded on C's death.

(iv.) A dies, leaving a widow B, and a son C by another wife, and a

(1881), 8 I. A. 229; 8 Cal. 302).


2 Where the estate is vested in the co-widow as heir to her son it cannot be so devested; Fauzuddin Ali Khan v. Tinoorvi Saha (1885), 22 Calc. 585; Anandibai v. Kushibai (1904), 28 Bom. 461.


5 Bhooobun Moyee Debi (Mussumut) v. Ram Kishore Acharaj Chowdhry (1885), 10 M. I. A. 279; 3 W. R. P. C. 15.

6 Vellanki Venkata Krishna Row (Rajah) v. Venkata Rama Lakshmi Narasuya (1876), 4 I. A. 1; 1 Mad. 174.

mother D. C dies unmarried, and thereupon B adopts E. E cannot 
oust D who had succeeded on C’s death.¹

(v.) A dies, leaving a widow B and a son C. C dies, leaving a widow 
D and a son E, who subsequently dies. On E’s death, B adopts F. F 
cannot oust D.²

(vi.) A and his sons B and C were members of an undivided family. 
B died, leaving a widow D, then A died. On his death, C succeeded to 
the family property. C died, leaving a widow E. After C’s death, D 
adopted F. F cannot oust E.³

(vii.) A dies, leaving three widows and B the wife of a son who had 
predeceased him. B adopts C. C cannot oust the widows.⁴

(viii.) A and B were undivided brothers. A dies, leaving a widow 
C. The whole property then belonged to B. B dies, leaving a widow 
D. C adopts E. E cannot oust D.⁵

(ix.) A dies, leaving a widow B, and a daughter C, and a brother’s 
son D. C dies, then D dies, having given to his widow E a power of 
adoption. Then B dies. Afterwards E adopts F. F has no right to 
the property.⁶

(x.) A dies, leaving two widows B and C, and a son D by B. He 
authorized C to adopt a son in the event of D dying unmarried. D 
died unmarried. C adopted a son E, to which adoption B was not a 
party. E cannot oust B who succeeded as heir to her son.⁷

(xi.) A dies, leaving a widow B and two brothers C and D. C dies, 
leaving a son E. D dies, leaving a widow F, and having given her a 
power of adoption. After B’s death, F adopts G. G cannot compel E 
to give him half the property.⁸

In Kalidas Das v. Krishan Chandra Das,⁹ Peacock, C.J., 
said, “There is no case in which an estate vested by

¹ Drobomoyee Chowdhrai v. Shama Churn Chowdhry (1885), 12 Calc. 246.
² Keshto Bamkrishna v. Gowind Ganesh (1884), 9 Bom. 94.
³ Chandra v. Gojarbai (1890), 14 Bom. 463. If D had adopted before 
C’s death E could have succeeded 
against C, idem, at. p. 466, on the 
authority of Raghuandra (Shri) v. 
Boro Kishoro (Shri) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291.
⁴ Dharmidhar (Shri) v. Chinto 
(1893), 20 Bom. 250.
⁵ Rupchand Hinduwal v. Rahmat 
-⁶ Kallyprosonno Ghose v. Goocool 
⁷ Faisuddin Ali Khan v. Tiscoori 
⁸ Chunder Mitra (1877), 2 Calc. 295.
⁹ If the adoption had taken place 
in the lifetime of C then G would 
have been entitled to share with E. 
Bhuvaneshvari Debi v. Nilkomal Lahiri 
(1885), 12 I. A. 137; 13 Calc. 18. 
S. C. in Court below, Nilkomal Lahiri 
v. Jotendro Mohun Lahiri (1881), 7 
Calc. 178; 8 C. L. R. 401.
¹⁰ (1869), 2 B. L. R. (F. B.) 103, 
at p. 111; 11 W. R. (A. O. J.) 11, at 
p. 13.
inheritance can be vested by the adoption of a son by a widow after her husband’s death.”

Although the judgment proceeded on the circumstance that the person in whom the estate was vested had assented to the adoption, it is said in Babu Anaji v. Ratnoji Krishnara,¹ “For the purposes of inheritance the adoption may be considered as relating back to the death of the adoptive father vesting all estates which have during the intermediate period become vested, as it were, conditionally in another.” This is, it is submitted, put too broadly. In the same case² the Court, in referring to Sri Raghunada v. Sri Broho Kishor,³ says that “the person whose estate was there vested was a male full owner,” but in the case cited the parties were members of a joint undivided family, governed by the Mitakshara law, and the person whose estate was vested had not obtained it by inheritance, but by survivorship.⁴

In Surendra Nandan Das v. Sailaja Kant Das,⁵ expressions are used which would seem to apply to an estate of inheritance, but the Court was there dealing with a case where there had been a succession by survivorship in a family governed by the Mitakshara school of law.

So far as the estate of the donor of a power of adoption is concerned, the only persons whose rights of inheritance are superior to those of his widow are his son, grandson, and great-grandson, during the lifetime of any one of whom no adoption can take place, and an heir of one of such persons, in whom the estate has been vested after his death. When the estate has vested in such heir the power is at an end,⁶ and no estate is vested by an attempted exercise of the power.⁷

Where the power is at an end,⁸ or from any other reason the adoption is invalid, the adoption does not even vest the interest of the woman who purports to adopt.⁹

The devesting of an estate taken as devisee under a will may perhaps stand upon a different footing.¹⁰

¹ (1895), 21 Bom. 319, at p. 325.
² At p. 324.
³ (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291.
⁵ (1891), 18 Calc. 385, at pp. 395, 396.
⁶ Ante, p. 130.
⁸ Ante, p. 130.
¹⁰ See Sarat Chandra Mullick v. Kanai Lall Chunder (1903), 8 C. W. N. 268, at p. 270.
Where there is a provision in a will that the estate of the devisee should be devested on an adoption, and that the adopted son should take the property, such provision might be effectual.  

It is submitted that an estate cannot be devested by the mere consent of the person in whom it is vested.

This seems to be in accordance with the weight of authority. It is submitted that this question depends upon the question whether consent can validate an adoption, which is otherwise invalid. If it has not such effect, then the devesting of an estate would, it seems, not be effected by the act of adoption, but only in the way provided by law for the transfer of property.

Even if consent can operate to devest an estate a distinction might well be made between the cases in which the person so consenting is a full owner, and those in which the estate is vested in a qualified owner; in which latter cases the rights of the reversoners could scarcely be prejudiced by the consent.

Even if the then immediate reversoners should also consent, it is by no means clear that the rights of the persons who should become entitled on the succession opening out would be affected.

Where the consent is necessary for the purpose of validating the adoption, as in Madras, or Bombay, effect would be given to it. This question stands on a different footing.

The rule prohibiting the devesting of estates applies imperfectible estate.

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2 The decision in Annanah v. Maboo Bali Reddy (1875), 8 Mad. 108, at p. 112, where the estate was vested in the natural father, is express on this subject. In Bombay a different view was expressed in Payapa Akkapa Patel v. Appamma, 23 Bom. 327, at pp. 331, 332; Gopal Balbrihsna Kenjale v. Vishnu Raghunath Kenjale (1898), 23 Bom. 250; Bobo Anaji v. Ratnaji Krishnarao (1895), 21 Bom. 319, and Rupchand Hindumall v. Raknubai (1871), 8 Bom. H. C. (A. C.) 114, at p. 122; Bhumappa v. Basuc (1905), 29 Bom. 400. See contra Dharmidhar (Shri) v. Chinto (1895), 20 Bom. 250, at p. 258; Vasudeo Vishnu Manohar v. Rammendra Vinayak Modak (1895), 22 Bom. 551, at p. 555.

3 Ante, pp. 157, 158.

4 See Transfer of Property Act (IV. of 1882), s. 123.

5 This distinction was not made in the Bombay cases (above, note 2), which held that an estate could be devested by consent. Both in Payapa Akkapa Patel v. Appamma (1898), 23 Bom. 327, and in Rupchand Hindumall v. Raknubai (1871), 8 Bom. H. C. (A. C.) 114, the estate was vested in a female having a widow’s estate.

6 See Bahadur Singh v. Mohar Singh (1901), 29 I. A. 1; 24 All. 94; 6 C. W. N. 169, at p. 174.

7 Ante, p. 120.

8 Ante, p. 126.
to imparticle estates not governed by the Mitakshara law.

The rule is not affected by the circumstance that the adoption has been delayed by fraud, even when the fraud has been practised by a person who has thereby procured the vesting of the estate in him.¹

A widow whose estate is devested is entitled to maintenance from the property.²

An adoption prevents the succession of persons who would otherwise take the estate after the widow whose estate is devested.³

By adoption to a deceased member of a joint family governed by the Mitakshara law a person acquires such interest in the joint family property as he would have acquired if he had been naturally born, and his adoption devests such interest as has passed over to other members of the family by survivorship.⁴

Adoption would not, however, devest estates which had passed by inheritance from those who had acquired rights by survivorship.⁵

In the case of an imparticle estate, the succession to which is in a joint family governed by Mitakshara law, the estate of a person to whom a right has accrued by survivorship may be devested by an adoption to the holder whose rights have so survived.⁶

¹ Bhubaneswari Debi v. Nilkomul Lahiri (1885), 12 I. A. 137; 12 Calc. 18; S. in Court below, Nilkomul Lahuri v. Jotendro Mohun Lahuri (1881), 7 Calc. 178; 8 C. L. R. 401.
² Jamadai v. Raychand Nathchand (1883), 7 Bom. 225; Rakhmabai v. Radhubai (1888), 5 Bom. H. C. A.C. 181, at p. 193. As to the maintenance of widow, see ante, pp. 77, 78.
³ As, for instance, a daughter, or daughter’s son. Ramkishen Surkey v. Srimuttee Dibba (Mussamnur) (1824), 3 Ben. Sel. R. 367 (new edition, 489).
⁵ Ante, pp. 197, 198. See Ramchand Hindumal v. Rakhnabai (1871), 8 Bom. H. C. A. C. 114; Chandra v. Gojarabai (1890), 11 Bom. 463; ante, p. 199.
⁶ See Raghunada (Sri) v. Bruno Kishore (Sri) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291, where the estate of an undivided half-brother, who had succeeded to an imparticle residuary, was devested. This case
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ALIENATIONS. 203

An adopted son is not bound by unauthorized alienations made, or acts of waste committed by, the widow adopting him, at the time when the property was vested in her, or after the adoption,\(^1\) or by the manager of the estate.

Thus an alienation made by the widow, even before the adoption, can be set aside at the instance of the adopted son, unless it be made under such circumstances as would bind the reversioners;\(^2\) but even in the case where the transaction be not such as would have bound the reversioners, the alienee is entitled to retain possession during the lifetime or widowhood of the widow,\(^3\) as in the absence of an adoption she was competent to deal with her own personal interest,\(^4\) and the rights of the adopted son do not date before the adoption.\(^5\)

Where the alienation was made in fraud and in contemplation of the adoption, the position might be different.\(^6\)

It has been held that if the acts of the widow have been assented to by the then immediate reversioners, they cannot be questioned by the son who has been subsequently adopted,\(^7\) but it is submitted that this question depends upon whether a widow can with the concurrence of

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\(^1\) Antaji v. Dattaji (1893), 19 Bom. 36.

\(^2\) Kishenmunee (Ranee) v. Oodmant Singh (Rajah) (1824), 3 Ben. Sel. R. 220 (new edition, 304);


\(^4\) Ante, p. 181.

\(^5\) Ante, p. 189.

the then immediate reversioners give a complete title by transfer, a
question which is not yet completely settled.¹

It is submitted that the same right to question the acts of the
adoptive mother applies where she has succeeded to the estate as mother
of a previously adopted son or of a natural born son. In Gobindo
Nath Roy v. Ram Kanay Chowdhry,² it was held that the adopted
son could not question an alienation made by the widow when she held
the estate as mother, and that case was cited with approval in Kelly
Prosomo Ghose v. Gocool Chunder Mitter,³ and in Lakshman Bhuu
Khopbar v. Radhabai,⁴ but in neither of such two cases did this
particular question arise. Mr. Mayne⁵ says, as to the first-named
decision, “The decision was but given without any inquiry as to the
propriety of the alienation, and was rested on the authority of Chan-
drabullee’s case.”⁶ It does not seem to have occurred to the Court that
a mother had no more than a limited estate, which, upon the authority
of the case cited, was devested by the adoption. The son then came
in for all rights which had not been lawfully disposed of, or barred,
during the continuance of that estate.”

It is doubtful whether a widow can, when adopting, stipulate that
her management of the property shall not be inquired into. Apparently
she would have no such power.⁷

The adopted son is bound by all acts of the widow
within her authority.

A decree against a Hindu widow as representing her husband’s estate
binds her minor adopted son, and after the adoption the appeal, being
for his benefit, must be considered as prosecuted on his behalf, even
though he is not made a party thereto.⁸

An adopted son is not entitled to any account of the rents or profits of the estate rightfully received before his

¹ See Bcharalal v. Madhobal Ahir
Gyanal (1891), 19 I. A. 80; 19 Calc.
293; Sham Sunder Lal v. Achhan Kus-
war (1898), 25 I. A. 183, at p. 189;
21 All. 71, at p. 89; 2 C. W. N. 729,
at p. 733; Bakadur Singh v. Mohar
Singh (1901), 29 I. A. 1; 24 All.
94; 6 C. W. N. 189; Haye v. Haren-
dra Narain (1904), 31 Calc. 698;
Mohima Chunder Roy Chowdhuri v.
Gouri Nath Dey Chowdhuri (1897),
2 C. W. N. 189; Brajanath Baisakv.
Matilal Baisaki (1869), 3 B. L. R.
O. C. 92; Vinayak Vithal Bhangi v.
Govind Venkatesh Kulkami (1900),
25 Bom. 129; Nobokishore Sarma
Roy v. Harinath Sarma Roy (1844),
10 Calc. 1108, and cases there cited;
Sia Dosi v. Gur Sobai (1880), 5 All.
392; Varrin Banjir v. Odelji Bokal-
(sia (1881), 5 Bom. 563, at p. 571.
³ (1875), 14 W. B. C. R. 183.
⁴ (1877), 2 Calc. 295, at pp. 307,
308.
⁵ (1887), 11 Bom. 609, at p. 613.
⁶ “Hindu Law,” 7th ed., pp. 260,
261.
⁷ (1865), 10 M. I. A. 279; 3 W.
R. P. C. 15.
⁸ See ante, pp. 186, 189.
⁹ Hari Saran Malvra v. Bhaskaran-
tri Debi (1888), 151 A. 195; 16 Calc. 40.
adoption by the widow or other person whose estate is
vested by his adoption.¹

In the case of a joint family governed by the Mitak-
shara law, an adopted son is bound by an alienation made
by his adoptive father, or by any other manager of the
family, to the same extent as a natural son is bound.²

He cannot dispute an alienation made by the adoptive
father before his adoption,³ or any alienation of the separate
property of such father.

In cases governed by the Bengal school of law, an adopted son cannot dispute alienations of property, whether
ancestral or self-acquired, made by his adoptive father.⁴

Where the adoption devests the estate of a male holder,⁵ Alienations by
the adopted son cannot question his alienations to the
extent of ousting a bona fide holder for value, nor can he
require an account of rents and profits.⁶

He might, perhaps, where the proceeds of the alienation had been
carried, or not spent, require the alienor to account for such
proceeds.

Adoption does not sever the tie of blood which exists Marriage and
between the adopted son and the members of his natural
family. He cannot, therefore, marry in his natural family
within the prohibited degrees,⁷ nor can he take in adoption
therefrom a boy whom he could not have adopted if he
had himself remained in that family.⁸

A Kritima adoption does not transfer the subject of it Effect of
from his natural family. It gives him, in addition to his
adoption.

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¹ See ante, p. 181.
² See Rambhat v. Lakshman Chintaman Maydang (1881), 5 Bom. 630, at p. 635. As to the right of a
natural son, see post, p. 280, et seq. As to whether the father can by an arrangement made at the time of
the adoption preclude the son from disputing his acts with regard to the property, see ante, p. 188.
³ Rambhat v. Lakshman Chintaman Maydang (1881), 5 Bom. 630.
⁴ Ante, p. 185.
⁷ Ante, p. 39.
⁸ E.g., he cannot adopt his own
natural brother. Mootia Moodley v.
Upren, Mad. S. D. 1858, p. 117;
Norton, L. C. i. 66, referred to in
Narasimnud v. Balaramachouria (1863),
1 Mad. H. C. 420, at p. 426, note a.
rights in that family, rights of inheritance to the person (man or woman) actually adopting him, and to no one else.

His sons acquire no right of inheritance to his adoptive father.

If a husband and wife jointly adopt he inherits to both. If the husband adopts one son and the wife another, the sons inherit and offer oblations to each respectively.

This kind of adoption is purely contractual. There is no fiction of a new birth into the adoptive family. The son adopted “does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs obsequies and takes the inheritance.”

He may perform the obsequies of his natural father or mother, and also those of his adopters. He would apparently be in the same position as to rights of survivorship in ancestral property in his adoptive family as a natural-born son would be.

**Effects of Invalid Adoption.**

Where there has been an adoption in form, but such adoption is for any reason invalid, the adopted son does not acquire any rights, as such, in the family of the person purporting to adopt him, except so far as he may be entitled to maintenance.

The following are the cases of an invalid adoption:

(i.) Where there is in existence a son begotten or adopted.

They would, of course, possess the ordinary rights of inheritance to property which was vested in their father.


5. Ante, pp. 103, 104.
(ii.) Simultaneous adoption of more than one son.  
(iii.) Adoption of the same boy by two persons.  
(iv.) Adoption by a woman without authority.  
(v.) Adoption of a boy of a different primary caste.  
(vi.) Adoption of a boy within the prohibited degrees.  
(vii.) Adoption of a boy where the performance of initiatory ceremonies or marriage before adoption makes the adoption invalid.

It is unsettled whether, on the adoption being set aside, the boy can revert to his natural family, and whether he has any right of maintenance in his adoptive family.

In Bengal, if not throughout India, it would seem that a member of one of the regenerate classes who had been invested with the sacred thread in his new family, or a Sudra who has undergone the ceremony of marriage in his new family, cannot revert to his natural family, but he would apparently be entitled so to revert before the happening of those events, and would acquire no rights of maintenance in the new family, at any rate if there had not been a valid giving and receiving. Where the above-mentioned ceremonies have been performed, or where there is a valid giving and receiving, but the adoption is invalid on account of some personal defect such as the fact that the boy belonged to a different class from that of his adoptive father, there is authority that he would acquire a right of maintenance.

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1 *Ante*, p. 149.  
2 *Ante*, p. 149.  
3 *Ante*, p. 119.  
4 *Ante*, p. 138.  
5 *Ante*, p. 139-144.  
6 *Ante*, p. 147.

7 See *Rajoooramar Dosses (Srecmatty)* v. *Noboomar Mullick* (1856), 1 Boulnois, 137; 2 Sevestre, 641, note, in which the Court considered that where there has been no power to take in adoption, the performance of the ceremonies will not prevent a return to the natural family. As to this case, G. C. Sircaar says ("Law of Adoption," p. 424), "We have already seen that the performance of the initiatory ceremonies upon a person in the name of a gotra is considered to have the effect of irrevocably fixing his position in that gotra, hence a person upon whom these ceremonies have been performed in the name of the adoptive family cannot return to his own, notwithstanding the adoption may be invalid (Ruces Bhudr v. Roopshunker (1823), 2 Borrodall's, 656). It is difficult to see why that rule would not govern the case of an adoption that was made by an unauthorized widow; for the ceremonies in such a case also must be performed in the name of her husband's gotra.")


It has been held in Madras that where the adoption was invalid on the
ground of want of authority to take, there is no right of mainte-
nance, and that decision has been followed in Bombay.

The difficulty in determining the rights of a person whose adoption
is invalid arises from the absence of direct authority on the question as
to when (if at all) he can revert to his natural family.

Where he can so revert, and loses nothing by the infructuous
adoption, no hardship occurs. On the other hand, where he cannot so
revert, as when he has been fixed by religious ceremonies in the family
of the adopter, or, perhaps, wherever there has been an actual giving
and receiving by persons competent to give and receive, it is right that
he should, if possible, receive some compensation for the loss of
inheritance in both families. His maintenance is the proper measure
of compensation.

But where there is a gift of a boy to a person incompetent to
receive, or by a person incompetent to give, the difficulty is the greater.
If blame for the invalidity of the adoption can be attached to the
adoptive father, as where he has omitted to satisfy himself as to the
competency of the donor, or where he has given a power, which is in
law invalid, it seems right that his estate should bear the burden of
the maintenance. If the reversioner has delayed in challenging the
adoption, it may also be equitable to require the estate to bear the
burden of maintenance. Where there has been no such delay, and
no blame can be attached to the adoptive father, it seems hard upon
the reversioner that his interest should be affected by a charge which
owes its origin to an unauthorized act. It is impossible to lay down
any exact rule for adjusting these equities. The right might properly
depend upon the circumstances of each case.

A right of maintenance would apparently not extend to the descendants
of the person invalidly adopted. The only texts which provide for the
maintenance of persons invalidly adopted, except with regard to those
belonging to a class different from that of the adoptive father, only
contemplate the expenses of the marriage being provided.

In some cases a boy whose adoption is invalid can take
advantage of an arrangement made at the time of his adoption, or thereafter.

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1 Bacani Sankara Pandit v. Ambobay Ammal (1883), 1 Mad. H. C. 363.
3 Rajcoomaree Dosssee (Sroemutsy) v. Noboomar Mullick (1856), 1 Boul. 137; Sevastre, 64, note.
5 In Bacani Sankara Pandit v. Ambobay Ammal (1883), 1 Mad. H. C. 363, at p. 367, the question was
suggested, but not decided.
6 "Dattaka Chandrika," s. 1, paras. 14, 15.
7 "Dattaka Mimansa," s. 5, paras. 45, 46; "Dattaka Chandrika," s. 2, paras. 17; s. 6, 3.
In Runagama v. Atchama the father had divided an ancestral property between a validly adopted son and a son whose adoption was subsequently held to be invalid at the instance of the son who had been validly adopted. The latter was required to compensate the former out of separate property belonging to the father.

In Surendra Kesava Roy v. Doorgusundari Dasses, an arrangement affecting the rights of two boys who were adopted simultaneously by two widows was enforced against such widows.

As to the power to enforce a compromise of doubtful rights, see Act I. of 1877, s. 23 (c).

The invalidity of an adoption would not invalidate a gift by will or otherwise to a person erroneously described as an adopted son, unless it appear that the validity of the adoption was a condition of, or the motive for, the gift.

A gift or bequest to a described person with a direction that he should be adopted as a son to the donor or testator takes effect, even in the absence of such adoption, unless it appears that the adoption was a condition of the gift. If it be reasonably clear that the testator would not have made the gift had it not been for the supposed existence of

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1 (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 62.
2 (1892), 19 I. A. 108; 19 Calc. 108.
4 See cases below, note 7, Manjamma v. Sheshgirirao (1902), 26 Bom. 491, at p. 496.
5 Manindra Deb Raihat v. Rajeswar Das (1884), 12 I. A. 72; 11 Calc. 488; Lali (Mussummal) v. Muridhar (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 130; Vandrasan Jhakan (Pate) v. Manilal Chhundal (Pate) (1890), 15 Bom. 565, at p. 579; Siddheswar Dossay v. Doorgachurn Sct (1865), 2 Ind. Jur. N. S. 22; Bourke (O. C.), 380.
6 Nithcoomoni Debay v. Saroda Prasad Mookerjee (1876), 3 I. A. H. L. 253; 26 W. R. C. R. 91; Subbarajyer v. Subbommal (1900), 27 I. A. 162; 24 Mad. 214; 4 C. W. N. 304. In Monemohonath Dey v. Onantanath Dey (1865), 2 Ind. Jur. N. S. 24, there was an actual adoption of two designated persons in accordance with an invalid power. The gift was upheld.
of the character of an adopted son, the Court will construe the mention of the character as imposing a condition precedent to the gift.\(^1\)

Where there is a bequest or gift to an unascertained person to be adopted hereafter by the widow of the testator, only a person whose adoption is valid in law can take, even if a valid adoption be inconsistent with the conditions of the gift.\(^2\)

\(^1\) *Siddeserry Dossee v. Doorgachurn Sett* (1865), 2 Ind. Jur. N. S. 22; Bourke (O. C.), 360.

\(^2\) See *Surendra Keshov Roy v. Doorgasundari Dossee* (1892), 19 I. A. 108; 19 Calc. 513; S. C. in Court below (1886), 12 Calc. 686, where the bequest was to two boys to be simultaneously adopted as sons to the testator.
CHAPTER V.

PARENT AND CHILD (continued).

DUTIES AND RIGHTS OF FATHER.

Maintenance.

It is the duty of a Hindu father to maintain his minor children,\(^1\) and unmarried daughters, provided they are not interested in property sufficient for their support, or are not otherwise capable of maintaining themselves.\(^8\)

It is his duty to provide the marriage expenses of his daughters, and to cause his son to be educated in accordance with his station in life.

There is no obligation to maintain an adult son,\(^3\) except, perhaps, when he is suffering from a disease which prevents him from maintaining himself.\(^4\)

With the exception of a case in Bengal, where it was held that a suit would lie by the mother of an illegitimate child against the putative father of the maintenance of the child,\(^6\) and of a case in Madras where

\(^1\) Whether natural born, or adopted.
\(^2\) "Manu," chap. ix. para. 108; chap. xi. paras. 9, 10; Colebrooke's "Digest," vol. ii. pp. 112, 113; vol. iii. p. 5; Strange's "Hindu Law," vol. i. p. 67.
\(^5\) *Ghora Kanta Mohanty v. Gerei* (1904), 32 Calc. 479. In that decision the learned judges relied upon *Run Murdum Syn (Chowtury) v. Sahub Parbalad Syn* (1857), 7 M. I. A. 18; 4 W. R. C. R. 132, which was a suit claiming maintenance out of the deceased father's estate. The judges go on to say, "But apart from the Hindu law, we should think that, upon general principles, the defendant, having begotten the child, is bound to provide for its maintenance, if that is necessary." It is submitted that there are no grounds for this general proposition.
a decree was given at the instance of an illegitimate son,\(^1\) the Reports
do not show any successful cases of proceedings in Civil Courts against
a father for the maintenance of his child. It seems doubtful whether the
duty can be enforced in a Civil Court,\(^2\) but it is submitted that if an
illegitimate son can enforce such right, legitimate sons are equally
entitled.

It is clear that even if there be a right to maintenance, separate
maintenance can only be awarded under very special circumstances.\(^3\)

On the death of the father the maintenance of unmarried daughters, and the expenses of their marriage,
must be provided out of his property.\(^4\)

As to how far it amounts to a charge upon the property, see ante,
pp. 88–92.

Although on her marriage a daughter ceases to belong
to her father’s family,\(^5\) and must first look to her husband\(^6\)
and his family\(^7\) for her maintenance, there is a moral duty
to maintain a married daughter who is without means,
and who is unable to obtain support from her husband, or
after his death from his family. This duty is not en-
forceable during the father’s lifetime, and it has been held
that it is not enforceable against his property after his
death.\(^8\)

Where a son or other heir is excluded from inheritance
on account of disability, he is entitled to maintenance for
himself and his family out of the property which he would
have inherited.\(^9\)

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\(^1\) Kuppa v. Singaravolu (1885), 8 Mad. 325.
\(^2\) K. K. Bhattacharya (“Law of the Joint Hindu Family,” pp. 282, 283) repudiates, however, any dis-
tinction between a moral and a legal obligation, except in the Bengal
school.
\(^3\) See Shavatri (Itato) v. Narayanan
Nambudiri (Itato) (1863), 1 Mad. H. C.
372.
\(^4\) See Mangal (Bai) v. Rukhmini
(Bai) (1898), 23 Bom. 291; Tulsha
v. Gopal Bai (1884), 6 All. 632;
Macnaghten’s “Hindu Law,” vol. ii.
chap. ii. case 10; “Vyavastha Dar-
pana,” 2nd ed., p. 370.
\(^5\) Ante, p. 55.
\(^6\) Ante, p. 75.
\(^7\) Ante, p. 77.
\(^8\) Mangal (Bai) v. Rukhmini (Bai)
(1898), 23 Bom. 291. See, however,
Mokhada Dasses v. Nundo Lall Haldar
(1901), 28 Calc. 278, at p. 288; 5
C. W. N. 397, at p. 300. Macnaghten’s
\(^9\) “Mitakhara,” chap. ii. s. 10,
para. 5; “Dayabhaga,” chap. v.
paras. 11, 14–16; “Smriti Chand-
A father may be compelled, by proceedings under the Criminal Procedure Code, to maintain his legitimate or illegitimate child, of whatever age he or she may be, who is unable to maintain himself or herself.

As to the rights of children to maintenance out of coparcenary property, see post, pp. 242, 272.

A Hindu is bound to provide for the maintenance of his minor illegitimate sons by Hindu mothers.

After his death his illegitimate sons are entitled to maintenance out of his estate, or out of property in which he was a coparcener, whether imitable or not, if he was a member of one of the regenerate classes. If he was a Sudra they are only so entitled in case they are not entitled to inherit, or to a share on partition.

Under the Bengal school of law, this right against the father ceases on the sons attaining majority, but it is submitted that after the father's death there is a right against his property, even if they are adults. Under the

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1 Act V. of 1898, chap. xxxvi.
2 Nilmoney Singh Deo v. Baneshur (1978), 4 Calc. 91.
3 Ghana Kanda Mohanta v. Gershi (1904), 32 Calc. 479 (see ante, p. 211); Kuppa v. Singaravela (1885), 5 Mad. 325.
4 There is no text of Hindu law under which an illegitimate son of a Hindu by a woman who is not a Hindu can claim maintenance, and in none of the reported cases has maintenance ever been awarded to an illegitimate son who was not a Hindu by birth. Lingappa Gounden v. Eundessa (1903), 27 Mad. 13, at p. 15. See Addyoto Churn Doss v. Woorjan Beebee (1879), 4 C. L. R. 154.
5 Roshan Singh v. Balwant Singh (1899), 27 I. A. 51; 22 All. 191; 4 C. W. N. 358.
9 Nilmoney Singh Deo v. Baneshur (1878), 4 Calc. 91.
Mitakshara school, they continue entitled to maintenance out of coparcenary property, whether impartible or not; also out of self-acquired property which was owned by the father; but the right does not descend to their children.

Obedience a condition.

It has been said by the Allahabad High Court in a case governed by the Mitakshara school of law, "Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which, under Hindu law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied, but thereafter it cannot be ignored. What constitutes docility or disobedience, in the sense of the texts, is a question the answer of which is not easy; but we think that the true answer is indicated in a Vaisvastha, translated as No. 2, Book I. chapter vi. section 2, of Mesas. West and Bühler's collection (ed. 1878, p. 276), and we think that, on attaining full age, the respondents must, as a condition of receiving maintenance from the estate of Mauji Lal (the father), render to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong."

"The Court would presume the natural son qualified to receive maintenance, unless the opposite party could show what, in the contemplation of the law, is a legal disqualification."

The right of maintenance is not affected by the child being the result of a casual connection, or by the connection between the parents being adulterous.

The maintenance of an illegitimate son may, like the maintenance of other persons entitled thereto, be secured on the property out of which he is entitled to be maintained.

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1 Hargobind Kauri v. Dharam Singh (1884), 6 All. 329; Pershad Singh v. Mukesree (Rance) (1821), 3 Ben. Sel. R. 192 (new edition, 176); Rahi v. Govinda Valad Teja (1876), 1 Bom. 97; "Mitakshara," chap. i. s. 12, para. 3; "Dayabhaga," ch. ix. para. 28; "Vyavahara Mayukha," chap. iv. s. 4, para. 30. These texts are founded on a passage of "Vrihaspati," which confines the right to the case where there is no other offspring.

2 Roshan Singh v. Balwant Singh (1899), 27 I. A. 51; 22 All. 191; 4 C. W. N. 253; S. C. in Court below (1899), 18 All. 253.

3 Hargobind Kauri v. Dharam Singh (1884), 6 All. 329, at p. 335.


5 See Multusamy Jagavira Yettapa Naikar v. Venkotnamba Yettia (1865), 2 Mad. H. C. 298; S. C. on appeal (1868), 12 M. A. 203 (see p. 229); 2 B. L. R. P. C. 15 (see p. 20); 11 W. R. P. C. 6 (see p. 9).

6 Viraramthi Udayan v. Singaravelu (1877), 1 Mad. 306; Rahi v. Govinda Valad Teja (1875), 1 Bom. 97.

7 Ante, p. 88.

8 Anantkaya v. Vishnu (1893), 17 Mad. 160.
In a Madras case it was said, "In determining the rate of maintenance, an illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance, and he cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of his mother's family."

The right of an illegitimate daughter to maintenance under the Hindu law has been denied.

A Hindu is morally, although not legally, bound to maintain the widow of his son, even "if he has no fund with the disposal of which his son, if alive, could interfere, and if he has inherited nothing from his son, and has not had his rights in any property enlarged by his son's death."

The fact that the father-in-law had sold coparcenary property to pay his debts does not render him liable for his daughter-in-law's maintenance.

After his death, the persons who inherit his property, or whose interest in property is enlarged by his death, are legally bound to maintain his daughter-in-law, if chaste, out of the property which they have so inherited.

1 Gopalaswami Chetti v. Arunachalam Chetti (1903), 27 Mad. 32, at pp. 36, 37.
2 Parvati v. Ganpatrao Balal (1893), 18 Bom. 177, at p. 183. It was not necessary to decide the point in that case.
4 Ganga Bai v. Sitaram (1876), 1 All. 170, at p. 177.
or in which their interest has been enlarged, whether the property be coparcenary or self-acquired.\(^1\)

This right does not interfere with the father-in-law’s power to dispose of his self-acquired property by will.\(^2\)

The daughter-in-law does not lose her right by declining to reside in her father-in-law’s house.\(^3\)

Where the property of the father is impartible, and subject to the law of primogeniture, sons, even if adult, and capable of earning subsistence, are entitled to maintenance where the Mitakshara school of law applies.\(^4\)

They are also so entitled after his death, as against their brother or the person in possession,\(^5\) whether, it is submitted, they are governed by the Bengal or the Mitakshara school. Their descendants have no such right.\(^6\)

Grandsons\(^7\) and granddaughters have not, as such, any right to be maintained by their grandfather.

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\(^2\) Purvati (Bai) v. Taradai Dolatram (1900), 25 Bom. 283. See, however, Bangammal v. Echamal (1902), 22 Mad. 305, at p. 307.


\(^5\) Mallickanna Prasadha Nayudu (Raja Farlagadha) v. Durga Prasadha Nayudu (Raja Farlagadha) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74. As to maintenance from Saran, see Madhurao Manohar v. Atmaram Kasah (1890), 15 Bom. 519.

\(^6\) See Nilmoney Sing Deo v. Hingoo Lal Singh Deo (1879), 5 Calc. 356. As to a grant in lieu of maintenance see Roja See Bakadur Guru (Roja) v. Parthasarathi Appa Row (1902), 30 I. A. 14; 26 Mad. 202; 8 C. W. N. 105.

\(^7\) Kali v. Koshbai (1889), 7 Bom. 127; Mammakini Dasi v. Balesh Chandra Pandit (1871), 8 B. L. R. 22; 15 W. R. C. R. 498.
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The marriage expenses of a granddaughter have been held to be properly payable out of deceased grandfather’s estate.\(^1\)

A Hindu is bound to support his father and mother if they are in want. After his death his property is liable for their maintenance.\(^2\)

A stepson is not obliged to maintain his stepmother out of his self-acquired property,\(^3\) but he must maintain her out of family property.

A grandmother and sister (until marriage, and after marriage if destitute\(^4\)) are also to be maintained out of the property of a Hindu after his death.\(^5\)

A mother does not apparently lose her right to maintenance by unchastity,\(^6\) except in Bengal.\(^7\)

It is also the right and duty of a son to perform the funeral ceremonies and other ceremonies in commemoration of his father and mother.\(^8\)

An heir is legally bound to provide out of the estate which descends to him maintenance for such persons as the ancestor was legally or morally bound to support.\(^9\)

“The obligation of an heir to provide out of the estate, which descends to him, maintenance for certain persons whom the ancestor was legally or morally bound to maintain, is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance.”\(^10\)

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1 Ramnimmer Mitra v. Ikhomoyi Dasgupta (1889), 6 Cal. 366; 6 C. L. R. 459.
3 Daya (Bai) v. Natha Govindial (1885), 9 Bom. 279.
4 Strange’s “Hindu Law,” vol. ii. p. 83. See, however, Mangal (Bai) v. Rukmini (Bai) (1898), 23 Bom. 291.
8 Sundarji Damji v. Dahibai (1904), 29 Bom. 316; Vrijbhakandia v. Partani (Bai) (1907), 32 Bom. 26.
10 Janki v. Nand Ram (1888), 11 All. 194, at p. 201; Rajmonecy Dosses v. Shibchunder Mullick (1864), 2 Hyde, 103. This applies to Khojas, Rashid Karmali v. Sherbanoo (1904), 39 Bom. 85.
GUARDIANSHIP.

There is a difficulty in determining whether the person claiming maintenance is one whom the late proprietor was morally bound to maintain. The texts lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain, including the persons disqualified from inheritance and those dependent on them.

As to when maintenance is a complete charge upon property, see the cases relating to the maintenance of a widow, ante, pp. 88–92.

Guardianship.

A Hindu father is recognized as the legal guardian of all his male, and of his female unmarried, minor legitimate children, and is as such entitled to the custody of their persons and property.

The adoptive father acquires the same right, even as against the natural father.

An adult Hindu father can, by word or writing, nominate a guardian for his children, and he is unrestricted in the choice of such guardian. He may exclude even the mother from the guardianship.


2 Laksman Ramchandra v. Sarasvatibai (1875), 12 Bom. H. C. 69, at p. 77; "Vyavahara Mayukhā," chap. iv. s. 4, paras. 30; s. 9, para. 22; s. 11, para. 1, 3, 9, 12; "Mitakshara," chap. ii. s. 1, paras. 7, 12, 13, 20, 21; s. 10, para. 5, 15. The Rishi texts on the subject are collected in R. C. Mitra's "Law of Joint Property," pp. 66–68.


In the matter of Prunkrishna Surma (1892), 8 Calc. 969 ; S. C. Parameshwori Surma v. Empress, 11 C. L. R. 6; Maunghen's "Hindu Law," vol. i. ed. 1829, chap. viii. p. 103. In matter of Himnavath Bose (1889), 1 Hyde, 111. See Act VIII. of 1890, s. 19.


By not incorporating s. 47 of the Indian Succession Act (X. of 1865) in the Hindu Wills Act (XXI. of 1870), the Legislature has apparently indicated its opinion that the privilege enjoyed by adult Hindu fathers should not be extended to fathers who are themselves minors.

5 Further Lal Jha (Soohook) v. Doorga Lal Jha (Soohook) (1867), 7 W. R. C. R. 73, at p. 75. See Act VIII. of 1890, s. 6; Buddhul Manji v. Murari Premji (1907), 31 Bom. 413.
Although the right of the father to the guardianship of his children has been recognized by the legislature, it is one which is given to him for the benefit of his children, and should he at any time show himself unfit to be guardian the Court will place the custody of his children in a more suitable person.¹

Ample provision is made in the Guardians and Wards Act, 1890, for the purpose of protecting the persons and property of infants, and although the Court will have regard to the principle that it is generally for the benefit of infants that they should remain in the custody of their parents, and will also have regard to the personal law of the infant in question, the Courts will, in appointing a guardian, consider only the interest of the infant.²

On the death of the father, or in his absence,³ or in case of his having lost the right of guardianship, and in the absence of a valid appointment by him, the mother is entitled to the guardianship of her minor children.⁴

It has been held that under the Mithila law, the mother is entitled to the guardianship even during the lifetime of the father.⁵

A mother would ordinarily be entitled to the guardianship of her illegitimate child, and the father would against the mother have no right of guardianship.⁶

A parent is liable to be superseded by the appointment of a guardian under the provisions of the Guardians and Wards Act.

¹ See Act VIII. of 1890, s. 19.
³ See Madhoooodun Mookerjee v. Jacob Chunder Banerjee (1865), 3 W. B. C. R. 194.
⁵ Jusseko Koer v. Nettya Lall (Lalliah) (1879), 5 Cal. 48. There does not seem to be any other authority to the same effect. In Pirthoo Lal Jha (Soobah) v. Dooaga Lal Jha (Soobah) (1867), 7 W. B. C. B. 73, where the parties were governed by the Mithilaschool, a testamentary guardian, who was appointed by the father, was preferred to the mother.
⁶ In the matter of Saihri (1891), 16 Bom. 507, at p. 517; Vankarnav v. Savitramma (1888), 12 Mad. 67, at p. 68; King v. Nigpen (1814), 2 Mad. N. C. 91.
Wards Act, 1890, but the Court cannot make such appointment when the father is alive, unless he is unfit to be guardian.\(^1\)

Failing the father and mother, the Hindu law prescribed a succession to the right of guardianship. The elder brother, the elder half-brother, the paternal relations, and failing them the maternal kinsmen were preferred in order of priority;\(^2\) but their right was not, as in the case of the father or mother, an absolute one.\(^3\) In appointing a guardian a Court may be guided to some extent by this order of succession,\(^4\) but it would not give the same effect to the claims of these relatives as it would to the claim of a father or mother.

As to the guardianship of a female minor after marriage, see ante, pp. 62, 63.

If the minor is a member of a joint Hindu family, the kurta of the family would be entitled to the management of the joint property; but if the family be a divided one, the mother is, failing the father, entitled to the custody of the minor's property;\(^5\) and even if the family were joint, she would apparently be so entitled, so far as the minor's separate property, if any, is concerned. Where the mother is manager of her minor child's property, her position necessarily requires her to seek the advice of her husband's relations,\(^6\) and she would often strengthen her position by her so doing, but the law cannot compel her to seek, or to act under, their advice, if she wishes to take the whole responsibility upon herself.

A father may lose his right to the guardianship of his children by a persistent course of ill-treatment, by conduct tending to their corruption, or by acting in a way injurious to their morals or interest.\(^7\) He may lose the right by

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\(^1\) Act VIII. of 1890, s. 19.
\(^2\) Macnaghten's "Hindu Law," vol. i. pp. 103, 104; Strange's "Hindu Law," vol. i. p. 71.
\(^4\) See Strange's "Hindu Law," vol. i. p. 71; Act VIII. of 1890, s. 17.
\(^5\) Sir E. H. East's Notes, Merley's "Digest," vol. ii. p. 50; West and Bühler, 2nd ed., p. 88. In Motes Singh v. Dooluth Singh, N.-W. P. S. D. A., 13th April, 1844, it was held that an elder brother, if not separated, could act as guardian.
\(^7\) See Act VIII. of 1890, s. 19 (f).
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waiver, as where he has permitted another person to maintain and educate them, and it would be detrimental to their interests to alter the mode of their maintenance in course of their education.1

A mother may also for similar reasons lose her right.2

It is submitted that a father does not lose his right by a change of religion.3

Under the Hindu law loss of caste apparently involved a loss of the Loss of caste. right of guardianship of the person and property of minors;4 but since the passing of Act XXI. of 1850, such right of guardianship ceased to be affected by loss of caste.5 Where, however, the appointment of a guardian is made by a Court, the fact that the person proposed is out of caste would be a matter for consideration.6

Under the Hindu law a father or other guardian might lose his Recluso rights by permanently emigrating, becoming a recluse or entering a religious order.7

Hindu widows do not on remarriage ipso facto lose Hindu widows. their right of guardianship of their children,8 but, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the

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2 Venkamma v. Sivramma (1888), 12 Mad. 67. In the matter of Saithri (1901), 16 Bom. 307.
3 Act XXI. of 1850; Muchoo v. Arsoon Sahoo (1866), 5 W. R. C. R. 235; Queen v. Besoji, Perry's Oriental Cases, p. 91. It has been doubted whether Act XXI. of 1850 affects guardianship, but the Punjab Chief Court (In the matter of Gul Mohammed) has held that a right of guardianship is a right within the meaning of Act XXI. of 1850. See Kanahi Ram v. Biddya Ram (1878), 1 All. 549; Koulcara v. Jorai Ko- saundan (1905), 28 All. 233; Sham- sing v. Santaboi (1901), 25 Bom. 551, at p. 555.
8 Act XV. of 1856, s. 5. This Act has been declared to be in force throughout British India, except as regards the Scheduled Districts (Act XV. of 1874, s. 3), and in the Santhal Pargannahs (Reg. III. of 1872, s. 3, as amended by Reg. III. of 1888). As to the Scheduled Districts to which it has been applied, see General Acts, 1854–66, ed. 1887, p. 107.
husband the guardian of his children, the father, or paternal grandfather, or the mother or paternal grandmother, or any male relative, of the husband can apply to the highest Court having original jurisdiction in civil cases in the place where the husband was domiciled at the time of his death for the appointment of a guardian,¹ and the Court may, if it should think fit, appoint such guardian, who, when appointed, shall be entitled to have the care and custody of such children during their minority in the place of their mother, and in making such appointment the Court must be guided, as far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.²

When the children have not property of their own sufficient for their support and proper education whilst minors, the appointment can only be made with the consent of the mother, unless the proposed guardian gives security for the support and proper education of the children whilst minors.³

Remedies.

A father or other person entitled to the custody of an infant can recover such custody by suit.⁴

When the child is within the limits of the ordinary original civil jurisdiction of the High Courts of Bengal, Madras, and Bombay, he can apply for relief under sec. 491 of the Code of Criminal Procedure.⁵

Sec. 25 of the Guardians and Wards Act, 1890,⁶ gives the District

¹ Act XV. of 1856, s. 3. The application may be made under that Act, or under the Guardians and Wards Act (VIII. of 1890). In the latter case the conditions necessary for an application under Act VIII. of 1890 would apply. Act XV. of 1856 has no application to women who, by the rules of their caste, are capable of contracting a second valid marriage. In Kishen v. Enayet Hossein, S. D. A. N.-W. P., 25th June, 1861, it was held that a woman of the Aheer caste does not by remarriage forfeit her rights to act as guardian of her son by her first marriage.

² Act XV. of 1856, s. 3. See Khus-hali v. Kani, 4 All. 195.

³ Act XV. of 1856, s. 3.

⁴ Sharifa v. Munshken (1901), 25 Bom. 574; Balmukund v. Janki (1881), 3 All. 403. The guardian would bring the suit in his own name. For recent examples of suits of this kind, see Krishna v. Bede (1885), 9 Mad. 391; S. C. Bede v. Krishna (1886), 9 Mad. 391; Venkamma v. Savitramma (1888), 12 Mad. 67; Abasi v. Dunne (1878), 1 All. 598.

⁵ Act V. of 1898.

⁶ Act VIII. of 1890.
Courts power to arrest a ward and deliver him into the custody of his guardian.

Where the child is confined under such circumstances that the confinement amounts to an offence, sec. 100 of the Criminal Procedure Code is applicable, and sec. 552 of the same code deals with the case of a female child under fourteen years of age, who has been detained for an unlawful purpose.

1 Act V. of 1898.
CHAPTER VI.

THE JOINT FAMILY AND ITS PROPERTY.

Of what the family consists.

Among Hindus a family is not ordinarily composed only of parents and their unmarried children, although that type of family is sometimes to be found. The family would generally be composed of a man, his wife, his unmarried children, his married sons and their wives and children, and, in cases where they are not maintained by their husband's family, his widowed daughters.¹

A family of this type, although in many respects complete in itself, might be a component part of a larger family. This larger family consists of all the descendants in the male line from a common ancestor, and their wives, sons, and unmarried daughters.²

Whether the family be of the larger or smaller type, the members would ordinarily live together, being maintained from the common purse, and performing jointly the ceremonies required by their religion.

A family so living together is called by English lawyers a joint Hindu family, and in its ordinary condition the members of it are said to be joint in food, worship, and estate.

The rights of the individual members in the property belonging to the family varies, in accordance with the school of law to which the family belongs.³

If the family be governed by the Bengal school of law, sons have no rights in the joint property during the

¹ See ante, p. 212, and post, pp. 242, 272.
³ See ante, pp. 15, 16.
lifetime of their father. On his death intestate they acquire rights by inheritance.

The case of a family governed by the Mitakshara school of law is different. Within certain limits sons acquire by birth rights in the property, and can assert such rights even against their own father.

According to the Mitakshara school of law, “The conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, viz. the undivided state, it forms a corporate body,”¹ or unit,² in the sense of having a continuous existence notwithstanding the death of individual members.³

“Such corporate body, with its heritage, is purely a creation of law and cannot be created by act of parties, save in so far that by adoption a stranger may be affiliated as a member of that corporate family.

“According to the above conception of a family there may, of course, be one or more families all with one common ancestor, and each of the branches of that family with a separate common ancestor.” ⁴

“So long as a family remains an undivided unit, two or more members thereof—whether they be members of different branches or of one and the same branch of the family—can have no legal existence as a separate independent unit; but if they comprise all the members of a branch, or of a sub-branch, they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such. Such property may be the ‘self-acquisition’ or ‘obstructed heritage’⁵ of a paternal ancestor of that branch as distinguished from the other branches, which property has come to that branch and to that branch alone as ‘unobstructed heritage,’ or it may be the self-acquisition of one or more individual members of that branch, which by act of parties has been impressed with the character of joint property,⁶ owned by that branch and that branch alone, to the exclusion of the other branches.” ⁷

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² Ram Narain Singh (Rajah) v. Pertiem Singh (1873), 11 B. L. R. 397, at p. 404; 20 W. R. C. R. 189, at p. 191.
³ It is not a corporation in the sense of being a legal person. Sokkanadha Vannimundar v. Sokkanadha Vannimundar (1904), 28 Mad. 344, at p. 345.
⁵ Post, p. 281.
⁶ Post, p. 251.
The joint family may be broken up by the separation of individual members from the corporate body, or by the partition of the rights of all the members. On such separation or partition, the separating or dividing members form new families, to which the joint family system applies.1

The joint family may also come to an end by the death of the last surviving coparcener, in which case, in default of his disposing of the property, his heir takes by inheritance.

"By the nature of the case the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an interim enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family."2


In a suit which involves a question as to whether a family was joint or separate, or whether a particular property belonged to a joint family, or was the separate acquisition of an individual member of the family, the burden of proof would depend upon the allegations in the pleadings or at the hearing.3 and would, as in other cases, lie on the person who would fail if no evidence at all were given on either side.

This burden of proof would be shifted by the following presumptions:—

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1 Bata Krishna Naik v. Chintamani Naik (1885), 12 Cal. 262.
2 Ram Narain Singh (Bajaj) v. Pertum Singh (1879), 11 B. L. R. 397; at p. 404; 20 W. R. C. R. 189, at p. 192. See Saminadha Pillai v. Than-gathanni (1895), 19 Mad. 70;
3 Indian Evidence Act (I. of 1872), s. 102. See Bholanath Maha v. Ajodhya Persad Sookul (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.
Every Hindu family is presumed to be joint in food, Proemusion
worship, and estate. The property belonging to that of union.
family is presumed to be joint and undivided, the burden
of proving a separation being upon the person alleging it.¹

As to the presumption with regard to property in the name of a
copeener, see post, pp. 264, 265.

This presumption is merely as to the continuance of a juridical
relationship.² It takes the place of evidence, and may be displaced by
evidence of a state of things inconsistent with such presumption.³

It is not necessary, for the preservation of the joint
nature of family property, that the members of the family
should live in commensality; they may dwell and mess
apart, and yet remain joint in property.⁴

The presumption that the family is joint would be
Separation in
dwelling and
food.

¹ See Bholanath Mahto v. Ajoodhia Persad Bookul (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.
² Ganesh Dutt Thakoor (Chowdhry) v. Jesou Thakoorain (Mussammat) (1903), 31 I. A. 10; 31 Calc. 262;
³ Cf. Indian Evidence Act (I. of 8.172), ss. 109, 114, illustration (d).
⁴ Persad v. Radha Bey (Mussammat) (1846) & M. I. A. 137, at p. 168; Narguni Lutfomeedum-
⁵ See Bholanath Mahto v. Ajoodhia
⁶ Persad v. Radha Bey (Mussammat) (1846) & M. I. A. 137, at p. 168; 7 W. R. C. R. 35, at p. 37; Nurinliq Das
⁸ Persad Choukurbhut v. Gunga
⁹ Monoo Debee (1871), 16 W. R. C. R. 291; Cossambhoy Ahmed R. 291; Cossambhoy Ahmedboy v.
¹⁰ Ahmedhoy Habibhoy (1887), 12
¹¹ Bom. 280, at p. 309; Bilash Koona-
¹² v. Bhawoons Bukah
¹³ Narain (Baboo), W. R. 1844, C. R. 1.
¹⁴ Siambhur Sircuur v. Soordhuny Dosses (1865), 3 W. R. C. R. 21; Tangocshun Roy v. Baghshoon Roy
¹⁵ 5 W. R. C. R. 214; Beer
¹⁶ Narain Sircuur v. Ton Ceoses Nundos (1864), 1 W. R. C. R. 316.
weakened, if not rebutted, by evidence of separate trading, funds, and property, and independent dealing with such property,\(^1\) although the family may have been joint in food.\(^2\)

Where it is admitted or proved that a disruption of the unity of the joint family has taken place, this presumption has no application.\(^4\)

When one coparcener separates from the others there is no presumption that the remaining members continue united. In that case an agreement to remain united or to reunite must be proved like any other fact;\(^6\) but where a share is allotted to more than one person the presumption will be that such persons remain joint.\(^6\)

When it is admitted or proved that the members of the family were not in a complete state of union at the time of the institution of the suit, there is no presumption as to the family being joint at a particular time,\(^7\) or as to when the separation took place, but it lies upon the plaintiff to prove such a case as would entitle him to the relief which he seeks.\(^8\)

There is authority under the Bengal school of law that when one coparcener separates from the others who remain joint, such others are to be treated as reunited,\(^9\) but it is submitted that such separation in


\(^3\) Sreeram Ghose v. Sreethath Dutt Chowdhy (1867), 7 W. R. C. R. 451.


\(^6\) See Durga Dei v. Balmukund (1906), 29 All. 93.

\(^7\) Obhoy Churn Ghose v. Gobind Chunder Dey (1882), 9 Calc. 237, at p. 243.

\(^8\) Ram Ghulam Singh v. Ram Behari Singh (1895), 18 All. 90.

no way affects the status inter se of the coparceners who remain joint.¹

The presumption as to union applies to new families formed from the separation of members of an old family.²

"The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker."³

In practice a family does not continue joint for many generations. It has been said ⁴ that "in no case . . . will it be found that the diluted degree of blood relationship amongst the members of the complex family group extends beyond the fourth degree." Another writer says, "I doubt whether at this day there is a single undivided Hindu family throughout India, in which persons related to one another by a common ancestor beyond the seventh degree are to be found living together, or holding property in common."⁵ The seventh degree seems always to have been the limit.⁶

The property belonging to a joint family is called the coparcenary property.

The expression used in the Mitakshara is translated as "ancestral property," i.e. property transmitted in the direct male line from a common ancestor; but having regard to the fact that under the decisions all property held by the members of a Mitakshara family, as such, is ordinarily coparcenary property, and that in every case it cannot properly be described as "ancestral," it is more convenient to use the term "coparcenary."

See Kesabram Mahapatra v. Nandkishor Mahapatra (1889), 3 B. L. R. A. C. 7. As to reunion, see post, pp. 358, 359.

² Bota Krishna Naik v. Chintamani Naik (1885), 12 Cal. 262.
⁶ Ibid., pp. 136-138.
⁷ Purarjita, as distinguished from Swarjita, self-acquired.
⁸ Post, p. 245.
WHO ARE COPARCENERS.

Under the Bengal school the coparceners consist of the persons, whether male or female, entitled to shares by inheritance, transfer, or a will. These shares are defined.¹

There is no right of survivorship. On the death of a coparcener his share passes by inheritance or by will. A son, therefore, cannot as such,² as under the Mitakshara law, be a coparcener with his father.

There is thus unity of possession, but not as in the case of the Mitakshara law unity of ownership.

Under the Bengal school of law a Hindu may, without any restriction, dispose of his property,³ whether ancestral or self-acquired, by sale, mortgage, gift, or will, whether in favour of strangers or in favour of some of his own issue or relations, to the exclusion of others.⁴

This applies also to property,⁵ the succession to which is governed by the law of primogeniture.

The sons do not acquire any right in their father's property except under his will or as his heirs.⁶

² There might be a case of a son taking by a transfer or a will a share in property in which his father is also a sharer.
³ The property is not coparcenary property, but is on the same footing as self-acquired property.
⁵ Uddoy Additya Deb v. Jadsibal Additya Deb (1879), 5 Calc. 113; 4 C. L. R. 181; Navain Kirkotia v. Lokenath Kirkotia (1881), 7 Calc. 461; 9 C. L. R. 243.
⁶ See Dharmadas Kundo v. Amliya Dhan Kundo (1908), 10 C. W. N. 765.
In Soorjesmoney Dasses (Sreemutty) v. Denobundhoo Mullick (1857), the Supreme Court of Bengal laid down the following propositions with regard to joint property governed by the Bengal school of law:

1. "Each of the co-sharers has a right to call for a partition," but until such partition takes place ... the whole remains common stock; the co-sharers being equally interested in every part of it.

2. On the death of an original co-sharer his heirs stand in his place and succeed to his rights as they stood at his death; his rights may also, in his lifetime, pass to strangers, either by alienation, or, as in the case of creditors, by operation of law; ... but in all cases those who come in, in the place of the original co-sharer, by inheritance, assignment, or operation of law, can take only his rights as they stand, including, of course, the right to call for a partition.

3. Whatever increment is made to the common stock, whilst the estate continues joint, falls into and becomes part of that stock."

According to the decisions of the High Court of Bengal, an illegitimate son of a Sudra cannot inherit according to the Bengal school. This view has been arrived at by limiting the expression "dastputra" in the "Dayabhaga" to the son of a female slave. His father can give him a share of the property.

Under the Mitakshara law, those persons who by birth acquire a vested interest in the coparcenary property are coparceners. By that law a Hindu acquires by birth a vested interest in all coparcenary property held by his father, or grandfather, or great-grandfather, as members of a joint family, even during their lifetime.

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1 S M I A 526, at p. 599.
2 "Dayabhaga," chap. iii. s. 1, para. 16.
3 Post, p. 298.
4 Chap. ix. paras. 29, 30.
6 "Dayabhaga," chap. ix. para. 29.
7 They have, individually, no proprietary right until partition, which is treated by the Mitakshara as one of the sources of such right. See Chaukun Lal Singh v. Poran Chunder Singh (1888), 9 W. R. C. R. 483.
8 He does not by birth acquire an interest in a mere right of suit, or in an equitable right to procure an alteration in a grant. Ujagar Singh (Chundri) v. Pitam Singh (Chundri) (1881), 8 I. A. 190; 4 All. 120. He acquires an interest in debutter property. Ram Chandra Panda v. Ram Krishna Mahapatra (1908), 33 Calc. 507.
All the coparceners are male descendants in the male line of the acquirer of the property.\(^1\)

The interest that a son acquires is equal to that of his father. He does not acquire his title through his father, but separately and independently of his father,\(^2\) and he has no independent dominion over the property.\(^3\)

The distance in degree from the founder of the family does not affect the right of coparcenership,\(^4\) but the coparceners are limited to the head of each stock, and his sons, grandsons, and great-grandsons.\(^6\)

Thus the body of coparceners cannot include any individual together with a male descendant of his other than his son, grandson, or great grandson, or, in other words, no man can be a coparcener if his great-great-grandfather is also a coparcener.

If either his father, grandfather, or great-grandfather survive his great-great-grandfather, then he steps into the coparcenary on the death of the great-great-grandfather. If they all predecease his great-great-grandfather he does not take, but the interest survives to the collaterals, if any. If there is no coparcener, then the heir of the great-great-grandfather takes by inheritance.

In *Moro Vishvanath v. Ganesh Vithal*\(^6\) (1873), Nanabhai Haridas, J., said, "The rule which I deduce from the authorities on the subject is, not that a partition cannot be demanded by one more than four

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\(^1\) Bhattacharya’s *Hindu Law,* 2nd ed., p. 323.

\(^2\) *Sunder Lal v. Chiltar Mal* (1906), 29 All. 1.

\(^3\) *Bakdeo Das v. Sham Lal* (1875), 1 All. 77; *Beer Kishore Shuker Singh (Baboo) v. Hwr Bulbul Narain Singh (Baboo)* (1867), 7 W. R. C. R. 502.


\(^6\) 10 Bom. H. C. Rep. 444, at p. 465. As to the application of this principle to an inimitable estate, see *Yenmala Ganwirdavamma Garu (Sri Rajah) v. Yenmala Randamora Garu (Sri Rajah)* (1870), 6 Mad. H. C. 93.
degree removed from the acquirer or original owner of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the last owner, however remote he may be from the original owner thereof."

This is the only case in which a male member of a Mitakshara family, who is free from defects which operate as grounds for exclusion from partition,¹ is not a coparcener. As he is not a sapinda of his great-great-grandfather, he does not on his death, in that case, become a coparcener.

"According to the Mitakshara law, all the male descendants of the common ancestor have an interest in the property, and any of them may demand partition,² unless excluded by some disability.³ The descendants of the common ancestor may live together for generations; and when partition is to take place, all that is necessary is to ascertain their mutual relationship. To effect a partition in a case governed by the Dayabhaga it is necessary to know the dates of birth and death of predeceased members. But in a Mitakshara family the surviving members remain in possession of the whole property, as if the predeceased members never existed."⁴

An illegitimate son of a member of one of the three illegitimate regenerate classes acquires no rights as coparcener in coparcenary property.⁵

According to the Mitakshara school, an illegitimate son by a Sudra can inherit⁶ and be a coparcener, if he be not the result of adulterous⁷ or incestuous intercourse.⁸

An illegitimate son does not acquire an interest by

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¹ Post, p. 235.
³ See post, p. 235.
⁵ Rooham Singh v. Balwant Singh (1899), 27 I. A. 51, at p. 56; 22 All. 191, at p. 197; Ron Murdun Syn (Chowtury) v. Babub Purbudch Syn (1897), 7 M. I. A. 14; 4 W. R. P. C. 132. As to his right of maintenance, see ante, p. 213.
⁷ Ruki v. Govinda Valad Teja (1875), 1 Bom. 97; Venatoochella Chetty v. Parvathan (1875), 8 Mad. H. C. 134.
⁸ Datti Parisi Nayudu v. Datti Bangaru Nayudu (1889), 4 Mad. H. C. 204.
birth, and therefore cannot claim partition against his father, or dispute his father’s dealings with the coparcenary property, but his father can permit him to have a share of the coparcenary property. On the death of his father he becomes a coparcener with the legitimate sons, and on their deaths takes by survivorship.

He can bring a suit against them for partition, and his sons are entitled to share with the sons of legitimate sons.

In case of a partition between the illegitimate sons and legitimate sons, the former is entitled only to half a share of one of the latter.

As he does not represent his father he has no right as against the undivided brothers of his father or against the sons of such brother.

He is thus only by right a coparcener when there are legitimate sons, and the father has died separated from his brothers.

An illegitimate son who cannot inherit, or be a coparcener, is entitled to maintenance out of the property in which his father was a coparcener. This right can be enforced against immoveable property.

Under the Mitakshara law, a woman cannot become a coparcener with male coparceners.

1 Ram Saran Garain v. Tekteh Bar (1900), 28 Calc. 194.
3 Jogendra Bhupati Harri Chandu Mahapatra (Raja) v. Nityanund Masseher (1900), 17 I. A. 128; 18 Calc. 151; S. C. in Court below (1885), 17 Calc. 709; Sada v. Bai (1878), 4 Bom. 37, at pp. 44, 45.
4 Thangam Pillai v. Suppo Pillai (1888), 12 Mad. 401.
5 Fakirappa v. Fakirappa, 4 Bom. L. R. 809.
8 See Ramalinga Muppam v. Ponnai Goundan (1901), 25 Mad. 519, at pp. 511, 522.
9 “Dayabhaga,” chap. ix. para. 28; “Mitakshara,” chap. i. s. 12, para. 3. See ante, p. 214.
11 Puma Bibee v. Raghakissen Das (1903), 31 Calc. 476.
12 See post, p. 394.
Under all the schools of law, those who by Hindu law are incapacitated by physical infirmity from inheriting, are also incapacitated from taking as coparceners, or from taking a share on a partition, but if they would otherwise be coparceners they are entitled to maintenance\(^1\) for themselves and for the persons whom they are legally or morally bound to support,\(^2\) and on a partition of the coparcenary property provision should be made for such maintenance.

The following are the grounds of exclusion: impotence,\(^3\) idiocy,\(^4\) congenital blindness,\(^5\) deafness or dumbness,\(^6\) absence of a limb or sense,\(^7\) lameness, i.e. complete


\(^2\) Ante, pp. 211-216.

\(^3\) "Dayabhaga," chap. v. paras. 7, 8; "Viramitrodaya," chap. viii. The "Mitakshara" (chap. ii. s. 10, para. 2) describes an impotent person as one of the third sex, but "Balsbhatta" (a commentary on the "Mitakshara" by Lakshmi Devi) includes a male eunuch, so, according to her, impotence need not be congenital. The "Viramitrodaya" takes a different view, but the "Mitakshara" (chap. ii. s. 10, para. 3) includes persons who have become impotent. "Maana," chap. ix. para. 201, excludes eunuchs, so apparently non-congenital impotence will be a ground of exclusion. Impotence, except in the cases of hermaphrodites and eunuchs, would be difficult, if not impossible, to prove, see Bhattacharya’s "Law of Joint Family," pp. 405, 406.

\(^4\) "I.e. of unsound and imbecile mind. See Tirumamagal Aryan v. Ramareswamy Ayyangar (1863), 1 Mad. H. C. 214. The "Mitakshara" (chap. ii. s. 10, para. 2) defines an idiot as "a person deprived of the internal faculty; meaning one incapable of discriminating right from wrong."


\(^7\) "Mitakshara," chap. ii. s. 10; "Dayabhaga," chap. v. s. 7. "Literally, an organ; explained by some a sense, as that of smelling, or of sight, etc., but by others a limb, as the hand, foot, and so forth," Colebrooke’s annotation to "Dayabhaga," chap. v. s. 7.
incapacity to walk, lunacy, although not congenital or incurable.

If the interest be vested by birth, it cannot be divested by subsequent lunacy.

The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance, should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied. The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endowed with the business capacity to manage their affairs properly.

The ancient text-books also exclude persons suffering from an incurable disease. Under modern authorities, persons suffering from an aggravated and incurable form of leprosy are excluded.

Although there are no cases on the subject, there seems no reason why the text of the law should not be followed, and why, if it be clearly proved that a person is suffering from a serious and incurable

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1 "Dayabhaga," chap. v. para. 10; Colebrooke's "Digest," vol. iii. p. 421. "There is no text which declares that lameness should be congenital," Bhattacharya's "Hindu Law," 2nd ed., p. 580, but in Venkata Subba Rao v. Pursottam (1902), 26 Mad. 138, it was held that lameness which was not congenital did not exclude. See Patrick Chunder Chatterjee v. Jagad Mohini Devar (1874), 22 W. R. C. R. 348; Sirnar's "Vyavastha Darpana," 2nd ed., p. 1005.


3 Dwarkanath Bysak v. Mahendranath Bysak (1879), 9 B. L. R. 199; 18 W. R. C. R. 305; Deo Kishen v. Buddh Prakash (1883), 5 All. 509.

4 Tribeni Bakai v. Muhammad Umar (1905), 28 All. 247.

5 Sureti v. Narain Das (1890), 12 All. 530.

6 "Mitakshara," chap. ii. s. 10, in para. 9, "maramus" (atrophy) is given as an example; Colebrooke's "Digest," vol. iii. p. 321.

disease such as cancer or phthisis he should not be excluded. In the
case of the latter disease, as modern research has produced cures in
cases which before were treated as incurable, it would be difficult to
prove a case of exclusion. As to the former disease much might depend
on the situation and stage of the disease. 5

In ancient times there were many other grounds for exclusion from
inheritance and partition, but as they were removable by expiation, it
is said that the Courts would not apparently now give effect to them. 6
There is, however, authority that expiation is necessary. 7 For instance,
“an enemy to his father” was excluded, 8 but this portion of the law is
now obsolete. 9

Change of religion and loss of caste do not exclude from inheri-
tance. 10

Although “Manu” 11 treats fraud by one of the coparceners as
operating as a forfeiture of his share, it seems clear that it has no such
effect, but that the defrauding coparcener is merely compelled to bring
into partition the property of which he sought to defraud his co-
parceners. 12

An excluded person who is cured of his malady after partition is
apparently entitled to a share. 13

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1 K. K. Bhattacharya, (“Law of Joint Family,” pp. 407, 408) points
out the difficulty in holding that a
disease is incurable. See Issur Chunder Sen v. Rouse Dossar (1885), 2 W.
R. C. R. 125.
3 Sirnar’s “Yuvatha Darpana,” 2nd ed., pp. 1007, 1008. See, how-
ever, Bhadoonessar’s Debi v. Govardho Das Sarkar (1889), 11 W.
Sel. R. 62 (new edition, 71); Sheomaths Rai v. Dayamoyee Choudhurin (1814), 2
4 “Mitakshara,” chap. ii. s. 10, para. 3. See Jye Koomur (Muss.)
v. Bhikhees Singh, Ben. S. D. A.
1848, p. 320; Bhokhram Rais v. Sobra (Mussamunnaid) (1836), 6 Ben.
5 Kaka Pershad v. Buddee Sah
(1871), 3 N. W. P. H. C. 387.
6 Act XXI. of 1890. For a case
as to the law before the passing of
that Act, see Gobind Krishna Narain
v. Abdul Qayyum (1908), 25 All.
548; Gobind Krishna Narain v.
Khunni Lal (1907), 29 All. 487.
7 Chap. ix. para. 213.
8 Kaka Pershad v. Buddee Sah
(1871), 3 N. W. P. H. C. 267. See
Colebrooke’s “Digest,” vol. ii. p. 564,
vol. iii. p. 398; “Yajnavalkya,” ii.
para. 126; “Mitakshara,” chap. i.
s. 9; “Smriti Chandrika,” chap. xiv.
paras 4-6; “Yuvagana Mayukha,”
chap. iv. s. 6, para. 3; Strange’s
“Hindu Law,” vol. i. p. 292; Strange’s “Manual,” p. 273; West and
307, 308; “Viramitrodaya” (Sirnar’s
translation), p. 245; “Dayabhaga,”
chap. xii. para. 2; Daya-Krma-
Sangraha,” chap. viii.
9 “Mitakshara,” chap. ii. s. 10,
para. 7; “Mayukha,” chap. iv. s. 11,
para. 2; “Viramitrodaya,” chap.
vi. ver. 4; Bhattacharya’s “Law of
the Joint Family,” pp. 396, 397,
411-414. See, however, Mayne’s
“Hindu Law,” 7th ed., p. 655; and
Deo Kumar v. Budh Prakash (1883),
5 All. 509.

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This is an exception to the ordinary rule of Hindu law that an estate once vested cannot be devested.

A disqualification arising subsequent to separation does not exclude.¹ It is apparently competent to the other coparceners to waive the objection of disqualification.²

There is nothing to prevent a disqualified person from acquiring property by gift,³ or otherwise than by inheritance or partition.⁴

The burden of proof is upon the person seeking to prove the disability.⁵

The effect of exclusion from participation in the rights of the other members of the family is the same as if the person excluded were dead.⁶

In Madras and Bombay a coparcener may renounce his interest in the coparcenary property either in favour of the body of coparceners, or in favour of one or more individual coparcener,⁷ but in Bengal and the United Provinces he cannot renounce such interest except in favour of the whole body of coparceners.⁸ He can only renounce such interest with the acquiescence of the other members on his being given some trifle out of the family property.⁹

² See Muddun Gopal Lal (Lalo) v. Khikhi Kaur (Mussummat) (1890), 18 I. A. 9; 18 Cal. 541.
³ See Ganga Sahai v. Hira Singh (1880), 2 All. 809.
⁴ Court of Wards v. Kupalmun Sing (1873), 10 B. L. R. 364; 19 W. R. C. R. 164.
⁸ See Chendar Kishore v. Dampat Kishore (1894), 16 All. 369. See post, p. 300.
⁹ Sudarsonam Maistri v. Narasimha Aaloo Maistri (1901), 25 Mad. 149, at p. 156; “Mitakshara,” chap. i. s. 2, paras. 11, 12; “Manu,” chap. ix. para. 207.
CHAP. VI.]  

RIGHTS OF COPARCENERS.

I. Subject to any power the manager may have to make arrangements for the enjoyment of the property, each coparcener is entitled to joint possession of the coparcenary property with the other coparceners, and to the full enjoyment thereof.

Although he cannot sue for a share, he is entitled to enforce his right to joint possession by a suit.

He can bring a suit within twelve years from the time when his exclusion from the joint family property becomes known to him.

In a case governed by the Bengal school of law, the Judicial Committee said, "If there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged, and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. . . ."

In India a large proportion of the land, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which has been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists, are to act

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1 Post, p. 278.  
3 Laluchand v. Girijappa (1895), 20 Bom. 469.  
5 Watson and Company v. Ram Chand Dutt (1890), 17 I. A. 110, at pp. 120, 121; 18 Calc. 10, at p. 21, 22.  
6 See ante, p. 3.
according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

The Court can prevent a coparcener from altering the nature of the property without the consent of his coparceners, as by building on it, or otherwise interfering with the joint enjoyment.\(^1\) Whether it will do so depends upon the nature of the case. It will not do so in the absence of a real injury.\(^2\)

By arrangement between the parties, or at the discretion of the manager,\(^3\) portions may be occupied as a matter of convenience by individual coparceners. Where the coparceners permit one of their number to occupy a particular portion of the property and to improve it, they cannot oust him.\(^4\)

In the absence of an express agreement no claim for rent can be made against a coparcener occupying coparcenary property.\(^5\)

A coparcener cannot, without the consent of the other coparceners, appropriate a share of the proceeds of family property for the purpose of an investment for himself.\(^6\)

An individual member of a Mitakshara family cannot

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\(^2\) Binamchhinar Lah (Lala) v. Rajaram (1889), 3 B. L. R. App. 67; 16 W. R. C. R. 140, nota.

\(^3\) Post, p. 278.


\(^6\) See Boms Kooree (Musammad) v. Boodes Singh (Baboo) (1867), 8 W. R. C. R. 182.
sue for a share of the coparcenary property, but he can sue for possession jointly with his coparceners.

There is also authority that he may sue a trespasser alone. At any rate, he may do so if he joins his coparceners as parties.

According to all the schools a coparcener is not entitled to sue for a declaration as to the amount of his share, or to sue his coparceners for a portion of the property held by them. His remedy is by partition.

A suit by a person excluded from joint family property to enforce a Limitation, right to share therein must be brought within twelve years from the time when the exclusion becomes known to the plaintiff.

Where it is admitted or proved that the plaintiff was a member of a joint family, the burden of proving his exclusion, and his knowledge of such exclusion, for the period which would bar his right, lies upon the person asserting such exclusion.

It is competent to a person resisting a claim to property, which is Adverse alleged to be joint, to prove that he has acquired a right by adverse possession for twelve years. But as the possession of one member of a joint family is the possession of all, he cannot so acquire such rights unless he proves that the right has been claimed or asserted by other members of the family, and denied by him at least twelve years before suit.

Similarly, a person entitled to property as his separate acquisition may lose his right in consequence of the family having held possession adverse to his exclusive right for a period of twelve years.

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3 As to parties to suits, see post, p. 268.

4 See Radha Proshad Wasti v. Esuf (1881), 7 Calc. 414; 9 C. L. R. 76.

5 Baul Gorain v. Tew Gorain (1870), 4 B. L. R. App. 90.


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6 See post, Chap. IX.

7 Act XV. of 1877, Sched. II., art. 127.


12 Post, p. 251.
II. A coparcener is entitled to receive from the coparcenary property maintenance for himself, his wife, and his children, and for such persons as he is legally or morally bound to support, and provision for all usual and proper religious observances which should be performed by himself and such persons, also provision for the education of his sons, and for the marriage expenses of his daughters, or of other female dependents of his family.

As to the maintenance of such persons after the death of the coparcener, see post, p. 272.

All ancestral property is, while it remains undisposed of and unpartitioned, charged with the maintenance of all persons who are entitled to maintenance therefrom in the same sense that the maintenance of a widow is charged upon the estate of her husband.

III. A coparcener is entitled to receive such information as he may require as to the management of the property, and to be consulted in matters of great importance thereto, such as the sale or mortgage of the property, or of any portion thereof.

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1 Ayyaru Muppavan v. Niladichi Anmol (1862), 1 Mad. H. C. 45; “Manu,” chap. ix. para. 108; “Narada Smriti,” chap. ix. paras. 26-28; Bhattacharya’s “Law of the Joint Family,” pp. 280, 281. It has been held (12 Bom. H. C. 96, note) that a coparcener who can sue for partition cannot sue for maintenance, but it is submitted that there is no reason why he should be forced to such a proceeding. As to daughters, see Munikunwar v. Bhugoo (1822), 2 Borr. 139, at p. 144; ante, p. 212. As to sisters, see “Yajnavalkya,” bk. ii. chap. v. para. 1244.


3 “The indispensable duties alluded to in the ‘Mitakshara’ are undoubtedly the annual sarhas, the ceremony of investiture with sacred thread among the three superior castes, the marriage of the minor girls of the family, where such marriage must be celebrated before the girls arrive at the age of puberty (see ante, pp. 27, 28), and other religious ceremonies enjoined by the sacred writings, necessary to be performed at stated times and the non-performance of which would be a cause of sin, or forfeiture of caste, or would lower the position of the family,” K. K. Bhattacharya’s “Law of the Joint Family,” p. 277.


5 Shob Dayes v. Doorga Persad (1872), 4 N. W. P. H. C. 63. As to im impartible property, see Mullakharam Prasada Nayudu (Raja Yarlagadda) v. Durga Prasada Nayudu (Raja Yarlagadda) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.


7 See post, p. 274.
IV. A coparcener is entitled to sue to impeach and to restrain the acts of the manager or of other coparceners which are in excess of their powers. 1

V. A coparcener is entitled to obtain a partition of the property when he desires to be separated from the coparcenary. 2

This right exists as long as there is a joint tenancy. 3

"The rights of the coparceners in... an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons, 4 and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate." 5

On the death of a coparcener, his interest in the coparcenary property does not pass by inheritance. It lapses, or, as it is generally put, his rights pass by survivorship to the other coparceners, 6 subject to the rule that where

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2 He is not entitled to sue only for a declaration of his right to a share, or to claim otherwise than in a partition suit property held by the family as joint, ante, p. 241.

3 Bisheshar Das v. Ram Prasad (1906), 28 All. 627.

4 Post, p. 305.


he leaves male issue they represent his rights to a partition. His death has also the effect of introducing into the coparcenary one who is excluded by the rule which limits the coparcenary to four generations.

This process continues until partition.

The right to partition determines the right to take by survivorship.

Where there is no coparcener, property, which would otherwise be coparcenary, would pass by inheritance to the heirs of the deceased. There is no succession while the joint family remains.

Where there is a joint family business the death of a member of the family does not per se dissolve the business.

Under the Mitakshara school, the shares of coparceners are not defined until there be partition, or the members of the family agree among themselves with regard to particular property that it shall henceforth be the subject of ownership in defined shares.

The removal of coparceners by death, and the accession of new coparceners by birth, is continually affecting the interest of the coparceners to the extent that it increases or diminishes the share, which, if there were a partition,

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1. *Benes Pershad v. Mohaboodhy (Mussamut)* (1867), 7 W. R. C. R. 392; *Moopath (Mussamut) v. Teknoo (Mussamut)* (1867), 7 W. R. C. R. 440; *Ratan Dube v. Modhoosookum Mohapatr* (1878), 2 C. L. R. 328. The widow may acquire a right to the property by adverse possession, see *Sham Koer v. Duh Koer* (1902), 29 I. A. 192; 29 Calc. 664; 6 C. W. N. 657. The enlarged share is subject to the same incidents as the original share. *Gungoomull v. Bunseehur* (1869), 1 N. W. P. H. C. 170. The Curators Act (XIX. of 1841) has no application: *Sato Koer v. Gopal Salu* (1907), 34 Calc. 929; 12 C. W. N. 65.


would be allotted to them respectively, but until partition no coparcener has a greater interest in the coparcenary property than any one of the other coparceners.

In the well-known case of Appovier v. Rama Subba Aiyar (1866), Lord Westbury said, "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family." 2

**Coparcenary Property.**

Coparcenary property consists of—

(a) All property in which the members of a joint family have a common interest and a common possession, and therefore a right to partition. 8

"The principle of joint tenancy appears to be unknown property held to Hindu law, except in the case of coparcenary between jointly the members of an undivided family." 4

Thus property acquired by a transfer to members of the joint family jointly belongs to the coparcenary. 5

The 45th section of the Transfer of Property Act 6 is as follows:—

"Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract

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1 11 M. I. A. 75, at pp. 89-90; 8 W. R. P. C. 1.
2 As to the right to joint possession, see ante, p. 239.
6 IV. of 1882.
to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property."

Where property has been acquired jointly in business or otherwise by their joint labour by the members of a joint family, even without resort to the family funds, it is to be presumed to be the property of the family as such, but this presumption may be rebutted by proof that there was only an ordinary partnership, that is to say, a partnership which was the creature of contract, and not of birth and relationship, in which case the members would be entitled to share in accordance with their shares in the partnership, and there would be no rights of survivorship, or other incidents of coparcenary property.

The presumption does not apply when the business is carried on by some only of the members of the family without any aid from the family funds.

Mr. Mayne contends that in the case of property acquired by the joint exertions of the members of the family, but without any aid from the family funds, the sons would acquire no interest by birth.

"If the joint acquirers intended to hold the property so acquired as

1 See Rupeshwar Tencurry v. Shenrown Doss (1866), 10 M. I. A. 490, at p. 508; Shammarina v. Court of Wards (1873), 20 W. R. C. R. 197, and cases note 3 below. See Cobbrook’s "Digest," vol. iii. p. 338; ‘Mitakshara,’ chap. i. s. 4, para. 15; ‘Manu,’ chap. ix. para. 215. See, however, Chatturbhooj Meghji v. Dharamsi Narumji (1884), 9 Bom. 438, at pp. 445, 446. As to property acquired with the aid of family funds, see post, p. 252

2 Gopalswami Chetti v. Arumachalam Chetti (1903), 27 Mad. 92, and cases post, note 3.

3 See Rupeshwar Tencurry v. Shenrown Doss (1866), 10 M. I. A. 490, at p. 508; Chatturbhooj Meghji v. Dharamsi Narumji (1884), 9 Bom. 438, at p. 445; Sudarasan Maistry v. Narasimhulu Maistry (1901), 25 Mad. 149, at p. 155; Ram Narain Nursing Doss v. Ram Chunder Jhumoo Lall (1890), 18 Cal. 88. For an instance of a partnership between members of a joint family and a stranger, see Anand Ram v. Chammu Lal (1908), 25 All. 378.

4 Sudarasan Maistry v. Narasimhulu Maistry (1901), 25 Mad. 149.

co-owners, and not as joint family property in the Mitakshara sense of that expression, this view would be perfectly sound. But if, as supposed, the property was acquired by all the members of the undivided family, by their joint labour, it would, in the absence of any indication of intention to the contrary, be owned by them as joint family property, and in that case their male issue, who, by their birth, become members of such undivided family, necessarily acquire a right by birth in such property.”

In the case of a gift or a devise to the members of a joint family, the property would, in the absence of any term in the gift or devise which would show a different intention, be held as coparcenary property.

It has been suggested that this view might be inconsistent with the Tagore case, inasmuch as unborn persons might on birth obtain rights in the coparcenary. It is submitted that recent decisions as to a gift to a class negative this suggestion.

As to a babuna grant for the benefit of a junior member of the family and his direct male line, see Rambhander Marwari v. Mudeswar Singh (1906), 33 Calc. 1158; 10 C. W. N. 979.

Whether property, which may have been ancestral, but has been acquired by virtue of a compromise or arrangement, belongs to the compromise, coparcenary depends upon the nature of the arrangement.

Property inherited from the maternal grandfather by two persons living as members of a joint family is, in a case governed by the Mitakshara law, on a similar footing.
A full bench of the Madras High Court has declined to extend this principle to sister's sons, and expressed their inability to apply it "to cases other than those in which the inheritance devolves from a paternal or maternal male ancestor on his lineal descendants whether as 'unobstructed,' or as 'obstructed heritage.'" They point out that the distinction between the two cases is that whereas the class of daughters is incapable of being added to after the vesting, the class of sister's sons would be added to after the vesting by the birth of others.\(^1\)

\(^{(b)}\) In cases governed by the Mitakshara school of law, all property, whether movable or immovable,\(^2\) and however originally acquired,\(^3\) which is inherited by what is called "unobstructed heritage,"\(^4\) \(i.e\). which is inherited from a natural or adopted \(^5\) father, is coparcenary property \(^6\) as regards the issue of the person so inheriting it.\(^7\)

"In the 'Mitakshara,' chap. i. s. 1, v. 3, heritage is said to be 'of two sorts, unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents according to the illatom system (ante, p. 182); Challa Papi Reddi v. Challa Koli Reddi (1872), 7 Mad. H. C. 35. See Ramakrishna v. Subbha (1889), 12 Mad. 442.\(^6\)

\(^1\) Karuppai Nachiar v. Santharaman Chetty (1903), 27 Mad. 300, at p. 314.

\(^2\) Jugnohandas Mangaldas v. Sir Mangaldas Nathubhai (1886), 10 Bom. 598, at pp. 570–574. This includes a right of occupancy, Mahabir Prasad v. Bunda Singh (1884), 6 All. 294.

\(^3\) Chatturbhoo Meholi v. Dharmsri Narangi (1884), 9 Bom. 438, at p. 450; Hardoi Noorin v. Haruck Dhar Singh (1882), 12 C. L. R. 104.

\(^4\) Aaprasabandha Daya (inheritance not liable to be obstructed) as distinguished from Supratibhandha Daya (inheritance liable to be obstructed, post, p. 261). The distinction between the two forms of heritage is the same as the distinction between inheritance by an heir at law, and inheritance by an heir presumptive. In the latter case there is a possibility of a nearer heir being born. In the former case there is no such possibility.

\(^5\) This has no application to property inherited by a person adopted according to the illatom system (ante, p. 182); Challa Papi Reddi v. Challa Koli Reddi (1872), 7 Mad. H. C. 35. See Ramakrishna v. Subbha (1889), 12 Mad. 442.


\(^7\) It is otherwise as regards other persons, see Jambi v. Nanargsan (1888), 11 All. 194, at p. 198.
(or uncle), brothers, and the rest upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction."

Property inherited after the death of a widow to whom it was assigned in lieu of maintenance is on the same footing.

It is only the descendants of the person so inheriting, who acquire an interest in the property. Collateral relations who happen to be joint with such person acquire no such interest.

(c) In cases governed by the Mitakshara school of law, property inherited from a mother is coparcenary, but it is unsettled whether property inherited from the maternal grandfather is also coparcenary property.

The Madras decisions hold that property inherited by a daughter's son is coparcenary. The Bengal and Allahabad High Courts have entertained a different view, and there is no reported decision in Bombay on the subject.

The Judicial Committee has held that such property is not "self-acquired," and therefore it follows, it is submitted, that it is coparcenary, with all the incidents of coparcenary property.

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4. "Mitakshara," chap. i. s. 4, para. 2.
5. Vythinatha Aiyar v. Veggia Narayana Aiyar (1903), 27 Mad. 382; Muttayam Chetti v. Sengili Vira Pandia Chimna Tumbiar (1879), 3 Mad. 370. This question did not arise on appeal in this case (1899), 9 I. A. 138; 6 Mad. 1; 12 C. L. R. 169; Singanga Zemindar v. Lakshmana (1885), 9 Mad. 188, at p. 190. These last two cases were doubted in Venkataramanayamma Guru (Sri Raja Chelikami) v. Appa Rau Bahadur Guru (1897), 20 Mad. 207, at p. 219, which was reversed on a different point by the Judicial Committee; Venkayyamma Guru (Raja Chelikami) v. Venkataramanayamma (Raja Chelikami) (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1.
8. Muttayam Chetti v. Sengili Vira Pandia Chimnatambir (1892), 9 I. A. 128, at p. 148; 6 Mad. 1, at p. 16; 12 C. L. R. 169, at p. 182. In the Court below, the High Court held (Muttayam Chetti v. Sengili Vira Pandia Chimna Tumbiar, 3 Mad. 370, at p. 375) that the sons could not interfere with their father's action with regard to it, but there is, it is submitted, no reason for this distinction.
Mr. Mayne says, "When the case arises again it will be material to remember that property only becomes joint property by reason of being ancestral property where the ancestor from whom it was derived was a paternal ancestor. See 'Mitakshara,' chap. i. a. 1, paras. 3, 5, 21, 24, 27, 33; a. 5, paras. 2, 3, 5, 9-11."

(d) In cases governed by the Mitakshara school of law, the share of coparcenary property allotted to any member on partition becomes coparcenary property as regards his issue, whether such issue were or were not born at the time of partition.

The circumstance that the person to whom the property is allotted discharges it from encumbrances does not alter its nature. If the person to whom the property has been allotted has no issue, it passes to his heir.

(e) Self-acquired property, given or devised by a Hindu governed by the Mitakshara school of law to a son is, according to the High Courts of Bengal and Madras, in the absence of any contrary intention appearing from the gift or will, to be taken to be coparcenary property, so far as the issue of that son are concerned. The Bombay and Allahabad High Courts repudiate such presumption.

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1 "Hindu Law," 7th ed., p. 344 note (x). See also West and Bühler (3rd ed.), pp. 714, 715.
3 In Adurwami Debi v. Choudhury Shib Narayan Kur (1877), 3 Calc. 1, the son was not born at the time of the partition.
4 Visalakshi Amud v. Annapurna Sastri (1870), 5 Mad. H. C. 150.
5 See Befai Bahadur Singh v. Bhopindar Bahadur Singh (1895), 22 I. A. 159; 17 All. 456.
6 In Lakshmibai v. Ganpat Moroba (1868), 5 Bom. H. C. O. C. 128, the property was given to the grandsons in severalty.
8 See Nanabhai Gunpatram Dhairya v. Akruti (1886), 12 Bom. 122, at pp. 131, 131. (As in this case the devise was to the sons jointly, the property was coparcenary, ante, p. 245.) Jagmohan Das Mangaldas v. Sir Mangaldas Nathbhoj (1886), 10 Bom. 528; Parsadam Ram Tantia v. Jomki Bai (1907), 29 All. 354.
CHAP. VI.]

COPARCENARY PROPERTY.

Where coparcenary property purports to be given or devised to a son or other coparcener its character would obviously be unchanged, even where such gift or devise is permissible.

(f) The joint property of reunited coparceners.

(g) Property which was originally the separate property of an individual member of a joint family, but has been treated by him as coparcenary property, belongs to the coparcenary.

Where the members of a family having coparcenary property put their separate earnings into the joint stock, the proceeds of such earnings are to be presumed to be joint. The treatment must be such as to show unmistakably an intention to throw the property into the common stock. Where it is plain that no gift can have been intended, none can be inferred.

The right to claim property as separate may be barred by the Right by operation of the law of Limitation.

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1 See Tara Chand v. Reeb Ram (1886), 5 Mad. H. C. 50, at p. 55; Haridas Narain v. Harack Dhari Singh (1882), 12 C. L. R. 104; Nanomia Babusaiin (Mussamut) v. Mohun Mohun (Judgment of High Court, 1883), 13 I. A. 1, at pp. 5, 6; 13 Calc. 21.
3 Jasoda Koer v. Sheo Pershad Singh (1889), 17 Calc. 33, at p. 38. As to reunion, see post, pp. 358, 359.
4 Post, pp. 255 et seq.
6 Lal Bahadur v. Kamkha Lali (1907), 34 I. A. 45; 29 All. 244; 11 C. W. N. 417.

Acretions and acquisitions.

(h) Acretions to coparcenary property. Property acquired out of the income or with the aid of coparcenary property, whether movable or immovable, the income of such property, the proceeds of sale of such property, and property purchased out of such proceeds, or from movable property belonging to the family, are coparcenary property.

In a case governed by the Mitakshara law, a son acquires an interest in such property, whether he was or was not born or adopted before the date of the acquisition.

Even where the acquirer has received some aid from the family property he is entitled to treat the acquisition as separate, if the family property has not contributed in a material degree to the acquisition, and was not directly instrumental in bringing it about. See post, pp. 256, 257.

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4 Ramannu v. Venkata (1888), 11 Mad. 246.

5 Krishnaam Ayyangar v. Bajagopala Ayyangar (1894), 18 Mad. 73, at p. 83. See Shanmanee Singh v. Rughooburdeyal (1877), 3 Calc. 508; 1 C. L. R. 343.

6 See Shanmanee Singh v. Rughooburdeyal (1877), 3 Calc. 508, at p. 510; 1 C. L. R. 343, at p. 345.


9 See Rampershad Tewaray v. Shee Chowd Doss (1886), 10 M. I. A. 490, at p. 505; Ahmedbhoi Hubibboh v. Casumbhoi Ahmedbhoi (1889), 13 Bom. 554, at p. 545; Strange's "Hindu Law," l. 214.

10 Jugmohandas Mangalades v. Sir Mangalades Nathubho (1886), 10 Bom. 528, at pp. 556, 559; Jadhanee Dusi (Srimati) v. Gangadher Seel,
“It seems agreed that maintenance in the family, during the period of separate acquisition, though it contribute to the end, is not alone sufficient to affect it with a joint character, the expenditure for the purpose being incidental.”

It has been held that property acquired by a coparcener while drawing an income from coparcenary property is joint.

As to property acquired by the exercise of a profession, see post, pp. 257, 258.

The form of the transfer or the fact that the property was purchased or settled in the name of a particular member of the family is immaterial.

Property purchased from the income of an immoveable estate governed by the Mitakshara school of law, and the savings from the income of such estate not appropriated by the owner, or disposed of by his will, will form part of the estate.

The estate itself cannot be regarded as coparcenary property, inasmuch as by the custom of the family, it is held by a single individual.

It was formerly considered that coparcenary property would include property which by custom is held and enjoyed by a single member of the family, but in which there was a right of survivorship.

In a recent case in Bombay, Jenkins, C.J., said this: “No doubt


1 Strange’s “Hindu Law,” i. 214.
3 See In the goods of Pokurnull Auspericallah (1898), 39 Cal. 980; 1 C. W. N. 31.

4 See post, pp. 264, 265.
* It was held otherwise in Bawani Chulam v. Deo Rag Kuwar (1888), 5 All. 542; but see post, p. 254.
* See post, pp. 337–339.
* Baschoo v. Memboreboi (1904), 29 Bom. 51, at p. 57; S. C. on appeal,
the property claimed in Raghunadh's case was impartible, but at one time it was the common notion that even in impartible property all the male members of a joint family were coparceners subject to the qualification that the enjoyment was by one member of the family alone, and it was considered, rightly or wrongly, that there was warrant for this view in a number of decisions of the Privy Council, and notably Naragunty v. Vengama, Shivagunga case, the Tipperah case, Biree Rajah Yamanula Venkayamah v. Biree Rajah Yamanula Boochia Venkondara, Chowdhry Chintamun Singh v. Mussamut Noulucko Konwari. I mention these cases as to all of them Sir James Colvile, who delivered the judgment in Raghunadh's case, was a party; and if it was his view that the impartible zamindari belonged to the whole family, then the decision in Raghunadh's case would seem to have proceeded on circumstances very closely resembling those with which we are now dealing. But whatever may have been the opinion that prevailed at that time, it has now been definitely decided by the Privy Council in Rani Surtaj Kuari v. Rani Devraj Kuari, and in Sri Raja Rao Venkata Surya v. Court of Wards, that in impartible properties there is no coparcenary, so that in the light of these latter decisions it cannot be said that the conditions in Raghunadh's case were in all respects identical with those now under consideration. 

Presumption. If the owner of an estate, the devolution of which is governed by family custom, acquires separate property, but does not in his lifetime alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate.

Coparcenary as regards some coparceners only. Property may be coparcenary as regards some members of a joint family, while other members of the family, although coparceners in the family property, have no share therein. Thus, if a coparcener dies leaving self-acquired

Burchoo Harkinsonas v. Mankorhisi (1888), 15 I. A. 51; 10 All. 279.
2 (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415.
4 See Shumonnasun v. Court of Wards (1875), 20 W. R. C. R. 197.
property, such property becomes the coparcenary property of his descendants, but his collateral coparceners have no interest therein.

The coparcenary may also be trustees of property devoted to religious or pious uses. This class of property is incapable of partition.

**Separate Property.**

It is competent to a member of a joint family to acquire property for himself independently of his coparceners. Such separate acquisitions can be dealt with at the pleasure of the acquirer. In default of a will they pass to the heirs of the acquirer, who will, in cases under the Mitakshara law, if he be a son, take them as coparcenary property.

As to the power of a father to divide his self-acquired property unequally amongst his sons, see post, p. 335.

Property acquired in the following ways are the absolute property of the acquirer. Other members of the family have no interest therein.

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2. *See ante*, p. 248.
8. *See Yamunadai v. Manubai* (1899), 23 Bom. 608, at pp. 611. As to the Bengal school, see *ante*, p. 230.
Such property is not liable to partition because it has been acquired without detriment to the estate of the father or mother.  

(a) Property acquired by an individual member of the joint family by his own exertions, or from his separate capital, or on his own credit, without any help from, or detriment to, the coparcenary property.

Where with comparatively small aid from the coparcenary property the separate acquisition of a distinct property is made by an individual member by his own labour or capital, the acquirer, according to the Bengal authorities, is entitled to a double share on partition, no such share being given in case of the common stock being only improved or augmented.

It has been suggested that the extra share allotted to the acquirer may be treated by him as self-acquired.

1 "Mitakshara," chap. i. s. 4, para. 2.
2 Tottumpudi Venkataratnam v. Tottumpudi Seshamma (1903), 27 Mad. 228; Somasundara Mudaliar v. Ganga Bismen Soni (1904), 28 Mad. 386 (income derived from Government service). This would not include exertions as manager, Sheo Dyal Tewrce v. Judoonath Tewrce (1868), 9 W. R. C. R. 61, at p. 64. As to earnings by a prostitute, see Chandrasekha v. Secretary of State (1890), 14 Mad. 163; Boopagan v. Soorunam (1881), 4 Mad. 390.
3 Narsingh Dass (Rai) v. Narain Dass (Rai) (1871), 3 N. W. P. H. C. 217, at p. 235. As to a policy of insurance, see Rajamma v. Ramakrishnagya (1905), 29 Mad. 121.
6 "Mitakshara," chap. i. s. 4, para. 30, 31.
7 Bhattacharya's "Hindu Law," 2nd ed., p. 228. It cannot be said to have been acquired without detriment to the paternal estate: above, note 1.
SEPARATE PROPERTY.

Whether this limitation will be accepted by the Judicial Committee or will be adopted in the other Provinces may be open to question.

Mr. Mayne¹ says that the text of Vasiṣṭha,² on which it is founded, "probably applied originally to self-acquisition properly so called, and that it cut down the rights of a self-acquirer, instead of enlarging the rights of one who has made use of common property. The Smṛti Chandrika and Madhaviya both restrict the text to the gains of learning, when considered to be partible in consequence of the education from which they sprang having been imparted at the expense of the family."³ The general principles laid down by Vijnānāvavara seem to exclude the idea that any special and exclusive benefit can be obtained to any co-heir by a use of the family property.⁴ Mr. W. Macnaghten states that under Benares law no such benefit can be obtained, whatever may have been the personal exertions of any individuals, but that the rule does not exist in Bengal."⁵

Under the Bengal school of law the father takes a double share in acquisitions made by a son; if they have been made by the use of joint funds the father and the acquirer take two shares each, and the rest of the brothers one share each; but if made without the use of joint funds the acquisitions are divided half and half between the father and the son. A father claiming a share of property acquired by his son is not bound to allow the son any share of the ancestral property in his hands.⁶

This rule has no application when the son has separated from his father.⁷

(b) Property acquired as "gains of science,"⁸ i.e. by the

² "And if one of the brothers has gained something by his own effort, he shall receive a double share," Vasiṣṭha, xvii. 51; "Mitakṣhara," chap. i. s. 4, para. 29; "Dayabhaga," chap. vi. s. 1, paras. 27-29.
³ "Smṛti Chandrika," chap. vii. para. 9, and see futwah in 2 William Macnaghten, 167.
⁴ "Mitakṣhara," chap. i. s. 4, paras. 1-6.
⁵ 1 Wm. Macnaghten, 52; 2 Wm. Macn. 7 n. 158, 160 n., 162 n.
⁸ "Manu," chap. ix. para. 206; "Narada Smriti," chap. ix. para. 6. The word which was translated by Colebrooke as "gains of science" is said to be literally "learning money," and to have meant money acquired by the teaching of the Vedas, K. K. Bhattacharya's "Joint Hindu Family," pp. 661-667.
practice of a (learned) profession or occupation, where the property of the family has not been used for acquiring such property, or in the special education, which was necessary for the purpose of practising such profession.¹

A mere general education or maintenance, even during the time of the acquisition,² at the expense of the family, would not, apparently, make the profits of the profession coparcenary property,³ but a special education for the particular profession would stand upon a different footing.

(c) Gifts on marriage⁴ or on other occasions,⁵ and bequests.

The payment of the marriage expenses out of coparcenary property does not render the marriage gifts joint property.⁶

A babuana grant of ancestral property by the owner of an immoveable estate, to ensure for the benefit not only of a junior member of the family, but of his direct male line, does not lose its ancestral character by the grant.⁷

As to gifts and bequests to a son in cases governed by the Mitakshara school of law, see ante, p. 250.

As to gifts and bequests to the joint family, see ante, p. 247.

¹ See cases in note 2, post.
³ Laksman Mayaram v. Jamnabai (1892), 6 Bom. 225 (earnings in government employment); Krishnaji Mahadeo Mahajam v. Moro Mahadeo Mahajan (1890), 15 Bom. 32 (earning as Khorun [agent in financial or revenue collections]); Bhawoodekkhawa Lali v. Gunput Lali (1868), 11 B. L. R. 201 note; 10 W. R. C. R. 122; Velloo Chetty (Paulim) v. Sooryah Chetty (Paulim) (1877), 4 I. A. 109, at pp. 117, 118; 1 Mad. 252, at pp. 261, 262; Lochmin Kvar v. Debi Prasad (1897), 20 All. 435 (a case of money earned as a commissariat officer); Boollogam v. Scornam (1881), 4 Mad. 330 (where it was attempted to treat the earnings of a dancing-girl as joint property);
⁴ Maunia (Bai) v. Narain Das (1889), 6 Bom. H. C. A. C. 1.
⁶ See "Mitakshara," chap. i. s. 4, para. 2. “Manu” (chap. ix. para. 206) includes gifts presented as a mark of respect to a guest; "Narada" (chap. xii. paras. 6, 7) includes gifts by father and mother.
⁷ Sheo Gobind v. Skan Narain Singh (1875), 7 N. W. P. 75.
⁸ Ram Chandra Parsuram v. Mudamshour Singh (1906), 33 Calc. 1158.
(d) Grants of property made by Government,\(^1\) whether to a stranger or to a kineman of a former owner of the land, unless it appears from the grant that it was to enure for the benefit of the family,\(^2\) or where the grantee has constituted himself a trustee for the family,\(^3\) or apparently where a family custom has treated them as joint.\(^4\)

The quality of the estate in regard to its descendlibility would not, \textit{prima facie}, be altered by the regrant.\(^5\)

(e) Coparcenary property which had been lost to the family,\(^6\) but recovered by an individual member without recovery of lost property.

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\(^2\) \text{Hurrupshad v. Sheo Dyal (1876), 3 I. A. 259; 26 W. R. C. R. 55; Govind Rao (Sri Mahant) v. Sita Ram Kesho (1898), 25 I. A. 195; 21 All. 53; 2 C. W. N. 681. As where the grant merely operated as an ascertainment of the claim for revenue, and a release of the reversionary right of the Crown, \text{Narayan v. Chengalamma (1886), 10 Mad. 1. See Radhobai v. Nanarain (1879), 3 Bom. 151.}

\(^3\) \text{See Hardeo Bus (Thakoor) v. Jawahir Singh (Thakoor) (1877), 4 I. A. 178; 3 Calc. 522; 6 I. A. 161; Sooraj Koonar (Moussewat Thukrain) v. Government (1871), 14 M. I. A. 112; Shree Bahadur Singh (Thakur) v. Darioo Kuwar (Thakurain) (1877), 3 Calc. 645; Ramunund Koer (Thakurain) v. Raghunath Koer (Thakurain) (1881), 9 I. A. 41; 8 Calc. 769.}

\(^4\) \text{See Madharao Manohar v. Atmaram Kesho (1890), 15 Bom. 519.}

\(^5\) \text{See Venkata Narasimha Appa Row (Sri Rajaj) v. Rangayya Appa Row (Sri Rajaj) (1905), 29 Mad. 437.}

\(^6\) \text{This does not apply to a case where the property was held by a person claiming to be a member of the family, \text{Bissemarw Chuckerlulri v. Sctul Chunder Chuckerlulri (1868), 9 W. R. C. R. 69; S. C. 8 W. R. C. R. 13.}
the aid of the family property 1 from a stranger holding adversely to the family. 3

There must have been an express or implied abandonment of their rights by the coparceners, and the coparceners must have been in a position to sue. 8

Where the property recovered under these conditions consists of land, 4 the recoverer, except perhaps he be the father, is not entitled to the property absolutely, but he is entitled on partition to take one-fourth share as a reward for the recovery, and he has to share the remainder with his brethren. 5

Where the recoverer is the father, the Mitakshara would apparently give him the whole of the property, 6 but the Bengal authorities are said to make no distinction between a recovery by the father or one by another coparcener. 7

The redemption of property is not a recovery within the meaning of this rule. 8

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4 K. K. Bhattacharya (“Law Relating to the Joint Hindu Family,” p. 661) considers that this distinction only applies to arable land.

5 “Mitakshara,” chap. i. s. 4, para. 3; Colebrooke’s “Digest,” vol. iii, p. 365; “Daya-Krama Sangraha,” chap. iv. s. 2, para. 9. See Naraganti Achamnagaru v. Venkatachalapati Nayanivaru (1881), 4 Mad. 250, at p. 259. Where the property is impartible, the recoverer would apparently be entitled to a reward. Ibid., pp. 259, 260.

6 Chap. i. s. 5, para. 11.

7 Mayne’s “Hindu Law” (7th ed.), pp. 360, 361, citing “Dayabhaga,” chap. vi. s. 2, paras. 36-39; “Daya-Krama Sangraha,” chap. iv. s. 2, paras. 7, 8; William Macnaghten, vol. i. 52; William Macnaghten, vol. ii. 157. With the exception perhaps of the statement in 1 William Macnaghten, these are authorities of the Bengal school, in which the distinction could not be made. In Bolakee Sahoo v. Court of Wards (1870), 14 W. R. C. R. 34, the right of the father to the whole was maintained, but the question as to his being entitled only to an extra share does not seem to have been raised.

8 Visalatachi Ammal v. Annasamy Sastry (1870), 5 Mad. H. C. 150.
The use of family money for the purpose of recovering such property does not necessarily make it joint.\(^1\)

\((f)\) In a case governed by the Mitakshara school of law, property inherited by obstructed inheritance (Sapratibandha),\(^2\) i.e. from some person other than a natural or adopted father.\(^3\)

As to property inherited from a maternal grandfather, see ante, p. 249.

Under the Bengal school, inherited property, from whomsoever it be inherited, is the absolute property of a male heir.

\((g)\) Accretions to separate property of any kind and savings therefrom, and property purchased with the income thereof, or from the proceeds thereof.\(^4\)

A member of a joint family claiming property as separate must show of what the separate property consists,\(^5\) and that it was his separate acquisition.

As to the presumption with regard to the family being joint, see ante, pp. 226–229.

Property purchased, or held, by or in the name of, or settled with a coparcener in a family which is joint in estate, is, if held in a manner not inconsistent with the property being joint, presumed, apart from special circumstances, to have belonged to the coparcener at the time of its acquisition.\(^6\)

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4. See Boomadi Lall (Bukshes) v. Deekee Nundun Lall (Bukshes) (1873), 19 W. R. C. R. 223.
6. This includes money due on a bond, Kales Sunkur Bhadoorees v. Exham Chander Bhadoorees (1872), 17 W. R. C. R. 528.
8. They may have separated in food or worship, ante, p. 237.
There is no similar presumption in the case of property purchased by or in the name of dependent members of the family, who have no vested interest in the joint family, as, for instance, a son-in-law living in the house, a wife, under the Bengal school of law a son when the father is alive, or a female member of the family, but where the property had been purchased by the managing members in such name the presumption might arise.

"In the case of an ordinary Hindu family who are living together, or have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of


2 Chowdrami v. Tveri Kant Lakhri Chowdrami (1882), 8 Cal. 545. This decision was reversed on the facts, Dharani Kant Lakhri v. Kristobosram Chowdrami (1886), 11 A. 70; 13 Cal. 181. See Bindoo Bhasin Deb v. Pearse Mohun Bose (1884), 6 W. R. C. R. 312.

3 Sarada Prasad Bab v. Mahananda Roy (1894), 31 Cal. 448.

4 Narayana v. Krishna (1884), 8 Mad. 214.

5 See Chand Harree Maitae v. Narendro Narain Roj (Rajah) (1873), 19 W. R. C. R. 231. The purchase was made by the managing member in the name of the family priest.
establishing the contrary is thrown on the member of the family who disputes it."  

"The fact of the Hindu family is enough to put the purchaser upon inquiry, and if he deals with a single member without obtaining proof that the property is separate property he does so at his own risk."  

There has been some conflict as to whether it is necessary for the proof of person claiming the property as joint to prove that there was a nucleus of family property from which the property in question might have been acquired, or whether mere proof that the acquirer was at the time of the acquisition a member of a Hindu family is not sufficient. Mr. Mayne seeks to reconcile these decisions by pointing out how the burden of proof varies in accordance with the nature of the claim to separate property. It is difficult, if not impossible, to lay down a rule which will suit the circumstances of each case, but every weight must be given to the practice of sharing property in common as members of a joint family which prevails among Hindus. It rarely happens that a case depends upon the mere necessity to prove the existence of a nucleus of family property.

1 Bannoo v. Kashoo Ram (1877), 3 Calc. 315, at p. 317; Sudhanund Mohapatru v. Soorjo Mone Dayee (1869), 11 W. R. C. R. 436. This presumption applies also to the case where the property has passed by sale into the hands of third parties and has been redeemed by private purchase by a coparsoner; Gooroo Pershad Roy v. Deeb Pershad Tencourse (1860), 5 W. R. C. R. 58.  


Where there is such a nucleus it is clear that the burden is upon the person who alleges that the property was a separate acquisition.¹

When it is proved that there was family property, the fruits of which were capable of providing for the acquisition of the property in question, then the person claiming the property as a separate acquisition must prove that the family property was not used for the acquisition.²

The fact that the property had increased during a long period to a considerable value from a small nucleus of family property is not sufficient to repeat the presumption that it was all family property.³

The purchase of property in the name of one member of the family, or the use of his name in documents relating to the property,⁴ or in the carrying on of law suits by him alone,⁵ or an entry of his name in revenue records,⁶ does not by itself show that the acquisition was separate, or that there had been a separation, particularly where that member is the managing member of the family;⁷ but where a purchaser from such member has been misled, the family may, in some cases, be estopped from claiming the property as joint,⁸ and in conjunction with other evidence of separation, or of separate acquisition, such evidence may be of importance.⁹

³ Tettamudi Venkataratnam v. Tettamudi Seshamma (1903), 27 Mad. 298.
⁵ Deola Singh v. Toofanee Singh (1865), 1 W. R. C. R. 308.
The presumption may be rebutted by showing that the property has been self-acquired from separate funds, without the aid of the coparcenary property, and that the property is held separately,\(^1\) or by proof of separation before the acquisition, or by proof that at the time of acquisition there was no family property out of which it could have been acquired,\(^2\) or by proof of separation after the purchase, and exclusive possession of the property thereafter.\(^3\)

Evidence as to the source of the purchase-money is generally the most satisfactory mode of proof, but it is not indispensable.\(^4\)

Where it is admitted or proved that property in dispute was not acquired by use of coparcenary funds,\(^5\) or that a partition has already taken place,\(^6\) the burden lies upon the person alleging the property to be joint.

Where property was in its origin a separate acquisition of an individual member of the family, the burden of proving that it has become joint property, i.e. that its character has been changed by treatment,\(^7\) is on the person making the assertion.\(^8\)

There is no presumption that a family possesses any possession of property.

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2. See Gunga Dhar Chatterjee v. Soorjo Nath Chatterjee (1871), 15 W. R. C. R. 446.
8. See Venkataramanayamma Guru (Sri Raja Chelikani) v. Appa Ram Bahadur Guru (1897), 20 Mad. 207, at p. 220. This decision was set aside on appeal (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1, but this dictum as to the burden of proof was untouched by the decision of the Judicial Committee.
particular property, or any property at all. A person who claims a share in property as belonging to a joint family, of which he is admitted or has been proved to be a member, must prove either that the property was held or acquired by the members of the family as such, or that the person in whose possession it is is a member of the family.

He may, of course, rebut evidence of self-acquisition by evidence as to the source of the acquisition, or by other evidence tending to show that the property was joint.

1 See Obhoy Churn Ghose v. Gobind Chunder Dey (1882), 9 Calc. 237.
3 See Balaram Bhaskarji v. Ramchandra Bhaskarji (1898), 22 Bom. 922, at p. 931; Obhoy Churn Ghose v. Gobind Chunder Dey (1882), 9 Calc. 237.
4 Cases, ante, p. 263, note 1, and p. 264, note 4. A different view was entertained in Shiu Golam Sing v. Barun Sing (1868), 1 B. L. R. A. C. 164, at p. 167, where it was said, "He must, at least, show that the defendants whom he sues constitute a joint family, and that the property in question became joint property when acquired, or that at some period since its acquisition, it has been enjoyed jointly by that family."
CHAPTER VII.

MANAGEMENT AND DISPOSAL OF PROPERTY OF JOINT FAMILY.

"The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the mode of enjoyment by the members of an undivided family." ¹

This principle was laid down in a case governed by the Mitakshara school of law, but it would apply also to a joint family governed by the Bengal school of law, it being remembered that in the latter case sons have not during their father’s lifetime any interest in the family chest or purse.

Although a coparcener is not entitled ordinarily to credit for moneys paid by him out of his own funds for the benefit of the family on the improvement of the estate,² he is entitled to such credit where it is clear that he reserved his right to such credit, as where he paid the money to save the coparcenary estate from sale for arrears of Government revenue.³

Except where in a coparcenary governed by the Mitakshara the father has power to act independently of his sons,⁴ each coparcener must either himself, or by a manager having power in that behalf, be a party to every transaction relating to the coparcenary property.⁵

³ Vizianagram (Rajah of) v. Sotrucherla Somasekhandas (Rajah) (1903), 26 Mad. 686.
⁴ Viz. in contracting debts, post, chap. viii.
No coparcener, unless he be the manager, has power to enhance rent or eject tenants at his pleasure.\footnote{Balaji Baikaji Pinge v. Gopal Mahtoon (1876), 2 Calc. 149; Shri Churn Narain Singh v. Chakradeo Pershad Narain Singh (1871), 15 W. R. C. R. 436; Nunshu Lall v. Lloyd (1874), 22 W. R. C. R. 74; Arunachala Pillai v. Vythilinga Mudaliyar (1882), 6 Mad. 27; Hari Gopal v. Gokaldas Keshavahshet (1887), 12 Bom. 158.}

It has been held\footnote{Oedit Narain Singh v. Hudson (1885), 2 W. R., Act X. R. 15.} that payment to one of several joint proprietors is a payment to all. This would, it is submitted, depend upon the circumstances. Where there is a manager a tenant would rarely be entitled to pay to any other coparcener. Under some circumstances a debtor might get a discharge by payment to one coparcener,\footnote{See Guruhanantappa v. Chennalappaya (1899), 24 Bom. 123.} but it would ordinarily be safer for him to require a receipt from the manager or from the whole body of coparceners.

All the coparceners must be parties to a suit or execution proceedings relating to the coparcenary property,\footnote{See Civil Procedure Code, 1908, order i. rules 1, 3, 4; Act XIV. of 1889, ss. 26, 28. Guruswamy Gouda v. Dattatraya Anant (1903), 28 Bom. 11; Vaidial Lallubhai v. Shah Khushal Dalpatram (1909), 27 Bom. 157; Muhammad Askari v. Radha Ram Singh (1900), 22 All. 307; Balkrishna Sakara v. Moro Krishna Dabholkar (1896), 21 Bom. 154; Banarsi Das v. Makarani Kesar (1882), 5 All. 27; Pheebas Koornwar (Mununat) v. Jugeshwar Sahoy (1878), 3 I. A. 7, at p. 26; 1 Calc. 226, at pp. 248, 244; 25 W. R. C. R. 285, at p. 289; Bajaram Teswari v. Lochman Prasad (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; Gopal v. Macnaghten (1881), 7 Calc. 751; Unnada Persad Roy v. Erkina (1879), 12 B. L. R. 370; 21 W. R. C. R. 68; Nathuni Mahtoon v. Manraj Mahtoon (1876), 2 Calc. 149; Shri Churn Narain Singh v. Chakradeo Pershad Narain Singh (1871), 15 W. R. C. R. 436; Nunshu Lall v. Lloyd (1874), 22 W. R. C. R. 74; Arunachala Pillai v. Vythilinga Mudaliyar (1882), 6 Mad. 27; Hari Gopal v. Gokaldas Keshavahshet (1887), 12 Bom. 158.} or to a trade or business belonging to the family, even if it be founded on a transaction which was validly entered into by the manager,\footnote{Jugal Kishore v. HulasRam (1886), 8 All. 264; Rameshwar v. Ramlal Koondoo (1881), 6 Cal. 815; 8 G. L. R. 457; See Vaidial Lallubhai v. Shah Khushal Dalpatram (1909), 27 Bom. 157; Anant Ram v. Chasam Lal (1908), 25 All. 378.} but a decree made against the father\footnote{Jai Ram v. Sher Singh (1902), 25 All. 182; Allegappa Chetti v. Velian Chetti (1894), 18 Mad. 33.} or other manager, as representing the family, without any objection being made as to want of parties, may bind the other coparceners.\footnote{Act XIV. of 1889, s. 5, Civil Procedure Code, 1908, order i. r. 13.}

Thus one coparcener cannot sue alone to eject a tenant,\footnote{Post, p. 278.} and cannot

\footnote{Reesun Hossain v. Chora Singh.}
PARTIES TO SUITS.

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sue for enhancement of rent,1 or for his share of the rent,2 unless by an express or implied arrangement between the coparceners and the tenant he collects his share separately.3

In Ramayya v. Venkataramnam,4 where a suit was brought by a manager as representative of the family, the Court considered that the omission to make the coparcener a party was a mere formal error.

When a coparcener declines to be a plaintiff,5 or where he is acting in collusion with the tenant6 or other person sued, he may be joined as a defendant.

If the suit be barred against some of them, the whole suit fails.7

It has been held that where one of the family has


1 Jogendra Chunder Ghose v. Nobin Chunder Chottopadhyya (1882), 8 Calc. 353; Balkrishna Sakaram v. Moro Krishna Dabhokar (1896), 21 Bom. 154. As to a suit by a registered semiudar under Act VIII. (M. C.) of 1865, see Ayyappa v. Venkata Krishnamuraru (1892), 15 Mad. 484.


4 (1893), 17 Mad. 122, at pp. 126, 127.


6 Jado Dass v. Sutherland (1879), 4 Calc. 556; 3 C. L. R. 223; Doorga Churn Surma v. Jampa Dossea (1873), 12 B. L. R. 289; 21 W. R. C. R. 46. See, however, Jadoo Shat v. Kadambinee Dassees (1881), 7 Calc. 150.

entered into a contract in his own name he can enforce it alone.\(^1\)

Where he has been put in possession of a portion of the property by the others, he may be able to sue alone in respect of it.\(^2\)

A coparcener can sue for damages for an act by which he is individually damned.\(^3\)

\[\text{Manager.}\]

The property of a joint family is ordinarily managed by one of the coparceners who represents the family to the outside world. The father, if living, of a family governed by the Mitakshara school of law would be the manager.\(^4\) In other cases, the eldest male member of the family would ordinarily, but not necessarily, be selected.\(^5\)

When the coparceners cannot agree as to the selection of a manager, a partition seems to be the only practical remedy.

In Bengal the manager is called the "Karta."

The manager is not an ordinary agent of the family.\(^6\) He is thus described by Mr. Cowell: \(^7\) "When, therefore, we come to define the relation of each member, especially of the managing member, to the joint family and the joint estate, we are brought into contact with a relationship which has no counterpart in English law. Neither the term 'partner,' nor 'principal,' nor 'agent,' nor even 'coparcener,' will strictly apply. He is, in fact, a sort of representative owner, his independent rights being limited

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\(^1\) 
Bungssee Singh v. Soodish Lall (1881), 7 Calc. 739; 10 C. L. R. 263.

\(^2\) 

\(^3\) 

\(^4\) 
See Surju Prosad (Lala) v. Gokub Chand (1900), 27 *Calc. 724, at p. 743; 4 C. W. N. 701, at p. 711.

\(^5\) 
See K. K. Bhattacharya's "Joint Hindu Family," pp. 209, 223. As to the disqualification of a father, or other manager, see ibid., pp. 220, 221.

\(^6\) 
Muhammad Afsari v. Radhe Ram Singh (1900), 22 All. 367, at pp. 317, 320.

\(^7\) 
on all sides by the correlative rights of others, and burdened with a liability, coextensive with his ownership, to provide for the maintenance of the family.”

In dealing with the same question, the Judicial Committee said,1 “The relation of such persons is not that of principal, or agent, or of partners; it is much more like that of trustee and cestui que trust.”

The manager is the de facto guardian of the interests of minor coparceners in the coparcenary property.2

“A guardian of the property of an infant cannot properly be appointed in respect of the infant’s interest in the property of an undivided Mitakshara family... on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property.”3 These observations of the Judicial Committee would apparently apply also to the appointment of a guardian by a High Court.4 This principle does not apply when all the coparceners are minors and a guardian of the property is appointed of the whole number, but the order should reserve liberty to any minor


2 As to his powers of sale, see post, pp. 280 et seq.


4 In re Manikal Hugovean (1900), 25 Bom. 353, the High Court of Bombay, under its general jurisdiction, and apart from the Guardians and Wards Act, appointed a guardian of the interest of a minor in property held by a family governed by the Mitakshara school of Hindu law. In doing so the Court said (at p. 357), “But in coming to this conclusion we desire to add that it is a power to be exercised with the greatest caution. We make the appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs, and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an appointment unless the applicant were the manager, and it is expressly upon this ground that we make the appointment in this case.” See also Taimur Laxmon (1892), 16 Bom. 654; Jogannath Ramji (1899), 19 Bom. 96.
on attaining majority to apply for removal of the guardian or restriction of his power.\footnote{1}

Where the minor has separate property there would be no objection to the appointment of a guardian,\footnote{2} and in any case a guardian of his person can be appointed.\footnote{3}

When the members of the family have represented that a member other than the manager is entitled to act as such, they are bound by his acts in the same as if he had been de jure manager.\footnote{4}

The duty of the father or other manager is to manage the property of the joint family for the benefit of such family as a whole; to realize the income of the family property, pay the debts\footnote{5} and other outgoings connected with the management, and expend the residue for the benefit of the family and its members. He must provide for the maintenance, education, marriages, shrads, and other usual religious expenses of the coparceners,\footnote{6} and of such members of their family as they are, or were when alive, legally or morally bound to maintain,\footnote{7} including their illegitimate sons when not coparceners,\footnote{8} and also of persons disqualified from inheritance and their families.\footnote{9}

In expending money for the benefit of an individual member or his family, he need not take into account the share which such member would be entitled to on a partition.\footnote{10}

Widows and daughters entitled to maintenance out of coparcenary property would lose the right under the same

\footnote{1} Bindaji Laxman Triputikar v. Muthurao (1905), 80 Bom. 152.
\footnote{2} See Bandhu Prasad v. Dhiraji Kuar (1898), 20 All. 400.
\footnote{3} Virupakshappa v. Nilganga (1894), 19 Bom. 809.
\footnote{5} Where he cannot pay the debts out of income, he may have to alienate the property, see post, pp. 280 et seq.
\footnote{6} Ante, p. 242.
\footnote{7} As to widows, see ante, p. 85.
\footnote{8} As to the marriage of daughters, see Vaikuntam Ammangar v. Kallapi Ammangar (1900), 23 Mad. 512.
\footnote{9} Ante, p. 233.
circumstances as those which would deprive them of maintenance from the separate estate of their deceased husband or father.¹

"Of course no member of a joint Hindu family is liable to his coparceners for anything which might have been actually consumed by him in consequence of his having a larger family to support, or of his being subject to greater expenses than the others; but this is simply because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus, for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of those daughters to a suitable bridegroom is an obligation incumbent upon the whole family so long as it continues to be joint, and the expenses incurred on account of such marriage must be necessarily borne by all the members without any reference whatever to respective interests in the family estate."²

It is competent to the members of the family to make a special arrangement as to the accountability of the manager,³ or as to the way in which the family is to be managed.

By arrangement a manager may keep a separate account of expenditure on behalf of a particular member of the family, and on a partition such member may become liable for the amount appearing due on such account.⁴

In a suit for partition a coparcener can require the manager to furnish an account of his dealings with the coparcenary property for the purpose of ascertaining the amount of the property to be partitioned.⁵

In the case of a partition between members who have been in possession of different portions there may be no such right to an account.⁶

¹ Ante, pp. 81, 112.
³ See Ramabhadra (Rajah Setrucheria) v. Virabhadra Suryanarayana (Rajah Setrucheria) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533.
⁴ See Ramabhadra (Rajah Setrucheria) v. Virabhadra Suryanarayana (Rajah Setrucheria) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533.
⁵ See Soorjeemoney Dossees (Sreemutty) v. Denobundoo Mullick (1857), 6 M. I. A. 526, at p. 540.
⁷ Aonerrav v. Gurra (1881), 5 Bom. 589, as explained in Damodadas Maneklal v. Uttamram Maneklal (1892), 17 Bom. 271, at pp. 276, 279.
Although he does not seek for partition, a coparcener, who does not himself take part in the management of the property, may at any time by suit require the manager to account for his dealings with the family property, but he is not entitled, while he remains undivided, to require any particular share of the profits to be made over to him.

The cost of taking such account would probably not be on the same footing as the costs of an account, which is ancillary to partition. The Court would probably, unless default appeared in the manager’s accounts, or unless the manager had declined to render any information to his coparceners, or where the person seeking the account was in possession of complete information as to the accounts, require the coparcener asking for an account to pay the costs. Where the account is ancillary to the partition, the costs would ordinarily be borne in proportion to the shares.

In furnishing such account, the managing member of a joint family is entitled to credit for all sums of money bonâ fide spent by him for the benefit of the joint family. He must be debited with all sums which he has actually misappropriated, or which he has spent for purposes other than those in which the joint family was interested.

"What that account should be, so as to discharge him from his liability to account as manager, and what objections the other members can take to it, must ... depend on the conduct of the manager and the other members, the nature of the property, and the circumstances of the family, and cannot be satisfactorily stated in definite terms."

An arrangement between the coparceners as to the management of the property may be such as to render the manager liable to an account on the footing of an ordinary agency.

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4 Damodardas Maneckal v. Uttamram Maneckal (1892), 17 Bom. 271, at p. 279.
A coparcener is not, except under special circumstances, entitled to ask for an account of a portion of the property only. Where a trading business forms a part of the assets of the joint family, one member cannot sue for an account of past profits and losses, apart from the accounts of the joint family.¹

The manager represents the family in transactions with outsiders. He has the ordinary powers incident to the due management of the property;² but he can act only with the assent, express or implied, of the body of coparceners.³

Where a portion of the family assets consists of a trade or other business, the manager, or other member of the family in charge of the business, has all the powers which are usually exercised by a person carrying on such business, and can bind the members of the family by debts properly incurred for the purposes of the business,⁴ but minor members are only liable to the extent of the assets of the business, i.e. the joint family property.⁵

¹ See Samalbhai Nathubhai v. Somabhai (1880), 5 Bom. 88, at p. 40.
⁵ A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on
the business. He can only become a member of the partnership by a
consentient act on the part of himself and the partners."

The manager cannot start a new business so as to bind minor
coparceners,\(^2\) or adult coparceners who do not consent.

The fact that all the coparceners are partners in the business must,
if disputed, be proved.\(^3\)

Where the business is carried on by the manager on behalf of the
family in partnership with a stranger, the death of the manager dissolves
the partnership.\(^4\)

Where the manager has contracted debts for a proper
joint family purpose, the coparcenary property is liable.\(^5\)
The members of the family are liable to the extent of
family property which has come to their hands, and if the
manager or any other member of the party pays more
than his share he can require the others to contribute.\(^6\)

There is no presumption that the action of a manager in contracting
debts, etc., is on behalf of the joint family,\(^7\) or that it is within his
authority.\(^8\)

It has been held that where the manager borrows money on promissory
notes for the purpose of a joint family business, or to meet a joint family
necessity, the creditor can recover the money from all the members of
the family, although they were not all parties to the notes.\(^9\) It is
submitted that no one but a party to a promissory note can be held
liable thereunder,\(^10\) although the family may be liable for the debt.

\(^1\) Latchamanen Chetty v. Siva Pras-
192, 193; Anand Ram v. Channa
Lal (1905), 25 All. 578.

\(^2\) See Makhu Lal Dutt v. Ram Lal
Shah (1899), 3 C. W. N. 134; Morri-
sen v. Verschoyle (1901), 6 C. W. N.
429, at p. 458.

\(^3\) Vaidul Lalubhai v. Shah Khud-
skhal Dalipram (1902), 27 Bom.
197.

\(^4\) Sokhamadha Vannimunder v. Sok-
hamadha Vannimunder (1904), 28 Mad.
344.

\(^5\) Dwarka Nath Coghdbury v.
Bungehi Chandra Saha (1903), 9 C.
W. N. 979.

\(^6\) See Binoda Debi (Srimati) v.
Turavanduri Debi (Srimati) (1970),
8 B. L. R. App. 101; 14 W. R. C. R.
499; Aghore Nath Mukhopadhyaya v.
Grish Chunder Mukhopadhyaya (1892),
20 Calc. 19; Baldeo Sonar v. Mo-
burah Ali (1902), 29 Calc. 583; 6 C.
W. N. 370.

\(^7\) Soiri Padmanabha Ramappa v.
Narayanan (1895), 10 Ben. 320;
Krishna Ramaya Natt v. Venket-
Shah Pali (1895), 21 Bom. 698, at
p. 515; Shankar Pershad v. Govry
Pershad (1879), 5 Calc. 321.

\(^8\) See Nagendra Chandra Dey v.
Amar Chandra Kundu (1903), 7 C.
W. N. 23.

\(^9\) Baijnath Chandra De v. Ramshon
Dhor (1908), 11 C. W. N. 139. See
also Nagendra Chandra Dey v. Amar
Chandra Kundu (1903), 7 C. W. N.
725; Krishna Ayyar v. Krishnasami
Ayyar (1900), 25 Mad. 597.

\(^10\) See per Davies, J., in Krishna
Ayyar v. Krishnasami Ayyar (1900),
25 Mad. 597, at p. 601.
Where the manager contracts a debt which is binding not only on the persons executing the contract but on the other members of the joint family to which he belongs, the creditor may elect to treat the debt as a personal debt, and sue the manager personally, or he may sue him as representative of the family, or the whole family.

In the former case he can only recover his debt from the share of the manager; in the latter case he can recover it from the family property.

Although a manager may have power to deal with the property, he has no power to bind the other members of the family personally.

In the absence of fraud or collusion, the manager can bind the estate by a compromise, or by a reference to arbitration.

He can pay interest on a debt, or can acknowledge one, so as to extend the period of limitation, but he has no power to pay or receive a debt which is barred by limitation, except as against himself.

A coparcener is entitled to have a contract made by the manager without authority or in fraud of the family rescinded.

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1 Jumooma Persad Singh v. Dignarvin Singh (1888), 10 Cal. 1; 18 C. L. R. 74.
2 See post, p. 280.
3 See post, p. 278.
4 Post, pp. 280 et seq.
6 Pitam Singh v. Ujagar Singh (1879), 1 All. 851.
7 Jogan Nath v. Manun Lal (1894), 16 All. 231.
8 Bhasker Tutya Shet v. Vijayal Nath (1892), 17 Bom. 513; Chinnaya Nayudu v. Gurumatham Chetti (1881), 5 Mad. 169; Kumaramami Nadan v. Pula Nagappa Chetti (1878), 1 Mad. 385. As to the power of a father to bind his son, see Narayanasami Chetti v. Samudas Mudali (1883), 6 Mad. 293.
Arrangements. A manager has power to make all necessary arrangements as to the mode of enjoyment of the joint property by the coparceners, as to their commensality, and as to their religious duties and observances.¹

Where a son had taken possession of a portion of the coparcenary property against the will of his father, who was the manager, he was ejected.²

Discretion of manager. Where the discretion of the managing member is exercised bonâ fide and for the benefit of the estate, and the family have the benefit, such discretion should not be narrowly scrutinized.³

The members of a family are all bound by a decree obtained bonâ fide against the manager, as such, for a debt duly incurred in the management of the property, whether it were or were not charged upon the family property, and by a sale of the family property in pursuance of such decree, or in any suit brought in respect of the family property,⁴ although they were not parties to the suit.⁵

When they are of age and acquiesce in the conduct of the suit by their father, or other manager, the coparceners would the more clearly be bound by the decree.⁶

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² Baldeo Das v. Sham Lal (1875), 1 All. 77. This was put upon the ground that the son had no independent dominion.
⁴ As, for instance, a decree charging the family property with maintenance, Minakshi v. Chinnappa Udayan (1901), 24 Mad. 689.
⁶ See Kunjan Chetti v. Sidda Pillai (1899), 22 Mad. 461.
If a manager (with the acquiescence, express or implied, of the adult members of the family) bring a suit on behalf of the family, and no objection be made by the defendant, a decree can be made; but a defendant may protest himself by insisting that the other members of the family be brought on the record. ¹ There is a conflict of decisions as to whether, in a suit on a mortgage instituted since the Transfer of Property Act ² came into force, any but the actual parties are bound. ³

In Keshinath Chimnaji v. Chimnaji Sadashiv, ⁴ Scott, J., sitting on the Original side of the Bombay High Court, said, "As a matter of practice suits are not filed in this Court ⁵ by managers representing their infant coparceners; the practice is to join all parties interested, but it would seem that even if in the face of the plaint there was an allegation of a sole plaintiff that he sued as manager on behalf of a coparcenary, the minor coparcener would not be bound by proceedings, unless by judicial sale under the decree, rights had been created in third parties, and no prejudice were shown to the absent minors."

As to parties to suits, see ante, p. 268.

All members of a family are bound by decrees in suits brought by or against the manager of a joint family business as such, even though they are not parties to the suit; ⁶ but in a suit brought by such manager the defendant may insist upon all the members of the family who are members of the partnership being brought upon the record. ⁷

Minor members of the family who have not by a consentient act become members of the partnership are not necessary parties to the suit. ⁸

The decree on a mortgage is equally binding when the manager

² Act IV. of 1882.
³ See post, pp. 311-313.
⁴ (1906), 30 Bom. 477, at p. 486.
⁵ See, however, Bisessur Lall Schoo v. Lucinmesur Singh (Maharajah) (1879), 6 I. A. 233, at p. 237; 5 C. L. R. 477, at p. 480, and cases ante, p. 278, note 5.
⁶ The practice is the same on the Original side of the Bengal High Court.
⁸ Lutchmanen Chetty v. Swaproksa Modeliar (1899), 26 Cal. 349; 3 C. W. N. 190.
happens to have been appointed as guardian by the Court, but has obtained no sanction from the Court. ¹

An appeal by the manager as representative of the family is on the same footing as a suit brought by him. ²

When a suit on a mortgage or other contract has been brought against the manager, it has been held that there is nothing to prevent another suit against the members of the family on the same cause of action. ³

A decree, even for a joint family debt, in a suit by or against the manager alone, and not as representing the family, does not bind his coparceners, ⁴ and cannot be executed against the coparcenary property. ⁵ If a sale takes place in execution of such decree the interest of the defendant alone passes thereby. ⁶

**ALIENATION AND CHARGE.**

Where all the coparceners are adults they can together effect a valid sale or charge of the coparcenary property. ⁷ A sale or charge can also be made by the adult coparceners, and the manager acting on behalf of the minor coparceners in case of necessity. ⁸

A manager can alienate or charge the family property with the express or implied consent of all the then existing adult coparceners, so as to bind them. ⁹

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² See Jutadhari Lal v. Raghoober Persad (1889), 9 Calc. 508; 12 C. L. R. 255.
³ Muhammad Ashari v. Bashe Ram Singh (1900), 22 All. 307.
⁴ See Bundar Lal v. Chitar Mal (1904), 25 All. 1; S. C. ibid., p. 215.
⁶ Armugon Pillai v. Sobopathi Padakochi (1882), 5 Mad. 12; Subramaniyyam v. Subramaniyyam (1882), 5 Mad. 125; Vira Ragavanma v. Sanundula (1885), 8 Mad. 208; followed in Ablak Roy v. Rabbi Roy (1885), 11 Calc. 239; Guruneappa v. Thimma (1887), 10 Mad. 316; Maruti Narayan v. Lila Chand (1882), 8 Bom. 584; Kamal Singh v. Naran Singh (1882), 7 Bom. 81; Dusurnath Ramesh v. Jodhamuni Ramul (1889), 5 Mad. 193; Babaji v. Dhuri (1884), 9 Bom. 305. See post, pp. 311, 312.
⁷ Mahadeo Persad v. Ramyad Singh (1873), 12 B. L. R. 90, at p. 94; 20 W. R. C. R. 192, at p. 194.
⁸ *Post, pp. 285 et seq.
Ratification is equivalent to consent.¹

It is unsettled whether a manager can, even in the case of necessity,² alienate the family estate, so far as adult coparceners are concerned, without their assent, either express or implied.

The decisions are in conflict.³ The texts of the Mitakshara ⁴ upon which the law on the subject is based do not extend to such a case.

It is submitted that in case of necessity ⁵ the consent may be presumed,⁶ but that where there is an express dissent, of which the purchaser had notice, or which he had means of knowing, there could be no valid sale or charge.

As to the powers of a father in a family governed by the Mitakshara law, to sell or charge the property to pay his debts, see post, pp. 306-310.

Where the parties intend that all the coparceners should execute the transfer, the document does not take effect by reason only that the managing member has signed it, and that there is a recital of necessity.⁷

Where there is neither consent nor necessity, a manager,


² As to what amounts to necessity, see post, pp. 285-287.


⁴ Chap. i. s. 1, para. 28, 29.

⁵ Post, pp. 285-287.


other than the father, cannot alienate the family property by sale, mortgage, gift, permanent lease, or otherwise.

Under the Mitakshara law, a father can make a gift of a small portion of the movable coparcenary property for pious purposes, or as a gift of affection, i.e. to a child or other near relative. He can also devote a small portion of the immovable property to pious purposes, but not for any other purpose. He cannot do so by will.

There is some authority that, even under the Mitakshara law, a father has complete power of disposition over ancestral movables, but it is submitted that he has no greater power over movables than he has over immovable property.

With these exceptions, and except so far as he has power to alienate the property for payment of his debts, the powers of the father over coparcenary property are not in law greater than those of any other manager.

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1. As to the powers of a father to alienate for payment of debts, see post, pp. 306–310.
5. Rayakal v. Subbamma (1892), 16 Mad. 84; Baha v. Timma (1883), 7 Mad. 357; Gang Aikeshwar v. Firthi Py (1890), 2 All. 635; Rottala Runganatham Chettu v. Pulicat Ramasami Chetti (1903), 27 Mad. 162; Baha v. Balaji (1897), 22 Bom. 825; Pratiharayan Das v. Court of Wards (1889), 8 B. L. R. (A. J.) 21; 11 W. R. C. R. 343.
8. See Lakshman Dada Naik v. Ramchandra Dada Naik (1889), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; S. C. in Court below (1879), 1 Bom. 501.
Having regard to his position, greater deference will necessarily be paid to his wishes than in the case of any other manager.¹

In case of necessity,² the father or other manager³ can bind the interest of a minor coparcener by a sale or charge.⁴

This principle was laid down in the leading case of Hunooman Persaud Panday v. Munraj Koonversee (Mussamut Baboo)⁵ with regard to the manager for an infant heir, but it has been applied to the managers of joint families acting on behalf of infant coparceners,⁶ to widows and daughters inheriting property from their husbands and fathers,⁷ to the managers of religious endowments,⁸ to managers on behalf of lunatics,⁹ and to the holders of impaltable estates, which are inalienable by custom.¹⁰

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258; at p. 261; Ningareddi v. Lakshman (1901), 26 Bom. 163, at p. 166. An agreement amounting pro tanto to an alienation without consideration was set aside in Bala v. Bakhji (1897), 22 Bom. 825.

¹ See R. C. Mitra’s “Law of Joint Property,” pp. 81, 82.
³ The fact of his acting as manager is sufficient, although he may not be strictly entitled so to act. Hunooman Persaud Panday v. Munraj Koonversee (Mussamut Baboo) (1856), 8 M. I. A. 393, at p. 413; 18 W. R. C. R. note to p. 81. See also Gunga Pershad v. Phool Singh (1898), 10 W. R. C. R. 106; 10 B. L. R., note to p. 388; Sheo Shankar Gir v. Ram Shevak Choudhri (1896), 24 Calc. 77.
⁴ No distinction can be drawn between the power to charge and the power to sell. The need which would justify the exercise of the one power would justify the exercise of the other. Mohanmal Mondul v. Nafur Mondul (1899), 26 Calc. 820; 3 C. W. N. 770.
⁵ (1856), 8 M. I. A. 393; 18 W. R. C. R. note to p. 81.
⁷ Kamenswar Pershad (Baboo) v. Rum Bahadoor Singh (1880), 8 I. A. 8; 6 Calc. 843; 8 C. L. R. 361; Amarnath Soh (Lala) v. Achay Kuar (Rani) (1892), 19 I. A. 196; 14 All. 490; Mekhaw Baksh Singh v. Ratan Singh (1896), 23 I. A. 57; 23 Calc. 766.
⁸ Sheo Shankar Gir v. Ram Shevak Choudhri (1896), 24 Calc. 77; Doorganath Roy (Koomur) v. Ram Chunder Sen (1876), 4 I. A. 52, at p. 63; 2 Calc. 341, at p. 351.
¹⁰ Gopal Prosad Bhakat v. Raghubanath Deb (1904), 32 Calc. 158; 9 C. W. N. 330. As to polygara, see Kotta Ranasami Chetti v. Bangari Seshama Nayanaramu (1881), 3 Mad. 145. As to the powers of the karnavan of a tarwad, see Kalianyani v. Narayana (1885), 9 Mad. 266; Kanna Pisharodi v. Kombi Achen (1885), 8 Mad. 381; Elayachandikadathil Kombi Achen v. Kenatamkora Lakshmi Amma (1882), 5 Mad. 201. As to the alienation of impaltable estates which are not inalienable by custom, see post, p. 296.
Benefit apart from necessity. In that case it was said that the power "can only be exercised rightly in a case of need or for the benefit of the estate." Of the large number of cases in which the principles contained in Hunooman Persaud Panday's case have been applied, there is not, so far as the writer is aware, any one in which a sale or charge has been justified by benefit apart from necessity, except the case of Ratnam v. Govindarajulu, where the money was originally raised for, amongst other purposes, enlarging the family dwelling-house, but in that case, as the debt in question was raised for the purpose of paying an antecedent debt, the question as to the original loan did not really arise (see post, p. 285). Apart from necessity, it is not easy to say what is for the benefit of the estate. It is clearly not intended that this power should authorize a sale or charge for the purpose only of increasing the immediate income of the estate.

Manager having powers given by Court.

Matters to be regarded.

"Where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the bonâ fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on

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1 6 M. I. A., at p. 423; 18 W. R. note to p. 81.
2 (1877), 2 Mad. 339.
4 See Shurrut Chunder v. Rajkissen Mookerjes (1875), 15 B. L. R. 350; 24 W. R. C. R. 46; and it is submitted that the express terms of Act VIII. of 1890, s. 29, make this question clear. See Sinaga Pillai v. Munisami (1899), 22 Mad. 259; Anpuranbhai v. Durgapa Maka-

Bhupendro Narayan Dutt v. Nemeye Chand Mondul (1888), 15 Calc. 627, at p. 636; and Shurrut Chunder v. Rajkissen Mookerjes (1875), 15 B. L. R. 350; 24 W. R. C. R. 46; and it is submitted that the express terms of Act VIII. of 1890, s. 29, make this question clear. See Sinaga Pillai v. Munisami (1899), 22 Mad. 259; Anpuranbhai v. Durgapa Maka-

4 See Ranjit Sing v. Amulya Prosad Ghose (1905), 9 C. W. N. 923.
5 Ante, p. 271.
the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender ... unless he is shown to have acted mala fide, will not be affected, though it be shown that with better management the estate might have been kept free from debt." 1

All circumstances of pressure which render the raising of money necessary for the protection or preservation of the estate, or for the personal well-being of the coparceners, would support a sale or charge.

Baboo K. K. Bhattacharya, in his "Law of the Joint Hindu Family," 2 says, "Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives, these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessities."

The following are proper objects for the raising of money:—

(a) The payment of Government revenue or of other debts which are payable out of the estate. 3

The debts of the father or other person through whom the property has been acquired by inheritance, will, or gift, must be paid, provided

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2 Page 488.
they are such as to bind the estate,\(^1\) and therefore the payment of them constitutes a sufficient necessity for sale or mortgage,\(^2\) although no suit may have been instituted for the purpose of recovering them.\(^3\) Where there is a decree the necessity is the more pressing.\(^4\)

According to Hindu law, the payment of a father's debt, even in his lifetime, is a pious duty on the part of a son.\(^5\) In the case of a family governed by the Mitakshara school of Hindu law, the discharge of such debt is therefore such a necessary purpose as to give validity to a sale or mortgage of ancestral property by the father,\(^6\) or after his death,\(^7\) by the manager, whether the sons be minors or adults, provided that the debt has not been incurred for illegal or immoral purposes.

(b) The maintenance of the coparceners and of the persons whom they are legally or morally bound to maintain.\(^8\)

c) The reasonable marriage expenses of the female members of the family.\(^9\)

The marriage of male members of the family does not in Mitakshara cases appear to justify a sale or charge,\(^10\) but in a case governed by

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5. See post, p. 305.


Bengal law the sale of a share would, it is submitted, be justified. It is submitted that under both schools the sale of separate property would be justified.\(^1\)

\((d)\) The performance of an indispensable religious duty,\(^2\) such as the initiatory ceremony of a member of the family,\(^3\) the funeral ceremonies\(^4\) or \textit{sradh} of a member of the family, or of the widow of a member,\(^5\) or a debt incurred on account of such expenditure.\(^6\)

\((e)\) Necessary legal expenses.\(^7\)

The instrument effecting a sale or creating a charge need not contain Recital of any recital of necessity,\(^8\) but it is always better to insert such recital necessity. therein.

In determining whether a sale or mortgage for a family necessity is justifiable, a reasonable latitude must be allowed for the exercise of the manager's judgment, especially in the case of a father or of a manager of a trading family, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor has an interest in the property.\(^9\)

The circumstance that to meet the necessities of his ward the manager has pledged his personal credit, does not disentitle him to charge or sell the property,\(^10\) but he Manager may sell to repay money borrowed on personal credit.

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\(^{2}\) As to pilgrimages, see \textit{Mutteeram Koeor v. Gopali Sahoo} (1873), 11 B. L. R. 416.

\(^{3}\) Macnagthen's \textit{"Hindu Law," vol. ii. chap. xi. case 6, p. 296.}

\(^{4}\) \textit{Gunput Lall (Lallia) v. Toorun Koomoor (Mussamut)} (1871), 16 W. R. C. R. 52; \textit{Nathuran v. Shona Chhogan} (1890), 14 Bom. 562.


\(^{6}\) \textit{Gunput Lall (Lallia) v. Toorun Koomoor (Mussamut)} (1871), 16 W. R. C. R. 52.


\(^{8}\) \textit{Woomesh Chunder Sircar v. Digumburee Dosse} (1885), 5 W. R. C. R. 154.


\(^{10}\) \textit{Succcham Morarji v. Kalius Kalianji} (1894), 18 Bom. 631, at p. 635.
can only charge or sell it for the purpose of paying money which the minor was under an obligation to pay.¹

A person lending money on the security of coparcenary property, or of the property of a minor, or buying that property, is bound to exercise due care and attention in seeing that there was a legal necessity for the loan,² and must satisfy himself as well as he can,³ and as an honest man,⁴ with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,⁵ and that circumstances of necessity had occurred which, under the Hindu law, would justify the sale of the property,⁶ or a charge upon it at the rate of interest arranged for in the particular instance.⁷

In the case of a long series of borrowings it is not always possible to prove exactly the purpose for which any particular item was borrowed. "It will . . . be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects."⁸

Where the necessity arises from the pressure of a judgment debt, the person dealing with the manager is entitled to treat the judgment as primum facie proof of necessity.⁹

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¹ Rammalingji (Maharana Shri) v. Vadivel Vakhatshand (1894), 20 Bom. 61.
⁷ See Huronath Roy Badoor (Rajah) v. Rundhir Singh (1890), 18 I. A. 1; 18 Cal. 311.
Where the manager is authorized by the Court to sell or pledge under secs. 28 or 29 of the Guardians and Wards Act, or sec. 90 of the Probate and Administration Act, or under the powers possessed by the High Courts, a bonâ fide purchaser or mortgagee need not investigate behind the order of authority. If the person dealing with the manager does make the above inquiries and acts honestly, the real existence of an alleged sufficient, and reasonably credited, necessity is not a condition precedent to the validity of his charge; and, under such circumstances, he is not bound to see to the application of the purchase-money.

"It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purpose for which a loan is wanted are often future as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."
INQUIRY.

This principle is to be found in sec. 38 of the Transfer of Property Act, which is as follows:—

"Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith."

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Nature of inquiry.

The existence of a necessity and of sufficient pressure on the estate is all that the lender need inquire about. He need not inquire into its causes, or what is the exact amount required to be borrowed. Where the lender knows, or by ordinary diligence might have known, that there are funds available and sufficient for paying off the

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4 Nuffer Chunder Banerjee v. Gud-dathur Mundle (1865), 3 W. R. C. R. 129; Ghanham Singh v. Badiya Lal (1902), 24 All. 547. "If a larger portion than is required is sold, it must be shown by the purchaser that the money required to pay off the claim could not be raised otherwise than by the course adopted." Lachmeendur Singh (Baboo) v. Ekal Ali (1867), 8 W. R. C. R. 75, at pp. 77, 78.
debt, the sale would be invalid. He must be entirely on his guard. He must see whether the family with which he is dealing be divided or undivided; and if the latter, at his peril he must see that the transaction be one by which the coparcenors will be concluded.

The fact that the adult members support the manager in the transaction may justify the person advancing the money in giving additional credit to the representatives of the manager.

Where the transaction has been unimpeached for some years, a pur- chaser from the original vendee would not be expected to make minute inquiries.

Where it is sought to enforce or support a sale or mortgage by a manager, the purchaser or mortgagee must prove that the transaction was entered into in good faith; that he advanced in consideration of the sale or mortgage a sum of money which was reasonable with reference to the value of the property; that the money was raised or applied for the relief of a recognized necessity, or that proper inquiries were made by him with respect to the existence of a necessity justifying the sale, and that the

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3 Bhalani Santaran v. Babaji (1864), 8 Bom. 602, at p. 609.

4 Sarub Narain Choudhry v. Shew Gobiind Panday (1875), 11 B. L. R. App. 29.


8 Debi Dayal Sahoo v. Bhan Pertop Singh (1900), 31 Calc. 433, at p. 455; 8 C. W. N. 408, at p. 419; Jansae v. Nain Sukh (1897), 9 All. 483; Vadali Rama Krishna v. Manda Appayya (1855), 2 Mad. H. C. 407; Amarnath Shok (Lala) v. Acham Kuar (Rani) (1892), 19 I. A. 198; 14 All. 420; Bunosedhur (Laloo) v. Bindessree Dutt Singh (1868), 10 M. I. A. 454; 1 Ind. Jur. N. 8, 165. The necessity cannot be inferred from the habits and general character of the vendor. Mittrajit Sing v. Rayhunbansi Sing (1871), 8 B. L. R. App. 5.
result of such inquiries was such as to satisfy him as an honest man of the existence of such necessity. 1

In Hunooman Persaud Panday’s case 2 their Lordships of the Privy Council said, “Next as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the factum of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is _prima facie_, to support the charge and the onus of disproving it rests on the heir. For this position a decision, or rather a _dictum_ of the Sudder Dewany Adawlut at Agra in the case of Omed Rai v. Hoerall lay was quoted and relied upon. But the _dictum_ there, though general, must be read in connection with the facts of that case. It might be a correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof, of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father’s career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently, this _dictum_ may perhaps be supported on the general principle that the allegation, and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, 3 as well as on the obvious ground in

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2 Hunooman Persaud Panday v. Munraj Koomeree (Musumut) Bhoobee (1858), 6 M. I. A. 393, at pp. 418, 419; 18 W. R. C. R. note to p. 81.

3 See also the Indian Evidence Act 1. of 1872, s. 106, which provides that “when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.”
such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the dictum does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the onus of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on, them.\(^1\) Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one, whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.\(^2\)

The representations made by the manager at the time of the loan or alienation are evidence in favour of the person making the advance.

In *Hunooman Persaud Panday’s case* the following will be found:

"It is to be observed that the representations by the manager accompanying the loan as part of the res gestae as and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such prima facie proof has been generally required in the Supreme Court of Calcutta between the lender and the heir; where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 22nd volume of Morley's "Digest," seems to be the foundation of this practice (see also the case of Brown v. Ram Kunase Dutt).\(^3\) It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."\(^4\)

A recital of the necessity is by itself not sufficient

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\(^1\) See *Kaihu Singh v. Roop Singh* (1871), 3 N. W. P. H. C. 4. 18 W. R. C. R. note to p. 81.
\(^3\) *Ben. S. D. A. 1853, p. 883.*
evidence of necessity; but it may be some evidence of the representations made at the time.

In determining the question of the validity of a sale, adequacy of price is often an important point to be considered, though inadequacy of price is not necessarily conclusive proof of malá fides. The mere fact that the manager or guardian might at the time of the sale have been able to make some more advantageous arrangement for the estate would not nullify a sale to a boná fide purchaser for value.

Evidence of the boná fides of the transaction would of course be subject to be rebutted by evidence that the purchaser had acted malá fide, or in collusion with the manager to the injury of the family. If there be any fraud in proceedings to enforce a charge, which was free from fraud, such proceedings may be set aside.

When the purchaser or lender is unable to prove necessity for the raising of the whole of the money, or he is unable to prove that he was satisfied as to the necessity for the raising of the whole sum, he is entitled to a charge on the property for the amount which it was necessary to raise, or which after reasonable inquiries was shown to him to be necessary to raise. In any case he would be

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4 Kumola Pershad Narain Singh (Baboo) v. Noel Lall Saooh (1886), 6 W. R. C. R. 30, at p. 33.
7 As to the rights of a purchaser at an execution-sale without notice of the fraud, see Khetermonee Dassey v. Kishenmohun Mitter (1863), Marsh. 313; 2 Hay, 196. The question whether the sale should be set aside must be determined by the Court in accordance with the principles of justice, equity, and good conscience: Abdul Haye v. Nawab Bai (1886), B. L. R., F. B. R. 911; 9 W. R. C. R. 196.
8 Dooryanath Roy (Konwar) v.
entitled to a charge for what is actually applied for the benefit of the family.\(^1\)

In the case of his obtaining such a charge, a creditor, who has acted Interest.
fairly, would ordinarily be entitled to interest at the contract rate.\(^2\)

Where the interest is at a rate exceeding the rate at which the
manager would have been able to borrow under the circumstances, the
Court will reduce the interest to such lower rate, as the rate of interest
is a question to which the lender ought to have applied his mind when
inquiring as to the necessity.\(^3\)

Foreclosure proceedings, or a purchase at a sale held
under a decree in a suit on the mortgage, would not
relieve a mortgagee from the burden of proving the bond
fides of the transaction, or place him in any better position
with regard to the family,\(^4\) although a bond fide purchaser
without notice at a sale held in execution of a decree in a
suit which was properly constituted might not be bound
to inquire into the propriety of the loan which formed
the basis of the decree.\(^5\)

Except where, under the Mitakshara law, the father
\(^6\)
can alienate or charge the coparcenary property, no in-
dividual coparcener, other than the manager, is entitled,
without the consent of all the members, to deal with the
joint family property.\(^7\)

There may be circumstances where the acts of a member of the family,
who is not the manager, can be treated as binding the family,

\(^1\) Mathoora Doss v. Kanoo Beharee Singh (1876), 21 W. R. C. R. 287.
\(^3\) See Bunseedhur (Lalla) v. Bindeseree Dutt Singh (1868), 10 M. I. A. 454; 1 Ind. Jur. N. S. 185.
\(^4\) See Hurrumath Roy Bahadoor (Rajah) v. Rundhir Singh (1890), 4 I. A. 52; 2 Calc. 311; Deputy-Commissioner of Kheri v. Khajjan Singh (1907), 34 I. A. 72; 29 All. 331; 11 C. W. N. 474.
\(^6\) See ante, p. 288.
\(^7\) Post, pp. 305–309.

As to the duty of the purchaser, see Shibasoundery Dossee v. Rakhall Dossee Sirkhar (1864), 1 W. R. C. R. 38.
on the ground that there was an express or implied agency, as where money is borrowed for family purposes. As to who may contest an alienation, see ante, p. 243, and post, pp. 301, 302.

When there are no existing coparceners, the surviving coparcener is, under the Mitakshara law, entitled to dispose of ancestral property as if it were his separate acquisition; but a gift by will will take no effect against a son who was in his mother’s womb at the time of the death of his father.

The holder of an impartible estate can, in the absence of a custom rendering it inalienable, dispose thereof by will or transfer inter vivos, whether he be governed by the Mitakshara or by the Bengal school of law.

A sale which took place at a time when the accepted interpretation of the law was that an impartible estate was inalienable was construed with reference to the law as it then stood.

When the estate is inalienable, the holder can sell or charge it, 

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1 See Krishna Ayyar v. Krishnasami Ayyar (1900), 23 Mad. 597.  
4 As to the power to deal with separate acquisitions, see ante, p. 255. The last surviving member of a Madras tarwad can dispose of the tarwad property by will, Alami v. Komu (1888), 12 Mad. 126.  
7 Venkata Surya Mahipati Rama Krishna Rao Bhadur (Sri Raja Rao) v. Court of Wards (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415;  
9 Udaya Aditya Deb (Rajah) v. Jadub Lal Aditya Deb (1881), 8 I. A. 248; 8 Calc. 199. S. C. in Court below, 5 Calc. 113; 4 C. L. R. 181;  
10 Narains Khootia v. Loknath Khootia (1881), 7 Calc. 461; 9 C. L. R. 243.  
11 Abdur Ameen Khan Soub v. Appayammai Naicker (1908), 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 180.  
12 Gopal Prasad Bhakat v. Rakhnath Deb (1904), 32 Calc. 158; 9 C. W. N. 330.
in case of such a necessity as would justify the manager of an infant heir in a sale or charge.\(^1\)

Madras Acts II. of 1902, II. of 1903, and II. of 1904\(^2\) have rendered the holders of a large number of impartible estates in the Madras Presidency incapable of alienating or binding by their debts the estate except under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other coparceners independently of their consent.

**Alienation of Undivided Share.**

A Hindu governed by the Bengal school of Hindu law\(^3\) can deal with his undivided share of joint family property either by act *inter vivos* or by will, in the same way as he can deal with his separate property.\(^4\) On his death intestate his undivided share passes to his heir.

His share may be sold in execution of a decree.

The purchaser has been held entitled to be put into possession of the share bought by him,\(^4\) but not in such a way as to interfere with the family.

In one case\(^6\) when he applied for possession, a share was allotted to him in severalty. This had the same effect as if he had brought a partition suit.

According to the Mitakshara law, except where the debtor is the father, or paternal grandfather, of a coparcener, whose rights are enlarged by his death, a creditor of a coparcener, who has not obtained a judgment and has not attached the debtor's interest\(^8\) before the death of

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2. S. 4.
8. This does not include an attachment before judgment: *Ramanavyya v. Ramappayya* (1893), 17 Mad. 144.
his debtor, has no right to recover his debt from the coparcenary property.

If it were otherwise the right of survivorship would be ineffectual.

He can obtain a sale of the undivided interest of his debtor in the property of the coparcenary in execution of a decree, if during the lifetime of the debtor there has been an attachment and order for sale.

A provisional release from attachment does not affect his right.

The purchaser at such sale is not entitled to sue for possession, but is entitled to ascertain his share by such partition as the judgment debtor might have compelled before the alienation of his share took place.

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3 Ante, p. 243.


5 Suraj Bansi Koer v. Sheo Prakash Singh (1879), 6 I. A. 88, at p. 109; 5 Calc. 148, at p. 174; 4 C. L. R. 226, at p. 241; Balsihon (Rai) v. Sita Ram (Rai) (1885), 7 All. 731. In Bithal Das v. Nand Kishore (1900), 23 All. 106, the mere attachment seems to have been held sufficient to create a charge, but it is doubtful whether it has such effect, see Soochal Chander Paul v. Nitya Churn Bysack (1880), 6 Cal. 863.

6 Ram Chandra Narwar v. Mudeshwar Singh (1906), 33 Cal. 1158; 10 C. W. N. 979.


If he has obtained possession he is not liable to be turned out, but the coparceners are entitled to joint possession with him.¹

The question whether a member of a joint family governed by the Mitakshara school of law can alienate or charge his interest in the coparcenary property, must be determined according to the Province in which the case arises.

It is settled law in Madras ² and Bombay ⁹ that a purchaser for value ⁴ acquires the interest of his vendor, that is a right to partition, and a right on partition to the share to which his vendor would have been entitled,⁵ but without partition he cannot acquire a right to any specific property ⁶ or to a specific share. He is not entitled to possession,⁷ his right in that respect being the same as the right of a purchaser at a sale in execution of a decree.⁸

The Judicial Committee has recognized this to be the law applicable in Madras and Bombay.⁹

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⁵ In the case of a sale for inadequate consideration, the purchaser is entitled to a charge for the amount paid. Rottala Ranganathan Chetty v. Pulicat Ramasami Chetti (1903), 27 Mad. 162, ⁶ Ante, p. 298. He cannot alienate a share in impartible property. See Byarn v. Buttana (1890), 14 Mad. 38.
⁶ As to a right of worship, see Rajeswari Mulick v. Gopasree Mullik (1907), 11 C. W. N. 782.
⁸ Act IV. of 1882, s. 44.
⁹ Ante, p. 298.
The purchaser becomes "a sort of tenant in common with the coparceners, admissible as such to his distributive share upon a partition taking place."\(^1\)

As the purchaser does not by the death of his vendor lose his right to a partition, so his position is not improved by the death of other coparceners before partition. He stands in no better position than his alienor, and, consequently, like the latter, is liable to have his share diminished before partition by the birth of other coparceners if he stands by and does not insist upon an immediate partition.\(^2\)

As to the effect of a partition upon the rights of a purchaser or mortgagee of an undivided share, see post, p. 357.

An agreement in restraint of the alienation of an undivided share is valid,\(^3\) but it will not, it is submitted, bind a purchaser, at any rate where he has received no notice of the agreement.\(^4\) It does not affect a purchaser at a sale in execution of a decree.\(^5\)

In Bengal\(^6\) and in the United Provinces\(^7\) a coparcener has no power to alienate by sale or mortgage his undivided share\(^8\) to a stranger or to a coparcener for his own benefit\(^9\) without the consent of his coparceners. This view has been accepted by the Judicial Committee.\(^10\)

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1 Varudev Bhat v. Venkatesh (1873), 10 Bom. H. C. 128, at p. 147. As to a partition at the instance of the purchaser, see post, p. 328.


3 Lachhu Chand v. Tori Lal (1878), 1 All. 618.


7 Joynarain Sing v. Roseun Sing 2 S. D. A. N. W. P. (1860), 162; Goor Pershad v. Sheodeen (1873), 4 N. W. P. 137; Chamali Kuar v. Ram Prasad (1879), 2 All. 367; Rama Nand Singh v. Gobind Singh (1885), 5 All. 384; Chander Kishore v. Dampat Kishore (1894), 16 All. 384; Bhagirathi Misr v. Sheobhit (1896), 20 All. 525. See Anmol Ram v. Chandan Singh (1902), 24 All. 483.

8 He can do so when they are so far separate, that each collects his quota of rent separately, Kalika Sakhoy v. Gouru Sunkur (1889), 12 W. R. C. R. 287.

9 It has been held that he can alienate it for the benefit of the family, Jugynarath Khootia v. Dube Misser (1870), 14 W. R. C. R. 80.

The alienation of his share by one member, would imply his consent to the alienation of their shares by the other members.\(^1\)

The alienation will not be set aside at the instance of the alienor or persons claiming through him except upon the terms of refunding the amount paid with interest.\(^2\)

The power to dispose by gift or devise of his interest in coparcenary property in a case subject to the Mitakshara law is disallowed by all the High Courts.\(^3\)

As a right of survivorship accrues to the other coparceners on the death of coparcener,\(^4\) it follows that there can be no right to dispose of any interest in the coparcenary property by will.\(^5\)

As to the power of the last surviving coparcener, see ante, p. 296.

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**SETTING ASIDE ALIENATION.**

An alienation of coparcenary property, or of any interest thereon, by a father or other manager, or by a coparcener or stranger, may be contested by the son or any coparcener who may contest alienation.

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\(^1\) Girraj Dubey v. Sheosore Singh (1889), 2 All. 398.

\(^2\) Jaisingh Parshad v. Ganga Parshad Singh (1892), 19 Cal. 401.


\(^4\) Ante, p. 243.

\(^5\) Tottamudi Venkatachalam v. Tottamudi Seshamma (1903), 27 Mad. 228; Rathnam v. Sinambaram (1892), 18 Mad. 353; Vitta Butten v. Tomenamma (1874), 8 Mad. H. C. 6; Lakhshman Dada Naik v. Ramachandra Dada Naik (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; Harilal Rapjiji v. Mansi (Bai) (1905), 29 Bom. 351; Chatturbhooj Meghji v. Dharamsi Narainsi (1884), 9 Bom. 438; Lakshmi Shankar v. Vajnath (1881), 6 Bom. 24; Adjoodha Gir v. Kashoo Gir (1879), 4 N. W. P. 31; Buldeo Singh (Rajah) v. Mahabeesr Singh (1866), 1 Agra H. C. 155; Minakshi v. Virappa (1884), 8 Mad. 89; Hindu Wills Act (XXI of 1870), s. 3.
who was born, conceived, or adopted at the time of the completion of the alienation, and is entitled to a share on partition.

A person disqualified from inheritance could not sue, although he might have a right of maintenance. It has been held that an invalid alienation made without the consent of existing sons can be set aside at the instance of a son who was not born at the time of the alienation, but it is clear that an alienation which by consent or otherwise is binding upon all the coparceners in existence at the time cannot be contested by a person who is born subsequently.

In a family governed by the Mitakshara law a suit to set aside an alienation cannot on the death of the plaintiff be continued by his heir, as his right lapsed. Under the Bengal school the right would pass to the heir.

The person entitled to contest an alienation may sue to set aside the alienation, or if it has not taken place may sue for an injunction. Where he cannot obtain substantive relief he can sue for a declaratory decree.

In a case governed by the Bengal school of law a coparcener can sue to set aside an alienation, so far only as it affects his share of the coparcenary property.

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\[3\] See Sundaund Mohapattr v. Sootja Monee Doohee (1869), 11 W. R. C. R. 486; Bambhat v. Lokshun Chintamun Mucklay (1881), 5 Bom. 630, ante, p. 203.

\[4\] See Ponnambula Pillai v. Sundarapayyar (1897), 20 Mad. 354.

\[5\] Ram Soonder Roy v. Ram Sahye Bhugut (1882), 8 Calc. 919; Ram Sahye Bhukhu v. Laljoo Sahye (Lalla), 8 Calc. 149; 9 C. L. R. 487.


\[7\] See Bhokanath Khettry v. Kirtich Kissen Das Khettry (1907), 34 Calc. 372; 11 C. W. N. 482; Muthuramon Chetti v. Ettapooami (1899), 22 Mad. 372, at p. 375; Ramubhaiyam v. Virasami Ayyan (1898), 21 Mad. 222.

\[8\] Pudarath Singh v. Raja Ram (1892), 4 All. 235.


\[10\] As to declaratory decrees, see Act I. of 1877, s. 42; Kathama Natchiar v. Dorainga Tener (1875), 3 I. A. 169; 15 B. L. R. 83; 23 W. R. C. R. 314.
Under the Mitakshara school, in the case of an invalid alienation in the Bombay or Madras Presidencies by a coparcener, the coparcener aggrieved may be entitled to have it set aside except so far as the share of the alienor is concerned,\(^1\) whereas in Bengal or the United Provinces he is entitled to have the whole alienation set aside, subject to such equities as may be applicable.\(^2\)

This distinction arises because a sale of an undivided interest is permissible in the two former Presidencies.\(^3\)

A son is not entitled, during the father’s lifetime, to eject the purchaser because the father sells without authority.\(^4\) He may bring a suit for partition, or may possibly, if he sues on behalf of the family, be entitled to a decree for possession\(^5\) on such terms as may be equitable, as, for instance, that the purchaser be entitled to a charge for the money paid by him,\(^6\) or be entitled to sue for partition.\(^7\)

As to the right of the purchaser to compensation when he is ejected after the death of the father, see post, p. 304.

The consent of an adult coparcener or his acquiescence, Consent of coparcener.

at any rate where it amounts to an estoppel, prevents him from disputing an alienation made by a father or other manager.\(^8\) The ratification of the alienation by him will also have the same effect.\(^9\)

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\(^1\) See *Marappa Gaundan v. Rangasami Gaundan* (1899), 23 Mad. 89.


\(^3\) *Ande*, p. 299.

\(^4\) *Baboo Ram v. Gajadhar Singh* (1867), Agra H. C. F. R. 86;

\(^5\) *Pturam Baboo v. Ramteer Lall*, S. D. A. N. W. P., 1852, p. 365;


\(^7\) *Hammun Dutt Roy v. Kishen Kishor Narayan Sing (Babo)* (1879), 8 B. L. R. 385; 15 W. R. F. B. 6.

\(^8\) *Post*, p. 511.


\(^1\) See *Miller v. Runga Nath Moullick* (1865), 12 Calc. 389; *Act I. of 1872*, a. 115. The mere absence of objection does not amount to acquiescence, see *Kamakshi Ammal v. Chakrapany Chettiar* (1907), 30 Mad. 452.

\(^2\) See *Moobho Dyal Singh v. Kolbur Singh* (1888), B. L. R. F. B. 1018, at p. 1090; 9 W. R. C. R. 511, at p. 512; *Gangubai v. Vemunagi A. Dukur* (1864), 2 Bom. H. C. (2nd ed.) 301. As to ratification of the manager or guardian's acts after the ward has attained majority, see *Chetty Culum Comara Vencutachella Roddyer v. Rungasenamy Streemunth Jyengar*
A suit brought by a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property must be brought within twelve years from the time when the alienee takes possession of the property.  

When the coparcener seeking to set aside the alienation, or the family has benefited by the alienation, it may be equitable to compensate the purchaser or mortgagee.

As to a sale or mortgage by the father, see post, p. 311.

The equity to pay compensation only arises when the sale or charge affects the interests of members of the family other than the alienor.

Where the purchaser has, to the knowledge of those interested in setting aside the sale, and without their protest, laid out sums for the improvement or benefit of the property, they may be required to compensate him.

The burden is upon the alienee to show that the money has been applied to family purposes; or that the person seeking to set aside the alienation has benefited thereby.

Bahadoor (Rajah) (1881), 8 M. I. A. 319; Prasanna Koomar Bural v. Saj duor Bhalam (Chowdrey), Ben. S. D. A., 1853, p. 525; Ramanasami Aiyan v. Venkataramanaiyan (1879), 9 I. A. 198; 2 Mad. 91.

1 This does not include a sale in execution of a decree: Jeevendra Singh v. Ibrahim (1881), 8 Calc. 653.


CHAPTER VIII.

THE DEBTS OF A FATHER UNDER THE MITAKSHARA LAW.

The Hindu law imposes upon a son, and grandson, the duty of paying the debts of his father, and paternal grand-father, provided that they have not been incurred for immoral or illegal purposes.

Although, under the Mitakshara system of law, the father takes no greater interest than his son, grandson, or great-grandson when the family is undivided, the father can pay such debts out of the income of the family property, and can charge or sell the family property for that purpose. After his death his sons must pay his debts out of the coparcenary property. Moreover, a creditor can enforce the debt against the family property either during the lifetime of the debtor, or after his death.

"By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

In a joint family governed by the Mitakshara school of law, a father can bind his sons, grandsons, and great-grandsons by a charge or alienation of the coparcenary estate, or of any portion thereof, for the purpose of paying debts.

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2 Colebrooke's "Digest," vol. i. pp. 300, 305, 309, 311.
3 'This follows from his power to charge and sell."
4 Below and post, p. 306.
5 Post, p. 319.
his personal debts,¹ which he has incurred before the date of such charge or alienation,² provided that such debts have not been incurred for an illegal or immoral purpose or consideration.³

A creditor or alleenee, claiming under such charge or alienation, would have to prove that the debt existed, or that after due inquiries he, in good faith, believed that it existed.⁴ The purchaser in execution of a decree need not prove any inquiry.⁵

¹ This does not apparently include a claim to damages, see Perumam Das v. Bhattu Mahien (1897), 24 Cal. 872.
² Khalilul Rahman v. Golab Pershad (1899), 20 Cal. 328; Kishon Pershad Choudhry v. Tapan Pershad Sinha (1907), 94 Cal. 785; 11 C. W. N. 613. This will include a prior debt due by the father to the person to whom he mortgaged or conveyed family property, Radri Prasad v. Moisden Lah (1893), 15 All. 775, at p. 80.
The burden is then shifted upon the son to prove that the particular debt was contracted for an illegal or immoral purpose, and that the purchaser had notice, or upon reasonable inquiry might have discovered, that they were so contracted.1

It is not sufficient for him to show that the father was of licentious or extravagant habits.2

"When ancestral property has passed out of the family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the latter's debt, his sons by reason of duty to pay their father's debts cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice that they were so contracted . . . the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the surface of the proceedings."3

A son who was not born at the time that the debt was originally incurred4 cannot dispute a mortgage made to pay off the debt.4

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4 See ante, pp. 301, 302.

Where the son is only able to prove that a portion of the debt was incurred for illegal or immoral purposes, the land would apparently stand charged for the remainder of the money.  

The exception is based upon certain texts which are to be found in Colebrooke's "Digest." Vrishaapati says, "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath; or sums for which he is a surety (except in the cases before mentioned), or a fine, or a toll, or the balance of either." There are other similar texts.

The exception as to sums for which the father is liable as surety applies apparently to cases of security for appearance, for keeping the peace, or for good behaviour. Where the father was surety for a debt, the liability of his son has been declared in several cases, but the liability of a grandson has been denied.

If a criminal offence or fraud was the origin of the debt, the sons would not be obliged to recognize it; for instance, a decree for the value of property obtained by theft, a decree for money, or for the value of property misappropriated. This would not apply to a case of money being wrongly wrongfully retained, or to a decree for mesne profits obtained against the father by a person whom the latter wrongfully kept out of possession of immovable property.

\[\text{\textsuperscript{1}}\text{ Cf. ante, pp. 294, 295, 304.} \]
\[\text{\textsuperscript{2}}\text{ Colebrooke, "Digest," i. p. 305.} \]
\[\text{\textsuperscript{3}}\text{ For an illustration of cases of these kinds, see Maharaj Singh v. Balwant Singh (1908), 28 All. 508.} \]
\[\text{\textsuperscript{4}}\text{ What these words within brackets mean is not very clear.} \]
\[\text{\textsuperscript{5}}\text{ This expression includes money paid for a bride, see Keshow R新浪 Dinekar v. Naro Juna!dham Patankar (1822), 2 Borr. 194, at pp. 200, 201. Strange says (vol. i. p. 167), "that the reason why tolls and fines are excepted may be, that they are to be regarded as ready money payments, for which credit will have been given, at the risk of him by whom they ought to have been received."} \]
\[\text{\textsuperscript{6}}\text{ Colebrooke, "Digest," vol. i. pp. 247, 300, 305, 307, 311; "Narada Smrti," chap. iii. para. 11.} \]
\[\text{\textsuperscript{7}}\text{ Colebrooke, "Digest," vol. i. pp. 246, 247.} \]
\[\text{\textsuperscript{8}}\text{ Chettikulam Venkiteshala Reddiar v. Chettikulam Kumara Venkiteshala Reddiar (1905), 28 Mad. 377; Be-}\]
\[\text{\textsuperscript{9}}\text{ Narayan v. Venkatacharya Bal-}\]
\[\text{\textsuperscript{10}}\text{ Pareman Das v. Bhattachalman (1997), 24 Calc. 672.} \]
\[\text{\textsuperscript{11}}\text{ Mahabir Prasad v. Basdeo Singh (1884), 6 All. 254. See Chandra Sen v. Ganga Ram (1880), 2 All. 899; McDowell and Co. v. Ragava Chetty (1903), 27 Mad. 71; Jatikumar v. Gauri Nath (1906), 26 All. 718, at p. 720, where it was held that a promissory note given to satisfy a claim for money misappropriated did not create an illegal or immoral debt.} \]
\[\text{\textsuperscript{12}}\text{ Peary Lal Sinha v. Chandicharam Sinha (1906), 11 C. W. N. 163.} \]
Similarly, fines need not be paid out of the family property. "Neither sins nor the expulsion of them are hereditary." 1

The son’s liability extends also to the payment of interest, the Interest amount of interest being determinable by the law of the place. Where the rule of damdupat 3 is not in force, that rule cannot be put in force. 4

Such charge or alienation binds his sons 6 and grandsons, whether they be minors or adults.

There is some authority that adult sons, who do not consent, would not be bound, but there is express authority to the contrary, 7 and the many other decisions on the subject do not make this distinction. As the antecedent debt clearly binds the sons, the question whether they are bound by the mortgage or sale is not of great importance. 8

This power which is given to the father cannot be exercised by any other member of the family even in the father’s absence. 9

It has been held that when the father is insolvent, the official assignee has the same power as the father. 10

Except for the purpose of discharging such antecedent debt, or in case of a valid necessity, a father has no power to alienate or charge the coparcenary property, and the sale can be set aside.

Where a mortgage is given in respect of a debt not antecedent to the transaction, it can be treated as a secured debt against the father's interest, and, so far as the sons are concerned, it will be treated as an unsecured debt, and can be enforced against the sons by a suit, the decree in which can be executed against the coparcenary property (including the mortgaged property), but in that case it has been held that the limitation applicable to an unsecured debt would apply.

So (except, perhaps, so far as questions of limitation are concerned, and except, perhaps, in cases where the property had been dealt with by the sons before suit) there is no difference between the remedy on

438; Rangguya Chetti v. Thanikachalla Mudali (1895), 19 Mad. 74. In the former case it was further held that the official assignee can deal with the estate after the death of the father. It is submitted that this is not good law.

1 Ante, p. 283.

2 Chinnaya v. Perumal (1889), 13 Mad. 51.


4 See Luchmun Dass v. Giridhur Chodhry (1880), 5 Calc 855; 6 C. L. R. 473; Laforge Sahoy v. Fakir Chand (1880), 6 Calc 135, at p. 138; 7 C. L. R. 97, at p. 100; Gunga Prasad v. Ajudhia Pershad (1881), 8 Calc 131; 9 C. L. R. 417; Khalilul Rahman v. Gobind Pershad (1892), 20 Calc 328; Debi Das v. Jada Rai (1902), 24 All. 459, differing from Jamma v. Nain Sukh (1887), 9 All. 493; Sami Ayangar v. Ponnammal (1897), 21 Mad. 28; Hanuman Kanot v. Devulut Mundar (1884), 10 Calc 528; Kishun Pershad Chodhry v. Tipan Pershad Singh (1907), 34 Calc 735; 11 C. W. N. 613, dissenting from Maheswar Dutt Tewari v. Kishun Singh (1907), 34 Calc 184; 11 C. W. N. 294, in which latter case it was held, it is submitted erroneously, that the sons were bound by a mortgage not in respect of a debt, which was antecedent to the transaction. The decisions relied upon in the latter case were in cases relating to sales in execution of decrees, and therefore stand upon a different footing. As to imparietable estates, see Veera Soorappa Nayani v. Errappa Naidu (1906), 29 Mad. 484.

5 Kishun Pershad Chodhry v. Tipan Pershad Singh (1907), 34 Calc 735; 11 C. W. N. 613; Khalilul Rahman v. Gobind Pershad (1892), 20 Calc 328, at p. 327.

6 Surja Prasad v. Golab Chand (1900), 27 Calc 762, differed from in Maheswar Dutt Tewari v. Kishun Singh (1907), 34 Calc 184; 11 C. W. N. 294, see above, note 4. See Ram Singh v. Sobha Ram (1907), 29 All. 544. See note 1, post, p. 311.
a mortgage which is based on an antecedent debt and a mortgage
given in consideration of a payment at the time.¹

In some of the older cases it was held that where the debt was not
antecedent to the mortgage, the creditor had no rights against the
coparcenary property except in case of necessity.²

Where there is a sale by the father, not on account of
an antecedent debt, the sons cannot, unless the money
was obtained for illegal or immoral purposes, set it aside
without refunding the amount of the purchase-money, as
the purchase-money would be a debt which they would be
liable to pay.³

The question as to whether the mortgage or transfer
passed the whole property, or only the father's interest
therein, depends upon what the parties contracted about.⁴
This may be determined not only by the terms of
the document, but also by the surrounding circumstances.
The burden is upon the person claiming under the mort-
gage or sale.⁵

It is unsettled whether sons can be bound by a decree
enforcing a mortgage on coparcenary property made by their
father, and passed in a suit to which they are not parties.

The decisions in many suits instituted before the passing of the
Transfer of Property Act,⁶ determined that sons who were joint with
their father⁷ were so liable if the suit were brought against the father
as representing himself and his sons.⁸

¹ See Chidambaram Muddiar v. Kootharupurnad (1903), 27 Mad. 326,
at p. 328. In this case it was said, "on principle it is difficult to make
any distinction between a mortgage given for an antecedent debt and a
mortgage given for a debt then incurred, for in either case the debt
is binding upon the son and the enforcement of the security exonerates
the son from the burden of the father's debt." See Gunga Pershad v.
Sheodyal Singh (1881), 9 C. L. R. 417.
² Hasmat Rai (Koor) v. Sunder
Das (1885), 11 Calc. 396. See post,
pp. 319, 320, and Nathu Lal Chowdhry
v. Chadi Sahi (1889), 4 B. L. R. A. C.
15; 12 W. R. C. R. 447.
³ See Simbhunath Panday v. Golab
Singh (1887), 14 I. A. 77, at p. 83;
14 Calc. 572, at p. 579.
⁴ Narayanrao Danodar v. Bal-
krishna Mahadeo, Bom. P. J., 1881,
p. 293.
⁵ IV. of 1882.
⁶ See Trimbak Balkrishna v. Naray-
yan Danodhar Dabhokar (1884),
8 Bom. 481.
⁷ Ponnappa Pillai v. Pappuva-
yanavar (1881), 4 Mad. 1; S. C.
(1885), 9 Mad. 343; Srinivasa
In each case it was a question whether the decree was intended to bind the family, and whether in execution their interests passed by the sale. It did not follow from the mere fact that the interest purporting to be sold was the right title and interest of the father that the entire interest which he had authority to deal with did not pass.

If, however, the decree from the form of the suit, the character of the debt recovered by it and its terms was to be interpreted as a decree against the father alone and personal to himself, and all that was put up and sold thereunder in execution was his right and interest in the joint ancestral estate, then the auction purchaser acquired no more than that right and interest, i.e. the right to demand partition.

Where the mortgage charged the whole interests, the form of mortgage decree now adopted by the Indian Courts would be sufficient to cause a sale of all of such interest.

There is a difference of opinion as to whether the law as to who is bound by the decree has been altered by sec. 85 of the Transfer of Property Act. That section is as follows:—

_Suits for Foreclosure, Sale, or Redemption._

Subject to the provisions of the Code of Civil Procedure, sec. 437, all persons having an interest in the property comprised in a mortgage


1 See _Pemraj Chandra Bhow v. Savalya Gajaba_ (1890), 15 Bom. 293; _Doulut Ram v. Mehr Chand_ (1887), 14 I. A. 187; 15 Calc. 70; _Ram Narain Lal v. Bhavani Prasad_ (1881), 3 All. 443.

2 See _Pemraj Chandra_ et al. v. _Savalya Gajaba_ (1890), 15 Bom. 293; _Doulut Ram v. Mehr Chand_ (1887), 14 I. A. 187; 15 Calc. 70; _Ram Narain Lal v. Bhavani Prasad_ (1881), 3 All. 443.


4 _Basa Muli v. Maharksh Singh_ (1888), 8 All. 205; _Simbhamathi Panday v. Golab Singh_ (1887), 14 I. A. 77; 14 Calc. 572.

5 See _Act XIV._ of 1882, Sched. IV., No. 128.

6 _Act IV._ of 1882.

7 That section deals with suits concerning property vested in a trustee, executor, or administrator, and has therefore no application to the present question.
must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest."

The Bengal and Allahabad High Courts have held that where the plaintiff had notice of their existence, the sons can sue to set aside a decree to which they are not parties, but the latter Court has declined to extend this principle to a case where the property had been sold to a purchaser other than the decree holder. The result of this view of the section is that a new suit against the sons is necessary, and in such new suit the debt can be recovered by sale of the ancestral property. The Madras High Court considers that the law in this respect was not altered by the Transfer of Property Act. See Civil Procedure Code, 1908, Sched. I., Order XXXIV. r. 1.

"Independently of the statute, the position of a purchaser, who in a sale in execution of a decree against the father bought the entirety of the estate, is the same as regards the son, whether the decree was a mortgage decree or a decree for money. In either case, all that the son can claim is that not having been a party to the sale or the proceedings which led up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale."

Where the sons are not parties to the suit, whether sec. 85 of the Transfer of Property Act applies or not, they are entitled to have an opportunity, either in a fresh suit or in proceedings for execution of the decree, of raising

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1 Suraj Prosad (Lala) v. Golab Chand (1901), 28 Cal. 517; 5 C. W. N. 840, reversing decision of Ghose, J. (1900), 27 Cal. 724; 4 C. W. N. 701.


3 The burden of proving this is upon the sons: Ram Nath Rai v. Lockman Rai (1899), 21 All. 193.


5 Dharam Singh v. Angal Lal (1899), 21 All. 301; Lochman Das v. Daltu (1900), 29 All. 394. See Ram Singh v. Sobha Ram (1907), 29 All. 544. In Suraj Prosad (Lala) v. Golab Chand (1901), 28 Cal. 517; 5 C. W. N. 640; and Kankaia Lal v. Raj Bahadur (1902), 24 All. 211, the son in the suit brought by him had an opportunity of contesting the mortgage, so the Court declined to give him any remedy, except a right to redeem.

6 Ramasamayyan v. Virasami Ayyar (1898), 21 Mad. 222; Puliyan Gounden v. Rangayya Goundan (1898), 22 Mad. 207.


8 See Umakeswara v. Singaperumal (1885), 8 Mad. 376; Chander Perahad v. Sham Koer (1905), 33 Cal. 876. It has been held that the son cannot raise the question in the same suit where he has been made a party to the suit as representing his father: Hira Lal Sahu v. Parmeshar Rai (1899), 21 All. 356.
such questions and of asserting such rights as they could have raised and asserted if they had been made parties.

They can thus get a right to redeem,¹ but if the property has been sold to a third person, the Allahabad High Court has held that a suit for redemption does not lie simply on the ground they have not been made parties.² A son born after a decree for sale would have no right of redemption.³

A son who was not joint with the father at the time of the suit would be entitled to redeem.⁴

Where the son has been a party to the suit he could not, of course, raise in another suit any question as to the validity of the mortgage or sale.

When the sons are not parties to the suit against their father, the creditor may institute another suit against them.⁵

The interests of the sons pass in a sale of coparcenary property in execution of a decree against their father,⁶ except—

1. When their interests are not sold.⁷

2. When the sons prove that the debt was contracted for an illegal or immoral purpose,⁸ and the execution

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¹ See Rampuhl Singh v. Degnarain Singh (1881), 8 Calc. 517; 10 C. L. R. 489; Ponnapa Pillai v. Pappuvaryangar (1881), 4 Mad. 1, at p. 69; Trimbak Balkrishna v. Narayan Damodar Dabhokar (1884), 8 Bom. 481, at p. 488; Ramaswamy v. Virasami Ayyar (1898), 21 Mad. 222.
² Lal Singh v. Pulandar Singh (1905), 28 All. 182; Debi Singh v. Jia Ram (1902), 25 All. 214.
⁴ See Trimbak Balkrishna v. Narayan Damodar Dabhokar (1884), 8 Bom. 481.
⁵ See Ran Singh v. Sobha Ram (1907), 29 All. 544; Dhamram Singh v. Angan Lal (1899), 21 All. 301; Ari-aldutra v. Dorasami (1888), 11 Mad. 413.
⁷ See post, p. 317.
⁸ See ante, pp. 307, 308.
creditor purchases, or, if a stranger purchases, and has notice of, or upon inquiry could have ascertained, the illegal or immoral character of the debt upon which the decree was based.\footnote{1 See Joharlal v. Eknath (1899), 24 Bom. 443; Natakannab v. Punnasami (1892), 16 Mad. 99; ante, pp. 306, 307.}

A decree for a mere money debt of the father,\footnote{2 This includes a decree for the unsatisfied balance of a mortgage debt, Hari Ram v. Bishnath Singh (1900), 22 All. 408.} not illegal or immoral, and whether incurred for family purposes or not, may be enforced in his lifetime by an execution sale of the entire coparcenary estate,\footnote{3 Memoakshi Naidu v. Immudhi Kanaka Ramaya Kouden (1888), 19 I. A. 1; 12 Med. 442; Khalidul Rahman v. Gobind Pershad (1969), 20 Cal. 320; Ske Proshad v. Jung Bakasoor (1899), 9 Cal. 489; 12 C. L. R. 944; Narayana Charya v. Narso Krishna (1870), 1 Bom. 262; Lucknow Dass v. Giridhur Chowdhry (1890), 5 Cal. 855; 6 C. L. R. 473; Bhooma (Musumati) v. Roop Kishore (1879), 5 N. W. P. 89.} and is binding on the sons, whether they were or were not parties to the suit.\footnote{4 Bhagat Pershad v. Girja Koer (Musumati) (1888), 15 I. A. 99; 15 Calc. 717; Memoakshi Naidu v. Immudhi Kanaka Ramaya Kouden (1888), 16 I. A. 1; 12 Med. 442; Karan Singh v. Bhup Singh (1904), 27 All. 16; Mathura Prasad v. Ramchandra Rao (1902), 25 All. 57; Mallesan Naidu v. Jugala Panda (1989), 15 Mad. 329; Natakannab v. Punnasami (1892), 16 Med. 99; Kishali Bari v. Keshav Shambaja (1897), 11 Med. 84; Ramasadan v. Rajapokala (1899), 12 Med. 308; Ramdas Singh v. M. J. Prasad (1892), 9 Cal. 452; 12 C. L. R. 47. See Sham Lai v. Ganesh Lal (1905), 20 All. 298, where the suit had been dismissed as against the son.} They are, however, entitled in case they were not parties to contest the binding nature of the debt in another suit,\footnote{5 See Ramasami Nadan v. Ulagasarntha Goundan (1898), 22 Mad. 49; Gopalasami Pillai v. Chakalingam Pillai (1881), 4 Med. 329; Devji v. Sambhu (1899), 24 Bom. 135; Jagabhari Lahubhai v. Vajibhadanlal Jagi- vandas (1889), 11 Bom. 37; Karan Singh v. Bhup Singh (1904), 27 All. 16.} or by a claim under the Civil Procedure Code, 1908, Sched. L, Order XXI. r. 57.\footnote{6 Act XIV. of 1882, s. 378.}
In two cases the Allahabad High Court\(^1\) considered that where no sale had taken place, the sons could contest the decree on the sole ground that they were not parties to it, but in a latter case the same Court held that there is no ground for such distinction.\(^3\)

The son’s rights do not pass when in contravention of sec. 99 of the Transfer of Property Act\(^2\) the mortgagee has attached the property in execution of a money decree,\(^4\) or the sale is otherwise irregular.

Under the Civil Procedure Code of 1908 (s. 53) a creditor can, after the death of the father, execute the decree against coparcenary property in the hands of the sons. Where the property was attached in the father’s lifetime he could proceed\(^5\); but where there was no such attachment, a new suit was necessary according to the High Courts of Madras and Allahabad, and according to some of the Bengal decisions.\(^6\) It was held in Bombay,\(^7\) and by the majority of a Full Bench in Bengal,\(^8\) that the decree could be executed against the sons.

The carrying out of a mortgage decree stands upon the same footing.\(^9\)

If the coparcenary property has been charged by the decree, proceedings in execution can be taken against the sons after the death of the father.\(^10\)

The question whether the sale in execution of a decree against the father passed the whole interest of the family,
or only the father’s undivided interest, depends upon the terms of the proceedings in execution. The Court will look at the substance of the proceedings to see what was intended to be sold, and what the purchaser could reasonably think he was buying. It is a mixed question of law and fact. It is the duty of the judgment creditor to see that the orders of attachment and sale, or the sale certificate, clearly indicate the sale of all the interests in the property over which the judgment debtor had control. There is some conflict as to whether there is any presumption that the whole interest passed, or whether there is a presumption that the interest of the father only passed. It is submitted that if there is any presumption one way or the other, it is upon the person supporting the same.


2 In the following cases it was held that the interest of the father only passed by the sale: Deendyal Lal v. Jugdeep Narain Singh (1877), 1 I. A. 247; 3 Calc. 198; 1 C. L. R. 49; Simbhumath Panday v. Golab Singh (1887), 14 I. A. 77; 14 Calc. 572; Hurday Narain Sabu (Baboo) v. Beoder Perkash Maser (Pundit Baboo) (1883), 11 I. A. 26; 10 Calc. 626; Ram Sahai v. K reol Singh (1887), 9 All. 672; Pettachi Chettiar v. Sangili Veera Pandia Chinnathambiar (1887), 14 I. A. 84; 10 Mad. 241; Bhikaji Ramchandra Oka v. Yashomitrav Shripat Khopkar (1894), 8 Bom. 489; Maruti Sakharan v. Babaji (1890), 15 Bom. 87; Beni Parshad v. Puran Chand (1895), 23 Calc. 282; Bik Singh v. Lachman Singh (1880), 2 All. 800; Chandra Sen v. Ganges Ram (1880), 2 All. 899; Bhagat Dass v. Gouri Kunnor (1880), 7 C. L. R. 218; Collector of Monghyr v. Hurday Narain Shabai (1879), 5 Calc. 425; 5 C. L. R. 112. In the following cases it was held that the interests of the sons passed by the sale: Bhagbut Prashad v. Girja Koer (Museumat) (1888), 15 I. A. 99; 15 Calc. 717; Menakashi Naidu v. Immuble Kanaka Ramaya Kounden (1888), 16 I. A. 1; 12 Mad. 142; Mahabir Prashad (Rai Babu) v. Markunda Nath Sahai (Rai) (1889), 17 I. A. 11; 17 Calc. 584; Cooerji Hirji v. Dewsey Bhoja (1899), 17 Bom. 718; Verra Sowrippa Nayani v. Errappa Naidu (1908), 29 Mad. 484; Kunkali Beeri v. Keshava Shan baga (1887), 11 Mad. 64; Sakhrarashet v. Sitaramahe (1889), 11 Bom. 42; Sudashio Dinkar Joshi v. Dinkarranayan Joshi (1899), 6 Bom. 520. As to a sale under a mortgage decree, see ante, p. 311.

3 See Muhammad Husain v. Dipchand (1892), 14 All. 191; Pam Singh v. Parab Singh (1892), 14 All. 179; Beni Madho v. Basdeo Patak (1890), 12 All. 99.

4 Maruti Sakkaram v. Babaji (1900), 15 Bom. 87.

"The purchaser under the execution . . ." is "not bound to go further back than to see that there was a decree against" the father, "that the property was property liable to satisfy the decree, if the decree had been properly given against" him, "and having inquired into that, and having bonâ fide purchased the estate under the execution, and bonâ fide paid a valuable consideration for the property, the" sons "are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the" purchaser.1

"If his debt was of a nature to support a sale of the entirety," the father "might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is, that, not being parties to the sale or execution proceedings, they ought not to be barred from bringing the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone, . . . the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."2

A decree may be obtained against the sons during the lifetime of their father so as to bind the coparcenary property, provided that the money was not raised for an illegal or immoral purpose.3

Although the coparcenary property may not be liable, the father remains personally liable for a debt.

As to the sale of a share in the coparcenary property, see ante, pp. 297, 300.

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3 See Ramasami Nadan v. Uloganatha Goundan (1898), 29 Mad. 49; Ramphul Singh v. Degunarain Singh (1881), 8 Calc. 517; 10 C. L. R. 489.
The debts of a father, or paternal grandfather, even when not charged upon the estate, must be paid by the son, or grandson, out of the property of the coparcenery in which the debtor was a coparcener, provided such debts have not been incurred for an illegal or immoral purpose.

The liability to pay a debt involves a liability to pay interest.

Even during the lifetime of the father the son is liable to the extent of the coparcenary property, or of property of his father which comes into his hands; as, for instance, when the father has abandoned worldly affairs, or has been absent for a time which raises a presumption as to his death.

The limitation for a suit against the son for a debt of his father is six years from the time when the cause of action arose.

It has been held that the right of the creditor to sue the sons accrues during the father's lifetime, and that there is not a new cause of action on his death.

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3 See Colebrooke's "Digest," vol. i, p. 266.

4 An absence of twenty years was fixed by Vishnu(Colebrooke's "Digest," vol. i, p. 266); but the presumptions as to death now applicable are to be found in ss. 107, 108, of the "Indian Evidence Act" (I of 1872).

5 XV. of 1877.

6 Maharaj Sing v. Balwant Singh (1906), 28 All. 508, at p. 516; Narasing Mira v. Laipi Mira (1901), 23 All. 206; Nathaswamy v. Ponnuvisami (1899), 16 Mad. 89; Ramuvisa v. Venkataraman (1893), 17 Mad. 122.

7 Mallesam Naich v. Jogala Panda (1899), 29 Mad. 299. See Ramaswami Nadan v. Ulagamutha Goundan (1898), 22 Mad. 49; Nathaswamy v. Ponnuvisami (1899), 16 Mad. 90.
A simple contract debt even of a father is not a charge upon the coparcenary property, or upon his separate property. When the son or heir has alienated the property, the creditor cannot claim his debt against the alinee, except where the alienation has been, to the knowledge of the alinee, made in order to avoid the debt, or with the intention of avoiding it. In case of such alienation, the remedy of the creditor is against the son or heir personally.¹

The debts of the father cannot be recovered from the separate property of a son, even where such property has been the subject of a bonâ fide gift to the son by the father. They can only be recovered from the coparcenary property, or from property which was acquired by his sons on his death as his representatives.²

A creditor cannot enforce the payment of the debt of the father³ against property which has been allotted on partition to the son, unless the partition was effected for the purpose of avoiding the father's debts.⁴

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¹ Zuburdust Khan v. Indurmun (1867), Agra High Court Full Bench Reports, ed. 1903, p. 71; ed. 1874, p. 55; Unnopoorna Dasera v. Gunga Narain Paul (1865), 2 W. R. C. R. 296; Jamjiyaram Ramchandra v. Parbhudas Hathi (1872), 9 Bom. H. C. 116; Gomahkai v. C. Srinivasa Pillai (1868), 4 Mad. H. C. 84; Greender Chunder Ghose v. Mackintosh (1879), 9 Calc. 897; 4 C. L. R. 193; cf. Act IV. of 1882, s. 128. The right of a creditor against an alinee or devisee of the heir would apparently be no greater than his right against the alinee or devisee of his debtor, see Bishen Chand (Rai) v. Asmaida Koir (Mussumat) (1883), 11 I. A. 164; 6 All. 560.


³ This would not apply to a debt or a contract before partition entered into by the father as manager of the family. Ramachandra Padayachi v. Kondayya Chetti (1901), 24 Mad. 555.

⁴ Krishnasamni Konan v. Ramasami Ayyar (1899), 22 Mad. 519.
As under the Bengal school of law sons do not acquire any interest by birth in ancestral property, a father can obviously charge his share in the coparcenary property for the payment of any of his debts, however incurred, and after his death the payment of his debts can be enforced against the property, whether joint or separate, belonging to him at the time of his decease.

Apart from the obligation of a son or grandson to pay the debts of his father or grandfather out of coparcenary property, the Hindu law, like other systems of law, requires the person who succeeds to the property of another as heir or devisee, to pay the debts of such other person to the extent of the assets received by him. There is no obligation upon any other coparcener, who has acquired rights by survivorship, to pay the debts of the deceased coparcener.

Debts can be recovered from the person who has wrongfully come into possession of the property of the deceased debtor.

This would not apply to lands held on a tenure, which rendered it not transferable or saleable in execution of a decree.

1 See ante, p. 297.
3 As to the sale of a share, see Kotta Ramasami Chetti v. Banjuri Seshama Nayanar (1881), 3 Mad. 145, at p. 167. As to impropriable property, see Nachappa Chettiar v. Chinnavasami Naicker (1908), 29 Mad. 455.
CHAPTER IX.

PARTITION.

Partition is the process by which the members of a joint family become separate, and cease to be coparceners.¹

Partition, according to the Mitakshara school, consists of the ascertainment of the shares of the coparceners, such shares not having existed before partition,² and the separation of such shares from one another.

According to the Dayabhaya school it consists only of the separation of the shares, such shares having previously existed.³

WHO IS ENTITLED TO PARTITION.

"The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition." ⁴

Except in Bombay ⁶ an agreement not to partition coparcenary property binds the actual parties thereto,⁵ but it does not bind their representatives, or, unless there be an agreement not to assign, their assignees.⁷

¹ Cunningham's "Hindu Law," p. 136. As to the mode by which such separation is effected, see post, pp. 343–358.
² Ante, pp. 244, 245.
³ Ante, p. 230.
⁵ Ramalinga Khanapure v. Virupakshi Khanapure (1883), 7 Bom. 538.
A direction in a will prohibiting partition has no effect, as it is a condition in
condition repugnant to the gift.1 Similarly, the owner of property will
cannot by mere contract during his life prevent his heirs from partition-
ing property after his death.2

Except in the case of a suit by a minor,3 the Court has
no discretion to refuse partition.4 Each coparcener is at
liberty to elect to separate from the joint family, but he
cannot force a separation among the others against their
will.5

Under the Bengal school of law, every adult coparcener,6 male or female,7 is entitled to enforce partition of the
coparcenary property.

Except that there can be no partition directly between
grandfather and grandson while the father is alive,7 or
between great-grandfather and great-grandson when the
father or grandfather is alive, every adult coparcener is,
under the Mitakshara school of law, entitled to enforce
partition.

"The property in the paternal or ancestral estate acquired by birth

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1 Mokoondo Lall Shaw v. Gonesh Chander Shaw (1875), 1 Calc. 104;
Act X. of 1865, s. 125; applied to Hindu wills under the Hindu Wills Act (XXI. of 1870) by s. 2
of the latter Act.
2 Rajinder Dutt v. Shum Chand Mitter (1889), 6 Calc. 108.
3 Post, pp. 325, 326.
4 Sellam v. Chinannmal (1901),
24 Mad. 441, at p. 443.
5 Manjanatha v. Narayana (1882),
5 Mad. 369, at p. 367. In Radha Churn Das v. Kripa Sindhu Das (1879), 5 Calc. 474, at p. 476; 4
C. L. R. 428, at p. 430, the Court said, "It seems very doubtful whether
by the Hindu law any partial partition of the family property can take place
except by arrangement." See, how-
ever, Upendra Narain Myti v. Gopinath Bora (1883), 9 Calc. 817; 12
C. L. R. 356. As to the presumption
of a general partition, see ante, p.
228.
6 Durga Nath Pramanick v.
Chinlamani Dassi (1909), 51 Calc. 214; 8 C. W. N. 11. As to the case
of a childless widow, who is entitled
to a very small share, see post, p. 325,
note 6.
7 Biken Chand (Rai) v. Asmaidra
Koir (Musunmad) (1884), 11 I. A.
164, at p. 179; 8 All. 560, at p. 574;
"Mitakshara," chap. i. sec. 5, para. 3.
A different view was adopted in
Jogul Kishore v. Shib Sankh (1883),
5 All. 430. Although the grandson
may be unable to enforce partition he
is a coparcener. Apparently if his
interest be sold (see ante, pp. 297, 298),
the purchaser could not enforce
partition (see post, p. 328), and
might have to run the risk of
waiting until the death of the father
before suing for partition.
RIGHT TO PARTITION. [CHAP. IX.

under the Mitakshara law is... so connected with the right to a partition that it does not exist where there is no right to it."

Under the Mitakshara law, a son is entitled to partition of the coparcenary estate, whether movable or immovable, as against his father. On his father's death he is entitled to partition as against his father's father. On the death of his father and his father's father he has a similar right against his father's father.

On the death of his father he represents his father's right to claim partition against his father's father.

Even when his father and grandfather are both alive, a suit for partition may be brought by a coparcener, if they allow the property to be wasted and his interest to be imperilled.

Where two or more women hold property jointly, as in the cases of widows or daughters succeeding as heirs, one of them is entitled to enforce a partition, but such partition does not affect the right of survivorship of the

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1 Sortaj Kuari (Rani) v. Deoraj Kuari (Rani) (1888), 15 I. A. 51, at p. 64; 10 All. 272, at p. 287.
2 This question cannot arise under the Bengal school, ante, p. 230.
3 As to illegitimate sons, see ante, pp. 235, 234.
4 Jugmohan Das Mangal Das v. Mangal Das Nathubhoy (Sir) (1886), 10 Bom. 526.
5 Suroj Bansi Koer v. Sero Prashad Singha (1879), 6 I. A. 86, at p. 100; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 235; Apaji Narhar Kul-karni v. Ramchandra Ranji Kul-karni (1891), 16 Bom. 29, at pp. 32, 33; Raja Ram Texary v. Lachhman Persad (1887), B. L. R. F. B. R. 731, at p. 738; 8 W. R. C. R. 15, at p. 20; Laljee Singh v. Rajoomar Singh (1879), 12 B. L. R. 373; 20 W. R. C. R. 338; Subba Aygar v. Ganasa Aygar (1895), 18 Mad. 179; Kali-parshad v. Ramcharan (1879), 1 All. 159; Coomumboh Ahmedboh v. Ahmedboh Husobhoy (1897), 12 Bom. 260 (a case of Khoja Mahomedans). It was held by a majority of the full bench in Apaji Narhar Kul-karni v. Ramchandra Ranji Kul-karni (1891), 16 Bom. 29, that a son cannot in the lifetime of his father sue his father and uncles for partition, but the Madras High Court has dissented from this view, Subba Aygar v. Ganasa Aygar (1895), 18 Mad. 179, see also Battacharya's "Hindu Law," 2d ed., pp. 324, 325. It is submitted that the view of the dissenting Judge (Telang, J.) in the Bombay case was correct.


This follows from the fact that the great grandson acquires a right by birth, ante, pp. 232, 233.

8 "Mitakshara," chap. i. sec. 5, para. 1.


10 Suddar (Mussamat) v. Parbati (Mussamat) (1889), 16 I. A. 186; 12 All. 51, and cases in 325, note 1; Ayyupuddu v. Alamelu (1888), 11 Mad. 304; Contrâ Kathaperumal v. Venkabai (1890), 2 Mad. 194.
co-widow or sister, and must be effected in such a way as not to prejudice the reversionary heirs.

This case frequently occurs under the Bengal school of law. Under the Mitakshara school it could only occur with regard to the separate acquisitions of the husband or father, or in the case where the husband or father died without leaving any coparcener him surviving, or perhaps in a case where a share is allotted to a widow on a partition.

Where a widow or daughter is entitled to a partition a purchaser of her share is also entitled to partition.

Where a Hindu widow is entitled to partition, and there is a reasonable apprehension that she will waste the movable property allotted to her share, sufficient provision should be made in the final decree for partition, for the prevention of such waste, to safeguard the interests of the reversioners.

It has been held that in a suit for partition by a widow the Court has a discretion.

Where a coparcener is a minor, and his interests are likely to be prejudiced by the property remaining joint, as, for instance, where his coparceners are wasting the property, or setting up rights adverse to him, or decline to provide for his maintenance, it is for his interest that a suit for a partition be brought, even against his father.

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6. Mohadesy Koer v. Haruknurain (1882), 9 Calc. 344, at p. 350. It was said in Sodaninaney Dossee v. Jogesh Chunder Dutt (1877), 2 Calc. 262, at p. 271, that the Court would probably refuse partition by metes and bounds to a childless widow who was entitled to a very small share.

7. I.e., either a suit in a Civil Court, or a proceeding in a Revenue Court.


but if there be no such special circumstances, it is ordinarily not in the interest of the minor that such suit should be brought.\(^1\)

The same principle would apply to reviving on behalf of a minor a suit for partition instituted by his father,\(^4\) provided it be clear that the omission to continue the suit does not prejudice the minor’s rights to the property.

It is not ordinarily in the interests of a minor member of a joint Hindu family, or of any other minor joint-owner, that his share should be separated. *Prima facie*, a partition is not for a minor’s benefit, because, ordinarily speaking, the family estate is better managed, and yields a greater ratio of profit in union than when split up and distributed among the several parcelers, and moreover, by partition, a minor member of a Mitakshara family would lose the benefit of survivorship.\(^3\) There is also the danger of the minor’s property being wasted by the costs of litigation.

Such special circumstances, as would render a suit for partition necessary in the interest of the minor, would justify a guardian in arranging a partition.\(^6\)

Where an adult co-sharer insists upon partition the guardian cannot resist it, but must do his best in the interests of the minor.\(^5\)

A partition by arbitration,\(^6\) or by arrangement,\(^7\) or by the Collector,\(^9\) is binding on a minor, and can be enforced by him,\(^9\) provided that he be not injuriously affected

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thereby, that it be fair, that he be duly represented, and that the person representing him in such proceedings act bona fide and with a due regard to his interest.\(^1\)

"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition, and if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor’s interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself.\(^3\)

When a son is born to the father of a Mitakshara family, after there has been a partition between him and his sons, the afterborn son is not entitled to a redistribution, unless he was conceived at the time of the partition,\(^4\) but he is to the exclusion of his separated brethren entitled as a coparcener to the share allotted to his father, and to succeed as heir to his father.\(^5\)

It has been held that where the father has reserved no share for himself on the partition, an afterborn son is entitled to a share.\(^6\)

In a case governed by the Bengal school, a posthumous son would be entitled to reopen a partition made by his brothers after his father’s death and before his birth.\(^7\)

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5. *See Naval Singh v. Bhagoorn Singaj* (1882), 4 All. 427. Where one son has separated, the afterborn son is entitled to share with the father and the united sons, but has no right to a share of the property allotted to the separated son. *Ganpat Venkatesh Despande v. Gopalrao Venkatesh Despande* (1899), 23 Bom. 636.
As to the effect of a partition on the rights of coparceners who are absent, Sir Thomas Strange\(^1\) says as follows: "Upon the same footing, in this respect, with minors are absentees, residing in a foreign country,\(^2\) whose consent, at the time, not being attainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till the one arrive at majority, and the other returns; and this is the case of the latter to the extent of the seventh in descent, the right of parcers remaining at home, being lost by dispossesssion beyond the fourth."\(^3\)

This would, of course, be subject to the law for the limitation of suits.\(^4\)

The purchaser of the share of a coparcener, either at an execution sale\(^5\) or by a voluntary transfer, where such transfer is valid,\(^6\) has the same right of partition as the coparcener whose share was purchased by him, and is entitled to have a separate portion allotted to him,\(^7\) but he may be compelled to sell to a coparcener a share of a dwelling-house purchased by him.\(^8\)

A transferee, either by a private sale, or by a sale in execution of a decree, of the interest of a coparcener, in a

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2. The rules as to what is a foreign country (Coblebrooke's "Digest," vol. ii. p. 29), such as difference of language, the intervention of a mountain or great river, countries being accounted distant whence intelligence is not received in ten nights, would probably be disregarded in view of modern means of communication.
4. See Act XV. of 1877, Sched. II., Arta. 127, 144.
portion only of the family property, is not entitled, as of right, to partition of such portion only. Should he sue for a partition of such portion only, a coparcener may require him to include the whole of the family property in the suit, but is not obliged to insist upon it.

It has been said that in a case governed by the law of the Dayabhaga such partial partition can be claimed, but it is submitted that no such distinction can be drawn.

RIGHTS OF WIFE AND WIDOW.

Under the Mitakshara school of law, except in Southern India, on a partition of coparcenary property by a father and his son or sons (or purchasers of their shares), the wife of the father is entitled to have allotted to her for her separate enjoyment a share equal to a son’s share, in order to provide for her maintenance.

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3 Marurarao v. Sitaram (1898), 23 Bom. 184.
5 Sunurun Thakoor v. Chundermun Misser (1881), 3 Calc. 17; 9 C. L. R. 415.
6 Damodar Misser v. Senubutty Mucrai (1882), 6 Calc. 587; 10 C. L. R. 401; Dular Koeri v. Dwarkanath Misser (1904), 32 Calc. 234;
9 C. W. N. 270; Sunurun Thakoor v. Chundermun Misser (1881), 3 Calc. 17; 9 C. L. R. 415; Mukherjee Persad v. Ramyad Singh (1879), 12 B. L. R. 90, at p. 99; 20 W. R. C. R. 192, at p. 196; Laljee Singh v. Rajcoomar Singh (1875), 12 B. L. R. 373; 20 W. R. C. R. 387; Purshid Narain Sing v. Huscoom in Sahay (1880), 5 Calc. 845, at p. 854; 5 C. L. R. 576, at p. 585. In each of the above cases the partition was at the instance of a son, but it is submitted that the same principle would apply when the partition was at the instance of the father, see “Mitakshara,” chap. i. s. 7, paras. 1, 2. See “Vyavahara Manukha,” chap. iv., paras. 4, 5, 11; “Suriti Chandrika,” chap. ii. a. 1, paras. 39; “Vivada Chintamani” (P. C. Tagore’s translation), pp. 230, 231; Celebrooke’s “Digest,” vol. iii. p. 12. This includes a stepmother of the sons. Macnaghten’s “Hindu Law,” vol. i. p. 50.
Mr. Mayne states that in Southern India the practice of allotting shares to wives is obsolete. Having regard to old authorities of the Dravida school it was not settled whether the father retained for them the shares which are assigned to his wives, or whether, as in the case of the Benares, Bombay, and Mithila schools, the shares should be made over to the wives themselves. As under the law of the Bengal school a father is entitled to the absolute disposal of his property, whether ancestral or self-acquired, this question cannot arise. In the rare case of a father partitioning his property amongst his sons, it is said that "his sonless wives are each entitled to a share equal to that of a son, or to half of such share, according as they are unprovided, or provided, with stridhana."

If the wife has previously had separate property given to her by her husband or father-in-law, she takes so much as with such separate property would amount to a share equal to that of one of the sons.

Except in Southern India, where, it is said, the practice is obsolete, a widow is, on a partition of coparcenary property between her sons, or between her sons and grandsons (or purchasers of their shares), entitled to a share equal to that of one of her sons in lieu of maintenance.

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1 Mayne's "Hindu Law," 7th ed., p. 645; Meenatchi Chetty, Mad. dec. of 1853, 61
2 See "Smriti Chandrika," chap. ii, s. 1, 39; "Parmara Madhavya-Daya-rivhaga" (Burnell's translation), p. 8; Strange's "Hindu Law," vol. i. p. 189.
3 Ante, p. 230.
4 See, however, Colebrooke's "Digest," vol. iii, pp. 20–25.
8 She is not entitled to such right in property which has been acquired by the sons without any aid from the estate of their ancestors.
11 Ganesh Dutt Thakoor (Chowdry) v. Jemach Thookooon (Munuswamy)
In Madras a mother is, according to the “Smriti Chandrika,” entitled on partition between her sons to have allotted to her a portion sufficient for her maintenance, but not exceeding the share of one of her sons.  

Except under the Bengal school, a sonless widow is entitled to a share on a partition between her stepsons, but even in Bengal she is entitled to a share on a partition between her sons and stepsons.  

In a partition between sons by different wives the respective mothers are only entitled to share equally with their own sons the aggregate of the shares which an equal division among the brothers allot to those sons, or, in other words, the property must be first divided into as many shares as there are sons. Each widow then shares equally with each of her sons the portion allotted to her sons.  

In a Bombay case where there was a partition between a son and his stepmother and her three sons, the stepmother was given one-fifth. According to the above rule, she would have been entitled to a three-sixteenth share.

(1903), 31 I. A. 10, at p. 15; 31 Calo. 262, at p. 271; 8 C. W. N. 146, at p. 15; Hemangini Dasi (Srimati) v. Kedarnath Kudu Choudhury (1889), 16 I. A. 115; 16 Calo. 758; Torit Bhoosen Bonnerjee v. Taraprosono Bonnerjee (1879), 4 Calo. 756; Purus Naranig Sing v. Honoornak Sahay (1880), 5 Calo. 845; 5 C. L. R. 576; Kichori Mohun Ghose v. Monimohan Ghose (1885), 12 Calo. 165; Isree Pershad Singh v. Nasib Koer (1884), 10 Calo. 1017; Bilaso v. Dina Nath (1880), 3 All. 88; Jodoonath Dey Suvor v. Brojonath Dey (1874), 12 B. L. R. 385; Jugomohan Haldar v. Sarada Mohoyee Dosses (1877), 3 Calo. 149; Damodardas Manekal v. Uttamram Manekal (1892), 17 Bom. 271; Lakshman Ramchandra Joshi v. Satyabhadnubai (1887), 2 Bom. 494, at p. 504; Sheo Dayal Tengaor v. Jodoonath Tengaor (1868), 9 W. R. C. R. 61. In Thukoo Bose Bhise v. Ruma Bose Bhise (1894), 2 Borr. 446, at p. 454, the pundits declared that the mother had a right to a share, although there was only one son. See also cases in West and Bühler, 2nd ed., pp. 391, 392.


3 Damoodur Misser v. Senabatty Mirzain (1882), 8 Calo. 337; 10 C. L. R. 401 (a Mithila case); Laljeet Singh v. Rajcoomar Singh (1873), 12 B. L. R. 373; 20 W. R. C. R. 337; Thakur Proshad (Choudhry) v. Bhagbat 1 C. L. J. 142.

4 See Torit Bhoosen Bonnerjee v. Taraprosono Bonnerjee (1879), 4 Calo. 756.

5 Kristobhainay Dosses v. Ashutosh Bose Mullick (1886), 13 Calo. 89; Cally Churn Mullick v. Janow Dosses (1866), 1 Ind. Jur. 284.

6 Damodardas Manekal v. Uttaram Manekal (1892), 17 Bom. 271.
This right of the mother has been held only to apply to the case of a general partition, and not to a case where there has been only a partition of an item of the property at the instance of a stranger.  

It has also been held that this right only comes into operation when the partition is completed.  

Under the Bengal law a husband can by will deprive his wife of a share on partition.  

On a partition between her son’s sons, a widow is entitled to a share equal to that of a son’s son.  

On a partition between son’s sons and great-grandsons, she is entitled to the share of a son’s son.  

When the partition is between grandsons by different sons, the share of the grandmother is to be ascertained by giving her such a share as she would take if each of the grandsons took equally. Thus if there be nine grandsons she will get one-tenth, and so on. The share which the grandsons themselves take depends upon the number in each stock, and upon whether their own mothers are alive.  

The right of a widow to a share on a partition between her great-grandsons is not expressly recognized by the Hindu law. The right would, it is submitted, be admissible upon grounds similar to those which confer a right upon a mother and grandmother.

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1 Barahi Deb v. Debkomini Deb (1892), 20 Calc. 892.  
5 Purna Chandra Chakravarti v. Sarojini Deb (1904), 31 Calc. 1065, at p. 1076; 3 C. W. N. 763, at p. 771.  
6 Purna Chandra Chakravarti v. Sarojini Deb (1904), 31 Calc. 1065; 3 C. W. N. 763. F. Macnaghten, 52.  
7 Colebrooke’s “Digest,” vol. iiii. p. 27. F. Macnaghten, pp. 28, 51; doubted by Wilson, Works v. 25.  
In fixing the amount of her share, the widow must be debited with the value of any gift or legacy which she may have received from her husband.1

Apparently, as in the case of allotting maintenance, her separate property must be taken into account,2 but the fact that she has inherited a share from one of her sons does not deprive her of her right to a share on partition.3

According to the Mitakshara, the share becomes the absolute property of the widow to whom it is allotted,4 but, according to the Bengal school, on the death of the widow the share goes back to the sons or grandsons from whose shares it was deducted,5 and she has no power to dispose of it by will.6

Although a right to maintenance is not a complete charge upon the property,7 a right to a share in lieu of maintenance is not affected by a sale of an undivided share, whether before8 or during the pendency of a partition suit.9

It has been held that the loss of a right of maintenance would involve the loss of the right to a share on partition.10 It is, it is submitted, clear that when the share had been allotted, want of chastity would not de vest the right.11

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2 "Mitakshara," chap. i. s. 2, para. 9; "Vyavahara Mayukha," chap. iv. s. 4, para. 18.
3 Ante, p. 84. See "Vyavahara Mayukha," chap. iv. s. 4, para. 18.
4 Jugomohan Halder v. Saradamojoy Dassjee (1877), 3 Calc. 149.
5 Chidud v. Naubat (1901), 24 All. 67; Sri Pall Rai v. Sarajbali (1901), 24 All. 82.
8 Ante, p. 88.
10 Jogendra Chunder Ghose v. Fulumari Dassi (1899), 37 Calc. 77; S. C. sub nomine Jogendra Chunder Ghose v. Ganendra Nath Sircar, 4 C. W. N. 254; ante, pp. 92, 93.
11 Sellum v. Chinnamal (1901), 24 Mad. 441.
12 See Moniram Kolita v. Kerry Kolitany (1880), 7 I. A. 115; 5 Calc. 776; 6 C. L. R. 322.
A wife or widow cannot, until there has been a partition or separation, enforce her right to a share,¹ even if by arrangement a share of the profits has been assigned to her for her maintenance,² and until partition she has no alienable interest.³ When there has been a partition, or a separation, she may sue for her share.⁴ She is a necessary party to a suit by a son against her husband,⁵ or to a suit between her sons, for partition; but the omission to reserve a share for the mother does not render the partition invalid.⁶ She may acquiesce in such omission.⁷

A woman, who is not a coparcener, is not entitled to a share except on such partition as is above mentioned.⁸

Although some of the ancient writers gave her the right to a one-fourth share,⁹ a sister is not entitled to a share on a partition.¹⁰ As she is entitled to her maintenance until marriage, and to her marriage expenses out of the family property,¹¹ provision therefor should be made at the time of the partition.

**Allotment of Shares.**

On a partition shares are allotted in accordance with the following rules. There is nothing in law to prevent an arrangement upon a different footing,¹² so far as the interest of adult coparceners are concerned, but an

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¹ *Sunder Bahu v. Monohur Lal Upadhyaya* (1881), 10 C. L. R. 79, at p. 80; *Strange’s “Hindu Law,”* vol. i. pp. 188, 189; *Colebrooke’s “Digest,”* vol. iii. pp. 27, 422-427.
² *Bhoop Singh v. Phool Kuver (Mussunud)* (1887), 2 Agra, 385.
⁴ *Ram Joshi v. Laxmi Bai* (1864), 1 Bom. H. C. 189, and cases ante, p. 330, note 11.
⁶ *Ganesh Dutt Thakoor (Choudhry) v. Jeech Thakoorain (Mussunud)* (1900), 31 I. A. 10, at p. 15; 31 Calc. 389, at p. 271; 8 C. W. N. 146, at p. 150.
¹¹ *Ante*, pp. 48, 242, 272.
¹² See *Ram Nirunjum Singh v. Prayag Singh* (1881), 8 Calc. 138; 10 C. L. R. 68.
arrangement between the parties to a partition that the shares should be inalienable, and should revert to the original coparceners, cannot be upheld.\(^1\)

Under the Mitakshara school of law, in a partition between a father and his sons, each of the sons take a share equal to that of the father.\(^2\)

Although under the Mitakshara a father is entitled to dispose of his self-acquired property,\(^3\) and under the Bengal school he is entitled to dispose of all his property, whether ancestral or self-acquired, it does not seem settled upon the authorities whether in the former case he can divide his self-acquired property, or in the latter case any of his property in unequal shares between his sons.\(^4\)

Some of the text writers\(^5\) prohibited such inequality of division, except under special circumstances.

Mr. Mayne\(^6\) sums up the authorities in the following words: "The result would be that a father under Mitakshara law, in dealing with his self-acquired property, or any other property in which his sons take no interest by birth, and a father under Bengal law, in dealing with any property, may distribute it as he likes. If he conforms to the rules of partition, the transaction will be valid by mutual agreement, without actual apportionment followed by possession; but if he does not conform to those rules, then he must deliver the share to each of the sharers, so as to make a valid gift to each."

As to the Bengal school, Dr. Jogendra Nath Bhattacharya\(^7\) said: "As the father can undoubtedly make a gift of ancestral property, even in favour of a stranger, there can be no doubt that the father can make an unequal partition of such property among his sons, though by doing so against the rules of the Shastras he incurs sin;" and R. C. Mitra\(^8\) says: "It has been held that the injunctions against an

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1 K. Venkatramanana v. K. Bramanana Sistrulu (1889), 4 Mad. H. C. 345. As to an agreement not to partition, see ante, p. 322.
2 "Mitakshara," chap. i. s. 5, para 5. Ante, p. 322.
3 Ante, p. 255.
4 Ante, p. 230.
unequal distribution by the father are mere moral precepts which no Court of law would enforce. A father bent upon making an unequal distribution may do so in more ways than one."

According to all the schools, on a partition brothers take equal shares.1

Under the Mitakshara school, the share of a brother who has died is represented by his sons, grandsons, and great-grandsons.

Under the Bengal school, the share of a brother, who is dead, is taken by his heir,2 devisee, or assignee.

As between different branches of a family, division must be per stirpes, i.e. according to the stock,3 and as between the sons of the same father, it must be per capita.4

This rule "is designed to ensure equality of partition in cases of vested interests held in coparcenary, and to carry out in those cases the principles that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares."5

Illustration. (Mitakshara School)

A (dead)

B (dead) C (dead)

D

E F G

D₁ D₂ D₃

E₁ F₁ F₂ G₁ G₂ G₃ G₄


2 Ante, p. 230.

3 "Mitakshara," chap. i. s. 5, para. 2; Rajnarain Singh v. Heerkesl (1878), 5 Calc. 142.


The family having descended from two brothers, one half-share must be allotted to each branch. As to B's branch, D and his sons, D₁, D₂, and D₃, are each entitled to \( \frac{1}{2} \) of \( \frac{3}{4} \), i.e. \( \frac{1}{4} \). As to C's branch, each of the sub-branches composed of C's sons, E, F, and G, with their sons respectively, will be entitled to \( \frac{1}{4} \) of \( \frac{1}{2} \), i.e. \( \frac{1}{8} \), so E and E₁ will each get \( \frac{1}{8} \) of \( \frac{1}{2} \), i.e. \( \frac{1}{16} \), F₁, and F₂ will each get \( \frac{1}{8} \) of \( \frac{1}{2} \), i.e. \( \frac{1}{16} \), G₁, G₂, G₃, and G₄ will each get \( \frac{1}{8} \) of \( \frac{1}{2} \), i.e. \( \frac{1}{16} \). This illustration will apply to the Bengal school, except that under that school the sons do not make the lifetime of their fathers.

This rule is laid down with reference to cases in which all the Partial coparceners desire partition at the same time. Where there is a partition, the particiation by some only of the coparceners, and subsequently there is a partition between the coparceners who had remained united after the first partition, the allotment of shares of the second partition must have regard to the state of the family before the first partition, with such variations as may have arisen in consequence of the death of coparceners or the birth of new coparceners.¹

Except where there is a family usage to the contrary, sons by different mothers take equally.²

When daughter's sons,³ or gotraja sapindas⁴ other than descendants, succeed as heirs, they take on partition per capita.

**Subject of Partition.**

The coparcenary property,⁵ movable or immovable, is subject of alone the subject of partition.

Partition cannot be made of property which has been Impartible proved to have, by ancient and invariable custom,⁶ always descended to one member, and to have been enjoyed by him alone, and not to have been divided.⁷

¹ See Manjanatha Shanabhaga v. Narayana Shanabhaga (1882), 5 Mad. 382.
³ Ramdhun Sain v. Kishen Kanth Sain (1821), 3 Ben. Sel. R. 100 (2nd ed. 133).
⁴ Naghash v. Gururao (1892), 17 Bom. 303, at p. 305.
⁵ Ante, pp. 245–255.
The following are instances where the custom of impartibility is to be found:—

(a) Zemindaries, especially in the Madras Presidency, partaking of the nature of a Raj or sovereignty.¹

(b) Palayams (tracts of country governed by a Poligar or petty chieftain as a principality or Raj) ² in the Madras Presidency.³

An estate which is neither a Raj nor a Palayam may also by family custom be impartible.⁴

(c) Saranjams ⁵ or Jaghirs.⁶ Although Saranjams are primâ facie impartible, they may be originally partible, or become so by family usage.⁷

Grants by Government, at any rate in the Southern Mahratta country, in the absence of any provision in the grant, or any custom would follow the ordinary rule of ancestral property,⁸ especially where they are granted for the maintenance of the family.⁹

As to the descent of jaghirs in the Punjab, see Act IV. (Punj. C.) of 1900.

It has been held that land held as appertaining to the office of desai, who was formerly the officer employed in the Mahratta country in superintending the collection of the Government revenues and other duties, is primâ facie partible.¹⁰

There is similar authority with regard to the office of deshpande, an

Kalakka Thola Udayar (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95.
² See Wilson’s “Glossary,” p. 391.
⁴ Chintamani Singh (Chowdhry) v. Nowulko Konwari (Mussamut) (1875), 2 I. A. 263; 1 Calc. 155; Shyamanand Das Mohapatra v. Rama Kinta Das Mohapatra (1904), 32 Cal. 6; Urjum Singh (Racut) v. Goanusim Singh (Racut) (1851), 5 M. I. A. 169.
⁶ Grants by the Sovereign, see Nilmoni Singh (Rajah) v. Bakranath Singh (1882), 9 I. A. 104; 9 Cal. 187.
hereditary revenue accountant of a district or a certain number of villages, and to the office of deshmukh, who is a district Revenue officer.

On partition, however, the right of the officer to allowances for the performance of the duties of his office must be reserved.

A mere arrangement for the convenient performance of the services of the officer is on a different footing from a custom.

Where the services have been abolished, a family custom might still render the property impartible.

The terms of the grant might, of course, create impartibility.

The office of Pattam, an office of dignity in a family governed by Pattam, the Aliya Satana law, is impartible.

(d) Service tenures, such as the ghatwa tenures in Manbhoom and Bheerboom, and those attached to village offices in Madras.

"Hereditary offices, whether religious or secular, are treated by the Hereditary Hindu law writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property, by means of a performance of the duties of the office, and the enjoyment of the emoluments by the different coparceners in rotation."
As to savings from impartment property, see ante, p. 258.

Impartible property which has been sold does not retain its character of impartibility.

When impartible property forms part of joint family property, it may, on a partition, be allotted to one of the coparceners, corresponding property being allotted to the others. When it is excluded from the partition, the members of the family retain their rights with regard to it.

Except where the property is held under a grant which precludes partibility, there seems no reason why the family may not discontinue the custom of impartibility, and make it subject to partition.

A coparcener is entitled to insist that all the family property, except what is impartible, as above, shall be divided.

Leasehold property, including property held on a lease from Government, can be partitioned.

Land in the possession of tenants can be partitioned, either by metes and bounds, or by a division of the rent.

A coparcener or purchaser is entitled to insist that the family dwelling-house be partitioned; but a purchaser may be required to sell his share therein to a coparcener.

He has a similar right with regard to a compound hitherto held in common, and such right is not affected by the fact that there is a public right of way over such compound.

"The principle . . . of partition is that if a property can
be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to 'a coparcener' by partition.¹

Where property is in its nature indivisible, as, for instance, in the case of animals, furniture, etc., it can be allotted to individual coparceners, corresponding or equivalent parcels of the property being allotted to other coparceners, or the value being made up in money.

Where it is impossible or inequitable to allot a specific item to an individual, as where it consists of a right of way, a passage, a well, a bridge, it may be necessary that the item of property should continue to be jointly enjoyed by the several coparceners.

In some cases it may be necessary to sell the property and adjust the proceeds in the distribution.²

Places of worship and sacrifice,³ and property dedicated to an idol or to other pious uses, cannot be physically partitioned.⁴

In one case,⁵ where there were two idols belonging to the family, an arrangement by which one of the heirs took one of the idols and the property endowed for the worship thereof, and the other took the other idol and property, was approved by the Court.

Where merely a charge is treated for religious purposes, the property can be alienated or partitioned subject to the charge.⁶

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¹ Ashanullah v. Kali Kinkur Kur (1884), 10 Calc. 675. This was a suit by a purchaser, but the principle applies to any case. See Strange’s “Hindu Law,” vol. ii. p. 329.
² See Act IV. of 1893, s. 2, post, p. 355.
Apart from a dedication, the use to which property has been put, as, for instance, when it has been used as a 
apooyag dalan, does not render it impartible, but the Court 
may, if the circumstances make it equitable, permit that 
portion to be allotted to a single sharer, and require him 
to pay owely of partition, or to account for its value in 
the partition.\(^1\)

Where there is a family idol, or temple, or religious 
endowment belonging to the coparcenary, it is usual to 
allot to each of the coparceners an alternating recurrent 
period of worship or holding in proportion to their shares.\(^2\)

In a Bombay case,\(^3\) the High Court on a partition gave 
the custody of the family idol and of the property appertaining thereto to the senior member of the family, reserving 
to the other members a right of access; but in Bengal it is the practice to provide for the worship and custody in 
"palaas" or turns.\(^4\) It is submitted that the latter practice 
is the right one.

A turn of worship is not alienable,\(^5\) except perhaps to other persons entitled to turns, or to members of the family.

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\(^1\) See Rajcomarnee Dossee v. Gopal Chunder Bose (1879), 3 Calc. 514.


\(^3\) See Damodar Das Manekal v. Uttamram Manekal (1899), 17 Bom. 271, at p. 288.


HOW SEPARATION AND PARTITION CAN BE EFFECTED.

Under the Mitakshara school of law, a father can effect a partition between his sons with or without their consent.\(^1\)

Apart from the special powers given to a father by the Mitakshara law, the union of the coparceners in a joint family can be dissolved by any arrangement, express or implied, by which the coparceners alter, or intend to alter, their title as coparceners into a title either as tenants in common or as owners of separate shares, or by any change in the status of the coparceners, which is inconsistent with their being members of a joint family.\(^2\)

Apart from the special powers given to a father by the Mitakshara law, a partition can be effected either by an arrangement between the coparceners, or by a decree of a competent Court,\(^3\) or by the Revenue authorities.\(^4\)

All the coparceners should be parties to a partition by arrangement,\(^5\) the guardians of minor coparceners acting on their behalf.\(^6\)

In the case of a partition by arrangement,\(^7\) the partition may be partial as regards the persons separating, some of the coparceners electing to remain joint, their status inter se being unaffected by the separation.\(^8\)

Coparceners may also by agreement arrange that a portion only of the property should be divided, the

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2. A mere change in the mode of holding the property is not conclusive, post, pp. 348, 349.
3. Post, p. 349.
5. As to the parties to a suit, see post, p. 350.
6. See ante, p. 326.
7. Cf. ante, p. 328.
remainder remaining joint. They can afterwards partition the remainder of the property.

"Though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state and not as members, who after partition have been reunited."

A separation in estate and interest can be effected, although there be no partition by metes and bounds.

There may be a separation of the members of the family and at the same time an arrangement for the sake of convenience that the property should remain joint, but be held in defined shares. In that case the rights of the separating coparceners inter se are those of ordinary tenants in common, and are free from the incidents applicable to a joint family.

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There would, in the absence of a valid agreement,¹ be a right to enforce a partition of such property subsequently.²

A partition can be effected without an instrument in writing.³

"The true test of partition of property, according to Hindu law, is the intention of the family to become separate owners."⁴

The question is one of intention merely, viz. whether the intention of the parties, to be inferred from the instruments which they had executed and the acts they had done, was to effect a division such as to alter the status of the family.⁵

An agreement between the coparceners to hold and enjoy the property in severalty operates as a separation in estate, although there may have been no actual partition by metes and bounds,⁶ and although the separate possession and enjoyment be postponed until the agreement be fully carried into effect.⁷

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¹ See Subbaraya Tavker v. Rajaram Tavker (1901), 25 Mad. 585.
² Revson Persad v. Radha Beeby (Mussumut) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; Budha Mal v. Bhagwan Das (1890), 18 Calc. 302. By Act II. of 1884, effect was given to unregistered partition deeds which had been executed in the Madras Presidency.
⁶ Tej Pratap Singh v. Champa Koles Koer (1885), 12 Calc. 98, at p. 103.
"When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

An arrangement by which property was allotted to a younger brother for his maintenance does not make an impartible zemindary the separate property of the elder brother.

The legal construction of the agreement cannot be controlled or altered by the subsequent conduct of the parties, except where there has been in law a valid reunion.

It has been held that where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to divide without more is of itself insufficient to effect a separation.

The fact that in documents executed by the coparceners, such as petitions to the Revenue or other authorities, or under the Land Registration Act, there is a definition of an interest in the joint estate, in terms of a fraction of the whole, without any indication of an intention to divide interests and liabilities, is insufficient to constitute a legal dissolution of a joint family, although it is evidence of a

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1 A mere definition of shares is not sufficient, see cases, post, p. 347, note 1, and p. 348.
3 Rajya Lakshmi Devi Ganu (Sri Raja Viravara Thodramal) v. Surya Narayana Dharasu Bahadur Ganu (Sri Raja Viravara Thodramal) (1897), 24 I. A. 118; 20 Mad. 256.
4 Balikshen Das v. Ranvarain Sahu (1903), 30 I. A. 139; 30 Calc. 738; 7 C. W. N. 578.
5 Post, pp. 358, 359.
7 Act VII. (B. C.) of 1876.
separation.\textsuperscript{1} Separation may be inferred from definition of shares, followed by entries of separate interests in the Revenue records.\textsuperscript{2}

When a cosharer sells his rights in the family property to another coparcener, such sale amounts to a separation, so far as the vendor is concerned.\textsuperscript{3}

There is considerable authority that an unequivocal act or declaration by a coparcener, showing his intention to hold his share separately, effects a partition;\textsuperscript{4} but if this be so, the mere filing of a suit for partition\textsuperscript{5} would operate to effect a separation, whereas the authorities\textsuperscript{6} only contemplate separation being effected by a decree in such suit, and moreover the expressions used in Appovier's Case,\textsuperscript{7} and the cases following it, seem, it is submitted, to show that there must be an agreement.\textsuperscript{8} Such signification of intention might perhaps, if not repudiated, be taken to imply an agreement.

A loss by a cosharer of his rights by operation of the law of limitation amounts to a separation of that cosharer, so far as the family property is concerned.\textsuperscript{9}

\textsuperscript{1} In the matter of Phuljhari Koer (Mussumat) (1872), 8 B. L. R. 385; 17 W. R. C. R. 102; Mukkakis Debi v. Utabati (1870), 8 B. L. R. 396, note; 14 W. R. C. R. 31; Ambika Dat v. Sukhmani Kuar (1877), 1 All. 437; Hooka Koer v. Kasse Prashad (1881), 7 Calc. 569.

\textsuperscript{2} Ram Lal v. Debi Dat (1888), 10 All. 490; see post, p. 350.

\textsuperscript{3} Ballirisha Trimbuk Tendulkar v. Sretrbok (1878), 3 Bom. 54. See Appa Pillai v. Runga Pillai (1882), 6 Mad. 71, as to an arrangement without consideration.


\textsuperscript{5} A suit for possession of a share would not be sufficient. In the matter of Phul Koeri (1889), 8 B. L. R. 388, note; S. C. Debes Pershad v. Phool Kooree (1889), 12 W. R. C. R. 510.

\textsuperscript{6} Post, p. 349.

\textsuperscript{7} Ante, p. 346.

\textsuperscript{8} See Mukkakis Deube v. Utabai (1870), 8 B. L. R. 396, note; 14 W. R. C. R. 31; Ashakai v. Zyo Hoji Bahintulil (1882), 9 Bom. 115.

\textsuperscript{9} See Moro Viskamath v. Ganesh Vithal (1873), 10 Bom. H. C. 444, at p. 452.
Proof of separation.

Separation may be proved by acts which show such agreement and intention, such as cesser of commensality, separate occupation of portions of the property, separate enjoyment of distinct shares of the profits, separate defnition of shares in the Revenue records, agreement to divide the proceeds in definite shares, or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others.

Mere cesser of commensality, division of the income, defnition of shares in the revenue or land registration records, separate occupation

1 See Ganesh Dutt Thakoor (Chowdhury) v. Jeeoch Thakoorain (Mussummut) (1903), 31 I. A. 10; 31 C alc. 262; 8 C. W. N. 146; Joynarin Giri v. Goluch Chunder Myteer (1876), 25 W. R. C. R. 355.


4 Ram Lal v. Debi Dat (1888), 10 All. 490; Ram Pershad Singh v. Lakhpali Koer (1902), 80 I. A. 1; 30 C alc. 231; 7 C. W. N. 162. See Ambika Datt v. Sukhmani Kuar (1877), 1 All. 437. See ante, p. 346.

5 Ram Kissen Singh (Maharajah) v. Sheonund Singh (Rajah) (1875), 23 W. R. C. R. 412.


8 Hookash Koer v. Kasses Proshad (1881), 7 C alc. 369.
of portions of the property, or separate collection of rents, or separate dealings, are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation.

The fact that a man availed himself of his near agnatic relations in the administration of his property at the same time that he gave them maintenance and paid the expenses of their marriage and other ceremonies is not inconsistent with his position as a separated member.

Conversion to Mahomedanism, or to Christianity, ipso facto separates the convert from the coparcenary.

A decree for partition is on the same footing as an agreement for partition.

A decree directing partition, or a decree giving effect to a suit, which, though not in terms seeking a partition, indicates a distinct intention of obtaining a separation in estate, or an award by arbitrators, operates as a separation.

The fact that the decree postposes the vesting of the share does not make any difference.


9. Chidambaram Chettiar v. Gouri Nachiar (1879), 6 I. A. 177; 2 Mad. 83; Subbaraya Mudali v. Manika Mudali (1896), 19 Mad. 345. In Babaji Parshram v. Kashibai (1879), 4 Bom. 157, a mere decree for partition was held not to operate as a separation.


It has been held that the decree does not create a severance pending an appeal,¹ but if pending the appeal the parties treat the decree as creating a severance it has such effect.²

Where, in a suit for general partition of a family estate, the plaintiff succeeded with regard only to a small portion thereof, it was held that the family did not in consequence of these proceedings become a divided one.³

In a case under the Bengal school of law, where the parties disregarded the decree, and continued to live as a joint family, it was held that there was no separation.⁴

An order for sale of a share of family property in execution of decree would not create a separation.⁵

"The disruption of a joint family cannot be effected by an order of Court against the intention of the parties, unless it be followed by an actual conversion of the joint tenancy into a tenancy in common, or an actual partition by metes and bounds."⁶

A suit for partition may be brought by a person who is entitled to partition.⁷

A suit for partition is barred when twelve years has expired from the time when exclusion of the plaintiff from the coparcenary property becomes known to him.⁸

All persons entitled to a share on partition, including the wife, mother, or grandmother, and purchasers of undivided shares⁹ or mortgagees,¹⁰ should be parties to a suit for partition.¹¹

² See Joynavain Giri v. Grish Chunder Myti (1878), 5 I. A. 228; 4 Calc. 434.
³ Mallikarjuna Prasada Nayudu (Raja Yarlagadda) v. Durga Prasada Nayudu (Raja Yarlagadda) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74.
⁶ Ibid.
⁷ See ante, pp. 322-327, as to who is entitled to partition.
¹⁰ Ante, pp. 328, 329.
¹¹ Civil Procedure Code, 1908, order i. rules 3, 4; Act XIV. of 1882, ss. 26, 28; Pahalad Singh v. Luchmunbatty (Mussamut) (1869), 12 W. R. C. R. 256.
A suit for partition must include all the property which is partible and available for partition at the time, and is within the limits of the jurisdiction of the Court in which the suit is brought. There is authority that when the suit does not include all the coparcenary property the suit should be dismissed, but it is submitted that where the objection is raised, the proper course is to permit the plaintiff to amend his plaint so as to include the whole property.

In a suit filed in the ordinary original jurisdiction of the High Courts there is no difficulty in including other property after an interlocutory decree for partition.

A defendant may insist that joint property which is not mentioned in the plaint be brought into the partition, whether it be or be not within the jurisdiction of the Court in which the suit is brought, but he cannot require the plaintiff to bring into the partition land which is outside British India.

Where no objection is raised by the parties there seems partial partition.

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2 See Puttaram Mudali v. Audimal Mudali (1870), 5 Mad. H. C. 419. Thus, where property has been mortgaged with possession it need not be brought into the partition. Krishna v. Narasimham (1900), 23 Mad. 609; Balkrishna Vithal v. Hari Shankar (1871), 8 Bom. H. C. A. C. 64; Narayan Babaji v. Pandurang Ramchandra (1875), 12 Bom. H. C. 145, at p. 155; Shiyamurtappa v. Virappa (1899), 24 Bom. 128.

* Punchamon Mullick v. Shob Chunder Mullick (1887), 14 Cal. 835.


* See Panchamon Mullick v. Shob Chunder Mullick (1887), 14 Cal. 835.

* See Shiyamurtappa v. Virappa (1899), 24 Bom. 128.


to be no reason why a partial partition should not be
affected even in a suit.¹

When the coparcenary property is situate within the
jurisdiction of more than one Court, suits can be brought
in the several Courts having jurisdiction.²

When there is property of the family held jointly by
the whole family with strangers, a separate suit should
be brought for partition of such property,³ except where
they have bought the interests of coparceners in the
coparcenary property.

A separate suit will lie with regard to property which
belongs to some of the coparceners only.⁴

It has been held in Bombay⁵ and Allahabad⁶ that a
purchaser of a share of one of the coparceners in a portion
of the coparcenary property is entitled to bring a suit for
partition of that portion only, but that any coparcener
may require his share in the whole of the coparcenary
property to be ascertained and partitioned in such suit.

In Madras the purchaser is required to bring a suit for
general partition,⁷ and apparently the same view would
be taken in Calcutta.⁸

A coparcener is entitled to bring against such purchaser
a partition suit limited to the property so purchased.⁹

¹ See Manjanatha Shanabhaga v. Narayana Shanabhaga (1882), 5 Mad. 362, ante, p. 343.
³ See Puroshottam v. Atmaram Janardan (1899), 23 Bom. 597.
⁴ Lachini Narain v. Janki Das (1901), 23 All. 216.
⁵ Murar Rao v. Sitaram (1898), 23 Bom. 184; Shimurteppa v. Virappa (1899), 24 Bom. 128.
⁶ Ram Mohan Lal v. Mulchand (1905), 28 All. 39.
⁸ See Hasmat Rai (Koer) v. Sundar Das (1885), 11 Calc. 396, at p. 339.
⁹ Ram Charan v. Ajudha Prasad (1905), 28 All. 50; Chinna Sanyasi Rasu (Sripati) v. Surya Rasu (Sripati) (1882), 5 Mad. 196; Subramanya Chettyar v. Padmanabha Chettyar (1896), 19 Mad. 267. See Venkaya v. Lakshmaya (1892), 16 Mad. 96.
Where a portion of the family property has passed entirely into the hands of strangers, there is no reason why the right thereto should not be determined without reference to the remaining property of the family.¹

In the case of a decree for partition and of a partition inquiry as to property. In the case of a decree for partition and of a partition inquiry as to property, it is necessary to ascertain the amount of the coparcenary property, and what is available for partition.

The presumption is that, “in the absence of evidence, the property for partition is such as exists at the time of the suit for partition.”²

An inquiry as to what the coparcenary property consists of generally involves an account of the rents and profits which have been received by the manager.³ Credit must be allowed to him for all expenditure properly made out of the purse of the coparcenary.⁴

As to the nature of the account which the manager is required to furnish, see ante, pp. 273, 274.

Where one member of the family has been entirely excluded from the enjoyment of the property, he would be entitled to an account of mense profits on an ordinary footing.⁵

An account of mense profits is also allowed when an arrangement for the enjoyment of the property in specific and definite shares has been disturbed.⁶

In the absence of an express agreement a coparcener is not entitled improvements. to credit for sums laid out by him in the improvement or upkeep of the coparcenary property.⁷

Provision must first be made for all debts due by the family as such,⁸ including debts due by the father of separating brothers,⁹ and also for all proper charges upon

¹ Subbarao v. Venkataratnam (1891), 16 Mad. 264.
⁴ See ante, p. 273.
⁵ Ante, p. 274.
⁶ See ante, p. 276.
⁷ Tura Chand v. Reeb Ram (1886), 3 Mad. H. C. 175, at p. 181; Lakshman Dada Nai v. Ramakrishna Dada Nai (1879), 1 Bom. 561;
the family property for maintenance,\textsuperscript{1} the marriages of
dependent female members,\textsuperscript{2} the expenses of whose mar-
rriages is not payable out of individual shares, and such
religious ceremonies as are payable by the whole family,\textsuperscript{3}
and cannot be adjusted so as to be paid out of individual
shares.

Each member of the coparcenary is obliged to bring
into hotchpot, and submit to partition any coparcenary
property, or property acquired from coparcenary funds
which may be in his hands.\textsuperscript{4}

He is not required to account for money which has
been received by him for his expenses.\textsuperscript{5}

Where a single coparcener has purported to deal with a defined
portion of the family property as if it were his own, it may be equitable
to allot such portion to the purchaser if possible.\textsuperscript{6} Where he has dealt
with a share in a defined portion, it may be equitable on partition to
allot him a share in such portion. If such course be not equitable or
practicable, the alienee would only have a right of compensation against
the alienor personally.\textsuperscript{7}

Where a coparcener has, by arrangement or without objection,
occupied a particular portion of the family property, or where he has
laid out his separate money on a certain portion of the property, it may
be equitable to allot to him the portion occupied, or improved by him,
provided that he does not thereby get more than his share.

\textsuperscript{1} Dayabhaga," chap. i. para. 47;
\textsuperscript{2} Vyasahara Mayukha," chap. iv. a.
\textsuperscript{3} paras. 1, 2; chap. v. a, para.
\textsuperscript{4} 14; Colebrooke's "Digest," vol. iii.
\textsuperscript{5} pp. 73, 389, 390.
\textsuperscript{6} \textit{Antri}, pp. 242, 272.
\textsuperscript{7} "Dayabhaga," chap. iii. s. 2,
\textsuperscript{8} para. 89; "Mitakshara," chap. i. a.
\textsuperscript{9} 7, para. 5; Colebrooke's "Digest,"
\textsuperscript{10} vol. iii. p. 96; Strange's "Hindu
\textsuperscript{11} Law," vol. ii. p. 313.
\textsuperscript{12} As to the expenses of initiation,
see "Mitakshara," chap. i. a. 7,
\textsuperscript{13} paras. 3, 4; "Dayabhaga," chap. iii.
\textsuperscript{14} s. 2, para. 41; Colebrooke's "Digest,"
\textsuperscript{15} vol. iii. pp. 96, 97. In a suit
\textsuperscript{16} for partition brought by a Hindu
\textsuperscript{17} against his father and brothers, the
\textsuperscript{18} brothers (but not the children of
\textsuperscript{19} brothers) are entitled to have set
\textsuperscript{20} apart from the family property a
\textsuperscript{21} sum sufficient to defray the expenses
\textsuperscript{22} of their prospective thread, betrothal,
\textsuperscript{23} and marriage ceremonies, such sum
to be calculated according to the extent of the family property,
\textsuperscript{24} Jairam v. Nathu (1906), 31 Bom.
\textsuperscript{25} 54.
\textsuperscript{26} Lakshman Dada Naik v. Ran-
\textsuperscript{27} chandra Dada Naik (1876), 1 Bom.
\textsuperscript{28} 581. See ante, p. 252.
\textsuperscript{29} Ibid., Komorao v. Gurrow (1881),
\textsuperscript{30} 5 Bom. 589, at p. 595.
\textsuperscript{31} Pandurang Anandrao v. Bhashar
\textsuperscript{32} Shadashiv (1874), 11 Bom. H. C. 72;
\textsuperscript{33} Udaram Skaram v. Ramu Pandhi-
\textsuperscript{34} (1875), 11 Bom. H. C. 76.
\textsuperscript{35} Aiyagari Venkataramaya v.
\textsuperscript{36} Aiyagari Ramayya (1902), 25 Mad.
\textsuperscript{37} 690, at pp. 718, 719.
In one case, where a coparcener built with his separate money a house upon ground belonging to the family, the Court held that each of the coparceners was entitled to a share in the house and the site upon which it was built, equal in value to his share of the site.

When the property is partible and capable of partition, the Court will ordinarily order a partition by metes and bounds.

The following provisions of the Partition Act, 1893, apply to all partitions by the Court, but do not affect any local law providing for the partition of immovable property paying revenue to Government.

Sec. 2. Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

Sec. 3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Sec. 4. (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such

2 Act IV. of 1893.
3 Hirakore (Bai) v. Trihamdas (1907), 4 Bom. 108.
4 Ownership, not occupation gives the right, Vaman Vishnu Gokhale v. Vaman Morbhat Kale (1898), 23 Bom. 73.
shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

6. (1) Every sale under section 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.

8. Any order for sale made by the Court under section 2, 3, or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure.

9. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

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1 This now would be the Chief Court of Lower Burmah in the exercise of its original civil jurisdiction. See Act VI. of 1900.
2 Act XIV. of 1882.
10. This Act shall apply to suits instituted before the commence-
ment thereof, in which no scheme for the partition of the property has
been finally approved by the Court.

A Civil Court can make a decree for a partition of an estate paying revenue to Government, but cannot carry out its decree. If the decree be for the partition, or for the separate possession of a share of an undivided estate assessed as such to the payment of undivided revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector according to the law, if any, for the time being in force for the partition, or the separate possession of such estate. The Civil Court may carry out the decree if no separate allotment of the revenue be asked for. Where a coparcener has mortgaged or sold his undivided share of coparcenary property, and the property has on partition been allotted to another member, the mortgagee or purchaser is entitled to a charge upon other property allotted on the partition to the person dealing with him.

Where, from accident, mistake, or fraud, a portion of the coparcenary property is not included in a partition, such portion must be divided amongst the persons who took under the partition. The subsequent discovery will not justify an interference with the original partition.

1 Meherban Raoood v. Behari Lal Barik (1896), 23 Calc. 679; Datta-
traya Vishal v. Mahadeoji Parashram (1891), 16 Bom. 528; Ramjoy Ghose v. Ramrunjun Chuckerbutti (1881), S C. L. R. 367; Farbhudas Lakhmidas v. Shankarbhai (1886), 11 Bom. 662; Chundernath Nundy v. Hur Narain Deb (1881), 7 Calc. 153.

2 This does not include a ryotwari estate in Madras, Muttuchidambara v. Karuppa (1884), 7 Mad. 382, or a share of a certain defined portion of a mahali, Ram Dayal v. Megu Lall (1884), S All. 452.

3 Act XIV. of 1892, s. 265; Civil Procedure Code, 1908, s. 54.


6 See Lackman Singh v. Samuel Singh (1878), 1 All. 543; "Mitak-
shara," chap. i. s. 9, para. 1; "Dayabhage," chap. xiii. paras. 1-3; "Vyavahara Mayukha," chap. iv. s. 6, para. 3; Jogendro Nath Roy v. Baladeb Das Marwari (1907), 12 C. W. N. 127.

7 "Dayabhage," chap. xiii. para. 6; Colebrooke’s "Digest," vol. iii. p.400.
except perhaps where by concealment one of the parties has obtained some special advantage in the original partition.¹

Where, after the partition, it appears that property allotted to one of the coparceners did not belong to the coparcenary,² or that a valid charge existed thereon,³ the coparcener to whom such property was allotted can insist upon the partition being reopened, or, at any rate, can claim compensation from the other parties to the partition.

The law relating to the partition of revenue-paying estates is to be found in the following enactments:—

For Ajmere.—Reg. II. of 1877.

For Bengal.—Regulations VIII. of 1793 and VII. of 1822; Act V. (Ben. C.) of 1897.

For Madras.—Mad. Reg. II. of 1803.

For Assam.—Reg. I. of 1886, ss. 96–121, 154.

For Bombay.—Act. X. of 1876; Act V. (Bom. C.) of 1879, ss. 113, 114; Act VI. (Bom. C.) of 1888.

For the Central Provinces.—Act XVIII. of 1881, s. 136, as amended by Act XVI. of 1889, s. 26.

For the United Provinces.—Act III. (N. W. P. C.) of 1901, ss. 105–140.

For the Punjab.—Act XVII. of 1887, ss. 112–135, 158.

Partition does not annul the filial relation nor the right of inheritance incidental to such relation.⁴

REUNION.

The parties to a partition,⁵ or some of them,⁶ may reunite so as to constitute, after such reunion, a joint

¹ See Moro Vishvanath v. Ganesh Vithal (1873), 10 Bom. H. C. 444, at pp. 451, 469.
² Maruti v. Rama (1895), 21 Bom. 333.
³ Lakshman v. Gopal (1898), 23 Bom. 355.
⁴ Marudayi v. Doraikami Karambiam (1907), 30 Mad. 348; Ramappa Nadjik v. Sithamnai (1879), 2 Mad. 132.
family, and to remit them to the same status as before the partition.

There must be a complete junction of estate, and not a mere living together,1 or joint enjoyment of the property.2

Where any of their descendants think fit to unite, they may do so; but such a union is not a reunion in the sense of the Hindu law, and does not affect the inheritance.3

According to the Mitakshara,4 reunion is restricted to three classes of cases, namely, (1) between father and son, (2) between brothers, (3) between paternal uncle and nephews.5 The same view is taken in the Smriti Chandrika,6 the Dayabhaga,7 the Viramitrodaya,8 and the Mayukha.9 The Mithila school permits any of the late co-sharers to reunite.10

An agreement to reunite cannot apparently be made by, or on behalf of, a minor.11

The burden of proof of reunion is on the person alleging it.12

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2 See Balkishen Das v. Ramnarain Saha (1908), 50 I. A. 139; 30 Cal. 738; 7 C. W. N. 578.
4 Chap. ii. s. 9, paras. 2, 3.
5 Basanta Kumar Singh v. Jogen-dra Nath Singh (1905), 53 Cal. 371; 10 C. W. N. 296.
7 Chap. xii. paras. 3, 4. See also "Daya-Krama-Sangraha," chap. v. para. 4.
8 G. C. Sircar’s translation, pp. 168, 169, 205.
9 Chap. iv. s. 19, para. 1.
10 "Vivada Chintamani" (P. C. Tagore’s translation), p. 301; "Daya-Krama-Sangraha," chap. v. para. 5.
11 Baluben Ladharan v. Rukmabai (1905), 30 I. A. 130, at p. 136; 30 Cal. 725, at pp. 734, 735; 7 C. W. N. 642, at p. 646.
12 Gopal Chunder Daghoria v. Kenaram Daghoria (1887), 7 W. R. C. R. 35.
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